This publication is part of the project “Promoting Access to Justice in Central and Eastern Europe” funded by the EUROPEAN COMMISSION and Open Society Justice Initiative.

The new democracies in Central and Eastern Europe have clear international obligations to provide legal aid in criminal proceedings when the interests of justice so require, and in civil proceedings if access to court is at stake. This is crucial to ensure practical implementation of human rights guarantees, independent of social status and material wealth.

In 2000, four NGOs active in Eastern Europe joined forces to launch a region-wide project to address the need for Legal Aid and Access to Justice in the region. The overall goal of the project is to promote access to justice in the Council of Europe’s new democracies. Moreover, all of these countries are on the road to join the European Union in the next few years.

The Project aim was to bring about legal aid reforms, through:

- broadening the availability of legal aid in criminal cases
- improving the quality of legal aid representation
- promoting alternative legal aid delivery models
- strengthening the civil legal aid mechanisms

The Project on Promoting Access to Justice in Central and Eastern Europe is a collaboration effort of four organizations:
Access to Justice
In Central and Eastern Europe

Country Reports

Bulgaria
Czech Republic
Estonia
Hungary
Latvia
Lithuania
Poland
Romania
Slovakia

Public Interest Law Initiative
Columbia University Budapest Law Center
Budapest • Hungary

InterRights
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Access to Justice in Central and Eastern Europe: Country Reports is a compilation of nine country reports and a comparative report assessing the state of provision of legal aid in the countries of Central and Eastern Europe. This publication is part of the Project on Promoting Access to Justice in Central and Eastern Europe, funded by the European Commission and the Open Society Institute. The Project has been a combined effort of four organizations: INTERIGHTS, the Public Interest Law Initiative/Columbia University Budapest Law Center (PILI), the Bulgarian Helsinki Committee, and the Polish Helsinki Foundation for Human Rights, in collaboration with the Open Society Justice Initiative.

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The country reports on access to justice\footnote{1} were commissioned within the framework of the Project on Promoting Access to Justice in Central and Eastern Europe. This Project is a partnership of the Public Interest Law Initiative, INTERIGHTS, the Bulgarian Helsinki Committee, and the Polish Helsinki Foundation for Human Rights.

The main goal of the Project was to assess the true dimensions of, and develop means toward solving, a crucial problem undermining the functioning of the rule of law and constitutional democracy in the countries of Central and Eastern Europe—the widespread deficiencies in the provision of legal aid, and their disproportionate negative impact on vulnerable groups in society, thereby putting social cohesion at risk.

The reports were drafted as part of the preparation for the European Forum on Access to Justice, held in Budapest, Hungary, on December 5–7, 2002, in collaboration with the Open Society Justice Initiative.

The European Forum on Access to Justice was the culmination of several years of work by the Project partners to assess the state of legal aid in Central and Eastern Europe and to raise awareness of the need for reforms. Although the countries in the region have clear international obligations to provide legal aid\footnote{2} so that the machinery of justice may be within reach of everyone, state-supported legal aid for the poor has not been, until recently, a priority of governments and international bodies in the reform of justice systems. Reforms that have otherwise transformed legal institutions and the practice of law in the region have suffered from a lack of attention to ensuring that these new legal mechanisms also reach the impoverished and marginalized.

The country reports on access to justice published here are based on a single methodology. They all follow a uniform structure and comply with a common set of guidelines.\footnote{3}

The purpose of the access to justice country reports is to assess the state of provision of legal aid in nine of the European Union accession countries in Central and Eastern Europe—Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, and Slovakia. A report was also commissioned in Slovenia, where a new Legal Aid Act entered into force, but there was not yet enough legal practice and case law to prepare a comprehensive country report according to the Project’s methodology and guidelines.

The access to justice country reports examine existing laws and judicial and administrative practices, as well as explore the findings of surveys and studies conducted by state
agencies, research institutes, and non-governmental organizations. These data provide the basis for evaluating the actual extent of legal aid in these countries. Proposals for legislative modifications are reviewed and summarized at the end of each report.

The reports include legislative and jurisprudential developments up to 1 September 2002 and examine relevant legal norms, books, articles, official reports, statistical data, policy statements, interviews, and other sources. Descriptions of actual practices that are not regulated by law or that deviate from the accepted legal norm are also included where relevant information is available. The reports identify specific obstacles to effective access to justice by analyzing the relevant laws and different practices in each country.

Finally, each report contains recommendations for changes to policies and practices of legal aid within that country.

The efforts of the Project partners to assist in improving access to justice in Central and Eastern Europe and beyond the region will continue. All of the partners, as well as an increasing number of other collaborators, are undertaking growing efforts to help improve the provision of legal aid. It is our hope that these efforts will help states to come closer to achieving the ideal of equal access to justice for all.


2 For the purposes of this report, legal aid is defined as: The provision of free legal services (representation, advice, information, etc.) to indigent persons, completely or partially free of charge for the recipient and paid for by the state.

3 The guidelines for the country reports are provided in the Appendix to this volume.
Access to Justice
In Central and Eastern Europe

COUNTRY REPORTS
Access to Justice in Central and Eastern Europe: Comparative Report*

Vessela Terzieva
Public Interest Law Initiative

1. Executive Summary

Justice in the abstract, philosophical sense depends on many factors outside the confines of legal codes and courtrooms. But in a modern democracy, access to justice frequently requires the assistance of a lawyer to help navigate an often complex maze of legal norms and court procedures. To be sure, effective and independent judiciaries, substantive and procedural guarantees of human rights, intelligible and consistently applied legislation—among other features—are all important preconditions for guaranteeing equal access to justice for all. But few factors have more practical impact than the simple fact of whether an individual receives qualified and effective legal assistance.

In criminal cases, the absence of legal aid in practice, regardless of what provisions exist in law, may prevent the indigent from exercising their procedural rights and may reduce their opportunity to influence the outcome of the proceedings when their liberty is at stake. The lack of legal aid in criminal cases also impedes civilian control over law enforcement institutions, especially at the pretrial stage, when judicial control is limited.

In civil cases, the lack of legal aid can prevent individuals from resolving disputes related to their civil rights and obligations. In both criminal and civil cases, the lack of access to justice results in reduced public confidence in the legal system—something that is indispensable to every democratic state rooted in the principles of the rule of law, human rights, and democracy.

Studies conducted in Central and Eastern Europe in the mid-1990s reveal that despite the rapid transformation of the legal institutions in these countries, the laws governing legal aid often remained in line with the principles of the old Soviet legal system. Legal aid systems in those countries were organized exclusively around the system of mandatory defense, which is limit-
ed in scope and does not take into account the defendants’ financial situation. The studies cited above also found the quality of ex officio legal representation to be unsatisfactory.

In recent years, international organizations such as the European Union and the Council of Europe have been developing standards related to access to justice and encouraging member states and prospective member states, several of which have taken steps towards improving legal aid. In 2000, Lithuania adopted the Law on State-Guaranteed Legal Aid, which significantly broadened the scope of cases eligible for legal aid and introduced new legal aid delivery mechanisms. In 2001, in the context of its efforts to harmonize its legislation with the laws of the countries in the European Union, Slovenia adopted a new Legal Aid Act, which entirely transformed the state system of legal aid there.2 Procedural laws were amended in Bulgaria (1999) and the Czech Republic (2001) to allow for better guarantees for legal aid beyond the scope of mandatory defense cases in criminal law. In Hungary, procedural laws and regulations governing the legal profession were modified to ensure better performance by lawyers appointed to represent indigent defendants.

Nevertheless, these amendments are far from sufficient. In many countries in Central and Eastern Europe, reform is needed to broaden the statutory eligibility criteria, to provide procedural guarantees for the right to legal aid outside mandatory defense, to ensure better application of the legal aid norms in practice, and to improve the management of the legal aid system.

This report summarizes the findings of nine reports assessing the status of access to justice in countries of Central and Eastern Europe applying for membership in the European Union: Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, and Slovakia. These reports were commissioned by the Project on Promoting Access to Justice in Central and Eastern Europe.3

The main goal of the project was to assess the true dimensions of, and develop means toward solving, a crucial problem undermining the functioning of the rule of law and constitutional democracy in the countries of Central and Eastern Europe: the widespread deficiencies in the provision of legal aid, and their disproportionate negative impact on vulnerable groups in society, thereby putting social cohesion at risk.

Despite recent positive developments, much remains to be done. While specific needs for reform vary from country to country, an overview of some of the commonalities can provide an important introduction to the problems facing access to justice in the region.

**Criminal cases**

**Limited availability of legal aid**

In most of the countries under review, the primary means of receiving legal aid in criminal cases is still through the mechanism of mandatory defense, which requires the justice system to provide representation by counsel in specifically designated criminal
cases when the defendant cannot afford to pay for it. Generally, the absence of counsel in such cases will be considered a serious procedural violation, and it will serve as a basis for overturning a conviction on appeal. Mandatory defense is limited to relatively few categories of cases, however, thus leaving out a number of situations in which significant interests of defendants, such as deprivation of liberty, are at stake.

No clear guarantees of the right to counsel provided at state expense outside the scope of mandatory defense

In theory, if defense is not mandatory, a defendant can request that a defense counsel be appointed on the ground of indigence (i.e., inability to pay for legal services). While the absence of counsel in mandatory defense cases is a procedural violation and may serve as grounds for overturning the conviction, absence of defense counsel in non-mandatory defense cases does not necessarily affect the stability of the judgment, providing wide discretion to the proceeding authorities. In addition, there are no clear procedural rules requiring the proceeding authorities to inform the defendant of his or her right to seek the appointment of counsel at state expense.

Lack of a means test or any uniform standards as to when to appoint counsel at state expense on the basis of indigence

The lack of a “means test” can pose serious problems to the application of the right to legal aid in practice. A means test is a clear set of criteria applied to determine whether an individual has the adequate financial means to hire counsel on his or her own. In Poland, for example, defendants have to “adequately demonstrate” that “they are not in a position to bear the costs of the proceedings.” The law contains no further provisions as to the evidence that should be submitted or the minimum or maximum income level that must be proved. In the Czech Republic, this lack of uniform standards has led to conflicting decisions by different courts in similar situations.

Lack of guarantees for the presence of counsel during preliminary investigation

In some countries, the presence of defense counsel is not mandatory during the pretrial stage (Hungary); in others, defense is mandatory only for some procedural activities, such as when the investigation file is closed and served on the accused (Poland). In several countries, investigative activities at the pretrial stage can take place in the absence of defense counsel. In light of some of the other problems in the legal aid system (discussed below), this failure to require the presence of defense counsel at pretrial investigations can have a disproportionate negative impact on defendants with ex officio counsel.

Post-conviction reimbursement

If an ex officio counsel is appointed in a mandatory defense case and the defendant
is found guilty, the defendant may be required to reimburse the state for the costs of the proceedings, including the fees of the appointed counsel. The court, however, may decide to take into account the financial situation of the defendant and order a partial or full waiver of the obligation to repay the costs and expenses (Lithuania, Slovakia). In some countries, the courts almost always require full reimbursement, and grant waivers only in exceptional circumstances (Hungary, Latvia).

**Appointment procedure not transparent**

A lack of transparency in the selection of *ex officio* counsel has been a problem in several countries (e.g., Czech Republic). According to informal interviews, the appointment mechanism varies from court to court. In some cases, preference is given to more “passive” attorneys who will ensure a speedier procedure.

**Civil cases**

**No right to legal aid from the outset of the proceedings**

None of the countries under review provides sufficient guarantees for the right of effective access to court in civil cases, which may influence the very initiation of proceedings. The right to be exempt from court costs and to be granted free legal representation usually attaches after the filing of the action. It is only after the proceedings have been initiated that a party may file a legal aid application with the court. In practice, it is very unlikely that indigent persons who are unfamiliar with the law and the judicial system will be able to prepare and file the requisite documents, including requests for waivers, without the assistance of a qualified attorney.

**Vague and ambiguous criteria for granting legal aid**

In some countries (Czech Republic, Poland), no clear means tests exist, which makes it difficult for the courts to decide on legal aid applications. Furthermore, the courts do not follow uniform standards regarding the evidence required to prove financial eligibility. While some courts in Slovakia, for example, base their decisions on facts stated by the applicant or on minimal proof of income, other courts require official documentation of financial status and income over the prior six months.

**In general**

**Lack of transparency in determining legal aid budgets**

Funds for legal aid are often part of the budget of the Ministry of Justice, redistributed to district and regional courts, or sometimes part of a separately administered overall budget for the courts, or in some cases administered through the Bar. In many countries, there is no separate budget line for legal aid at any of these levels. Usually these funds are lumped together with other expenses, such as costs of court
and public prosecutors’ proceedings (Poland), of forensic experts and interpreters (Bulgaria), or of administrative resources (Czech Republic). This fact creates difficulties in establishing the precise amount of funds spent on legal aid and in rationalizing budgetary planning. Official institutions collect no statistical data relevant to the management of the provision of legal aid.

**Lack of a managing institution**

In many countries, there is no agency authorized to manage the provision of legal aid. Managerial functions are divided among the Ministry of Justice, Bar Associations, and the courts. Communication among different agencies is not always efficient, which can have a negative impact on the rights of the people depending on legal aid services. In addition, the division of managerial responsibilities can result in the lack of any one institution taking responsibility for rationalizing and ensuring the effectiveness of the system for providing legal aid.

**Underutilized legal aid from the Bar**

The lack of awareness of the possibility of receiving free legal assistance from the Bar Associations is probably the primary reason that this procedure is so underused. The courts are not obliged to advise the parties of the availability of legal aid provided by the Bar, and little information is available to the general public. It is therefore not surprising that applications to the Bar for free legal assistance in civil cases are rare. For example, according to data from the Slovak Bar Association, the number of applications for legal aid filed with the Bar Association in both civil and criminal cases for the past four years is between twenty and thirty; the number of appointed counsel is less than ten per year.

**Poor quality of legal aid**

Despite the low number of disciplinary complaints filed against lawyers for the poor quality of their services, empirical surveys show that dissatisfaction with the work of appointed counsel is widespread. In 2000–2001, the Polish Helsinki Foundation for Human Rights conducted a survey of clients about their opinions on the quality of their legal representation. The results showed that 80 percent of defendants with privately retained counsel were satisfied or very satisfied with the quality of their legal services and counsel, but only 55 percent of defendants represented by *ex officio* appointed counsel were satisfied or very satisfied. Conversely, only 15 percent of the defendants with private lawyers were dissatisfied with the services they had received; of the defendants with *ex officio* appointed counsel, 35 percent were dissatisfied.
2. CRIMINAL LAW: EFFECTIVE ACCESS TO THE JUDICIAL SYSTEM FOR THE INDIGENT IN CRIMINAL CASES

2.1 RIGHT TO COUNSEL

2.1.1 Constitutional guarantees of the right to counsel and the right to legal aid

All constitutions in the countries under review provide guarantees for the right to counsel in criminal cases. Most constitutions explicitly proclaim the right to defense—the right to defend oneself in person or through legal representation—in all stages of the proceedings. Some constitutions (Bulgaria, Lithuania) specify that this right attaches at the moment of detention or at the first interrogation; others (Slovakia) prescribe that this right applies only to persons “charged with an offense.”

In many countries, constitutional court jurisprudence has interpreted the right to defense as a complex right consisting of a number of procedural rights for the defendant. In Romania, for example, both constitutional practice and legal theory have interpreted the right to defense to consist of a broad version, including all procedural guarantees available to individuals charged with a criminal offense, and a narrow version, synonymous with the right to legal representation.

The right to legal representation can be guaranteed effectively only through specific procedural obligations binding on the proceeding authorities. Constitutional courts in several countries have handed down decisions interpreting the right to defense in this way. For example, the Hungarian Constitutional Court has held that the right to defense is realized in “those... obligations of the authorities that guarantee that the accused/defendant be informed about the criminal charges brought against him or her... and those obligations of the authority that enable the counsel to conduct the defendant’s defense.” The Slovak Constitutional Court has held that “the judicial authorities are obliged to enable the citizen [who seeks judicial protection] to become a party to judicial proceedings.” The Latvian Constitutional Court has held that the obligations necessary to ensure the right to defense go beyond the obligations of the proceeding authorities. The Court held that the right to fair trial incorporated into Article 92 of the Constitution provides for a broader state “duty of establishing a specific system of court institutions and the duty of passing corresponding procedural norms.”

The Czech and the Slovak constitutions explicitly provide for everyone’s right to legal aid in the proceedings of courts and other public authorities from the outset of the proceedings. This principle, however, is realized in practice only to the extent that it is protected by subsequent legislation (see section 2.2).

Other constitutional principles relevant to the right to counsel adopted in all countries under review are the principle of equality before the law and the principle of supremacy of international law. In all countries under review (except Hungary, where a specific act of government or Parliament
is required for the incorporation of an international treaty into the domestic system,\textsuperscript{10} international treaties ratified by that country are part of the domestic law and take precedence over any conflicting domestic legislation. Therefore, the provisions concerning the right to counsel and right to legal aid of the European Convention on Human Rights and the International Covenant on Civil and Political Rights, which have been ratified by all countries, apply directly.

2.1.2 Right to counsel in criminal proceedings

The right to counsel is enshrined in the procedural laws of the countries under review. Usually it is one of the basic principles of the criminal procedure and is guaranteed by a number of specific rights for the defendant\textsuperscript{11} and by corresponding obligations for the proceeding authorities. The right to counsel encompasses the right to defend oneself in person or through legal representation of one’s own choosing, to be notified of this right, to be given sufficient time and facilities to prepare the defense, to communicate with counsel, to be appointed \textit{ex officio} defense counsel, and in some countries (Czech Republic, Lithuania, Slovakia) to obtain free or reduced-fee legal defense.\textsuperscript{12} The defendant and his or her counsel have the right to file motions, review files, submit evidence, and file other procedural motions.

The right to counsel includes the defendant’s right to have appointed an \textit{ex officio} defense counsel if he or she cannot afford to retain defense counsel and if certain additional conditions are met. Generally, the procedural laws in the countries under review distinguish between appointment of \textit{ex officio} counsel when defense is mandatory (see section 2.2.1) and appointment of defense counsel when it is not. In the first case, the decision to appoint a lawyer is made by the proceeding authority on the basis of specific circumstances defined by law. If defense is mandatory, the absence of defense counsel from certain procedural activities constitutes a breach of law and is grounds for overturning the conviction.

If defense is not mandatory, the absence of defense counsel does not always affect the stability of the judgment. Although the defendant can request that the proceeding authorities appoint a defense counsel (such a right is explicitly recognized in the criminal procedure codes of the Czech Republic, Poland, and Slovakia), there are no clear consequences with regard to the proceedings if the courts or the investigative authorities fail to appoint a counsel. The laws regulating the activities of Bar Associations provide for the possibility that the defendant will request an attorney from the Bar Associations, but these provisions also have a relationship to the stability of the judgment. Therefore, the right to \textit{ex officio} defense counsel is enforced primarily in cases when defense is mandatory and the proceeding authority is obliged to appoint an attorney. For more details, see section 2.2.

Most of the codes of criminal procedure
provide specific obligations for proceeding authorities to guarantee the defendant’s right to defense. These obligations require the proceeding authorities to inform defendants of their rights, including the right to counsel.

All codes of criminal procedure provide for the defendant’s right to counsel in all stages of the criminal proceedings. However, the procedural guarantees and the scope of the right to counsel differ in the different stages of the criminal proceedings. Certain limitations on the right to counsel exist during short-term detention, which in some countries may precede the criminal proceedings, and during the initial detention before charges are formally brought. Restrictions on the right to counsel during pretrial investigation are also common.

In Hungary, the Police Act allows for temporary detention of individuals for up to eight hours (in exceptional situations, up to twelve hours) if the person is caught while committing a crime or is suspected of having committed a crime. Because this short-term arrest is not formally a part of the criminal procedure, the general principles of procedural law do not apply. People detained through this process are not allowed to meet with visitors and therefore cannot have access to a lawyer, even though the police can formally question them.

In the Czech Republic, until recently, police were authorized to summon people to “give explanation” without the assistance or presence of defense counsel. Amendments to the Code of Criminal Procedure effective January 2002 remedied this situation and provided for the possibility to have an attorney present (and even to be granted legal aid) upon request of the person summoned for such interrogation.

In some countries (Poland, Slovakia), the investigative authorities may detain a person for a certain time without bringing charges against him or her. Although this detention is part of the criminal proceedings, the person has not been formally charged with a crime and therefore does not have the procedural rights of the accused. The proceeding authorities should inform the detainee about his or her rights and should allow him or her to contact a lawyer, but they are not obliged to provide a lawyer if an indigent detainee does not have the means to pay for one. Therefore, in some countries this interrogation may take place without the presence of counsel.

In Hungary, the first interrogation of a person must take place within twenty-four hours after the communication of suspicion that the person committed a crime. If this person has already been detained, the investigative authority must inform the detainee of the right to have a lawyer and, in cases of mandatory defense, that if he or she fails to select a lawyer within three days, the proceeding authority will appoint a lawyer ex officio. However, no statutory provision requires the authority to postpone the interrogation until a lawyer has been appointed. Therefore, the detainee can be interrogated without a lawyer, and the record of the interrogation can be used as evidence in the proceedings, because no formal breach of law has been committed.

In Bulgaria, in cases of mandatory
defense, counsel should be present during the first interrogation of the detainee. The consistent judicial practice indicates that the mere act of informing the defendant of his or her right to counsel without actually providing one constitutes a serious breach of law.\(^{17}\)

A person charged with a criminal offense can be detained pending trial if the conditions for detention are met. The decision on detention is made by a court in the presence of the accused within a short time after detention (usually up to seventy-two hours). Generally, defense counsel should be present at the hearings for pretrial detention (Latvia). In some countries it is possible for this hearing to take place without defense counsel, as the presence of an attorney is not mandatory. If counsel has been notified of the hearing but fails to appear, there is no procedural violation (Hungary).\(^{18}\)

In Poland, the defense counsel can participate in hearings during the detention period only if he or she happens to be physically present in the courtroom. It is not obligatory to notify defense counsel about the hearing.\(^{19}\) The detainee can ask to notify his or her defense counsel, but the court can reject the request if it finds that such a notification may delay the proceedings. Draft amendments to Poland’s Code of Criminal Procedure provide for obligatory notification to the prosecution (but not to defense counsel) of hearings on pretrial detention.

Although defense counsel can participate in all stages of the criminal proceedings, the scope of his or her rights is limited at pretrial investigation. Access to the case file during preliminary investigation is restricted, and in some countries the defense counsel can participate in procedural activities at this stage only if the procedural law explicitly provides for this.\(^{20}\) In other countries there are no formal restrictions on the scope of the rights of defense counsel during preliminary investigation.\(^{21}\)

Surveys were conducted in Bulgaria in 2000 and in Hungary in 1998–99 to evaluate the implementation of the right to counsel during the preliminary investigation. The Bulgarian survey\(^{22}\) was based on an examination of 1,357 files of cases of public prosecution in 109 of the 127 first-instance courts in Bulgaria. The survey revealed that in 23.6 percent of the cases, defense counsel was absent at the moment the initial charges were pressed, and in 19.3 percent of the cases during the interrogation of the accused. In 97.9 percent of the cases, defense counsel was absent during searches and seizures, and in 85.7 percent of the cases from the re-creation of the scene of the crime. In 15.2 percent of the cases, the defense counsel was absent at the moment the investigation file was closed and served on the accused.

The Hungarian survey,\(^{23}\) based on an analysis of 1,273 case files and interviews with judges, prosecutors, defense counsel, police officers, and detainees, revealed similar results. In all cases under review in town courts (327 cases), defense councils was absent from the following procedural activ-
ities: inspection, evidentiary experiment, presentation for recognition, and on-the-spot survey. The results from the county courts for these procedural activities are very similar: the defense counsel was present on one or two occasions out of the 165 cases reviewed. In addition, the defense counsel was absent from the hearing of witnesses in 87.8 percent of cases in town courts and from 78.2 percent of cases in county courts. Defense counsel was absent during the interrogation of defendant in 71.3 percent of cases in town courts and 73 percent of cases in county courts; and from the presentation of files in 73.1 percent of cases in town courts and 55 percent of cases in county courts.

Access to defense counsel during preliminary investigation in Poland is also problematic in practice. Surveys conducted by the Polish Helsinki Foundation for Human Rights reveal that in many cases, the accused's first contact with defense counsel was at the end of the preliminary investigation, when the investigation file was closed and served on the accused. This is a procedural action for which the presence of defense counsel is mandatory.

"Access to Justice Country Report: Hungary" also indicates additional problems in the implementation of the right to counsel. Contact with defense counsel (especially for defendants detained in police jails) is inhibited by the lack of any provision authorizing access by counsel to the jail before receiving a letter of authorization from the accused. Contact by telephone is also problematic (97 percent of the detainees interviewed in police jails and 60 percent of those detained in penitentiary institutions reported being hindered when trying to contact their counsel by phone). In addition, the costs of photocopying files (an essential element in any trial) are unreasonably high.

These shortcomings, which affect the general population of criminal defendants, have a disproportionately negative impact on indigent defendants.

2.1.3 Right to counsel and right to legal aid in non-criminal proceedings when deprivation of liberty is at stake

Proceedings for placement of minors in juvenile detention centers

In the countries under review, coercive educational measures can be applied to minors who have committed certain criminal acts but are not criminally liable. These measures may include a reprimand, supervision by social services, assignment to an educational institution, or commitment to a juvenile detention center. These measures may be imposed by a criminal court in connection with criminal proceedings (Latvia, Romania) or by a civil court for certain categories of minors (Czech Republic, Slovakia). In Bulgaria, a number of agencies were created specifically for this purpose. These special commissions (and not the court) in Bulgaria can decide on committing a juvenile to an institution. This policy has raised questions concerning the compatibility of this law with the standards of the European
Convention on Human Rights on the right to liberty and security and to fair trial.

If a court sentences an individual to an institution in the context of criminal proceedings, the general rules of criminal procedure apply and the minor must be represented by counsel (mandatory defense) (see section 2.2.1). The situation is different if a civil court orders the detention. In some countries (Czech Republic), the general rules of civil procedure, including the right to be represented by an attorney and the right to legal aid, apply, while in others (Bulgaria, Slovakia), the law provides for special representation by guardians ad litem, who are appointed by the court (commission in Bulgaria). This function is performed by a representative of the district authority (Slovakia) or by a commission member (Bulgaria), and not by an independent attorney, which raises serious concerns about the effective realization of the right to counsel.

**Procedings for placement in special psychiatric clinics**

The regulations of this field vary in the countries under review. Generally, a person can be committed to special medical treatment either in the course of criminal proceedings—when all principles of criminal procedure apply, including the provisions regarding the right to counsel and the right to mandatory defense—or in a special procedure.

In some countries, when a person is committed to treatment through a special procedure, the decision for placement in an institution is made by a court on a motion of the district prosecutor on the basis of prior psychiatric forensic examination (Bulgaria), or on a motion of a specialized health care institution (Slovakia). The court should appoint a guardian ad litem for the proceedings. In some countries, the person subjected to these proceedings may ask for appointment of ex officio legal counsel; however, the court is not obliged to appoint one, and in practice such appointments are rare. In Poland, these proceedings take place before special courts, which may appoint a counsel even without a special motion if the court finds that participation of defense counsel is necessary. In Hungary, the person subjected to these proceedings can be represented by a “patients’ rights officer,” an official employed by the National Welfare and Health Center.

In the special procedure of other countries (Czech Republic, Latvia), the decision for involuntary psychiatric treatment is made by a doctor or by specialized commissions of the respective medical facilities. Such a decision can be appealed under the general rules of administrative procedure: first before the relevant administrative authority (the director of the hospital, the minister of health, or the inspection for medical treatment and quality of capacity for work expertise) and eventually before a court. Although in theory the rules for legal representation in administrative proceedings apply to these cases, this is hardly a sufficient guarantee of the right to counsel. In some countries (Latvia), no specific obligation to provide legal aid exists, while in
others (Czech Republic), the criteria for granting legal aid in civil cases apply, although they have been criticized as overly broad and vague (see section 4.2). In Lithuania, legal aid for this type of proceedings is available.27

**Police short-term detention**

Police may detain a person for up to twenty-four hours if this person endangers his or her own health or the health of others, or is caught while committing a misdemeanor, and in certain other circumstances (Bulgaria, Czech Republic, Slovakia).28 In theory, the detainee under such circumstances may have contact with an attorney, but there is no obligation for the police to provide one or to facilitate an attorney’s access to the detainee. For short-term arrest prior to the criminal proceedings, see section 2.1.2.

**Convicted persons**

In the countries under review, convicted persons have the right to file complaints and petitions to public institutions. The prison administration has some legal obligation to facilitate this right (special mailboxes in Slovakia, the obligation to forward the complaints immediately to the relevant authorities in Bulgaria, etc.). In some countries (Latvia), the prosecutor visits the prison at least once a month, and prisoners can also make appointments with them. The prison administration in Latvia is working on creating a position of legal counsel in each prison. The consultations by the member of the prison staff would be available for free to the prisoners.

The Czech Law on Execution of Imprisonment Sentences provides the right to legal aid for prisoners but does not provide any further explanation. Although in theory legal aid may be sought through the Bar Association, there are no specific regulations that take into account his or her special circumstances or the fact that the person is detained.

*Detention of foreigners in connection with violation of immigration laws*

Generally, in the countries under review, foreigners may be detained outside the context of the criminal proceedings in the case of administrative expulsion or in extradition in accordance with international treaties. Hungarian law also provides for detention in the context of “alien policing” and for detention after refusal of entry.29 The decision to detain a foreigner in the cases of police detention and administrative expulsion is made by the relevant police authorities or the border police. It cannot be appealed on the merits, but it can be subject to judicial review for legality of the act ordering detention. This procedure generally follows the procedural rules for review of administrative acts, and in theory, where legal representation or legal aid provisions exist, they should be applied. In the Czech Republic, legal representation for judicial review of administrative expulsion is mandatory, although it falls within the category of administrative proceedings in general, where no legal aid is provided.
Detention related to drug addiction or alcoholism

In Poland, alcoholics may be detained for forced treatment. This decision is made by a court, and therefore the rules of the Code of Criminal Procedure regarding legal representation and the right to legal aid apply.30

2.2 RIGHT TO LEGAL AID:
ELIGIBILITY CRITERIA FOR GRANTING LEGAL AID IN CRIMINAL CASES

In general, in the countries under review, mandatory defense is the primary means of receiving legal aid in criminal cases. In certain categories of cases, the law requires that defendants be represented by counsel (mandatory defense). If a defendant fails to hire a defense counsel, the proceedings authorities must appoint an ex officio lawyer. A failure of the proceedings authorities to do so constitutes a serious breach of law and a ground for overturning the judgment. In mandatory defense cases, the costs of defense counsel are covered by the state.

Free legal representation may also be granted on the basis of indigence, outside the scope of mandatory defense (Poland, Slovakia). Recent amendments to the Czech Code of Criminal Procedure31 provide for a specific obligation of the proceeding authorities to appoint a defense counsel for free or for a reduced fee if the defendant proves a lack of sufficient financial means. Defense counsel fees in this case are covered by the state. However, the decision to appoint defense counsel in such cases is left to the discretion of the proceeding authorities—no clear unified financial criteria for granting legal aid exist (see section 2.2.2). Although the defendant has the right to legal aid, the fact that defense counsel has not been appointed to him or her is not likely to affect the validity of the sentence imposed in the absence of counsel.

Finally, Bar Associations can provide free legal services in criminal cases, either through pro bono services by its members or through payments provided by the Bar Association itself. However, Bar Associations are under no legal obligation to provide free legal assistance or to use any particular procedures or practices in doing so. Moreover, the obligation, under international human rights treaties, to secure the right to free legal assistance to indigent defendants “when the interests of justice so require” lies with the state.32

2.2.1 Substantive criteria

Mandatory defense

All codes of criminal procedure require mandatory participation of defense counsel in certain categories of cases. Common grounds for mandatory defense in the countries under review are: (1) the defendant is a minor; (2) the defendant suffers from certain kinds of physical or psychiatric disease; (3) the defendant does not understand the official language of the court; (4) more than one defendant with conflicting
interests are tried in the same trial and at least one of them has a defense counsel; (5) the severity of the potential sentence. As for the last category, defense is mandatory if the potential sentence is deprivation of liberty the upper limit of which exceeds five years (Czech Republic, Hungary, Romania, Slovakia); or if the lower limit is more than three years (Poland), or more than ten years (Bulgaria); or is life imprisonment (Latvia, Lithuania).

In Lithuania, a specific ground for mandatory defense exists when the state prosecutor participates in the case.\(^{33}\) This makes defense mandatory in almost all criminal cases, as the state prosecutor participates in all criminal cases, except for some minor ones involving bodily injuries or intentional minor impairment of health.

In Latvia, in practice, the courts appoint *ex officio* counsel every time a defense counsel is requested, not just in cases for which defense is mandatory.

In Poland, defense is mandatory if a person is charged with a felony, for which the lower limit of the potential sentence is more than three years of deprivation of liberty. This excludes criminal offenses punishable with deprivation of liberty for which the lower limit is less than three years but the upper limit is relatively high and can be ten or even twelve years.\(^{34}\)

In some countries, pretrial detention is a ground for mandatory defense (Czech Republic, Hungary, Poland, Romania, and Slovakia). In Hungary, the initial seventy-two-hour detention is excluded from the scope of mandatory defense (see section 2.1.2).

Some codes of criminal procedure also provide for the possibility of mandatory defense if this is “required by the interests of justice” (Bulgaria, Lithuania). Although this text repeats the text of Article 6.3(c) of the European Convention on Human Rights, its interpretation by the proceeding authorities might differ from the interpretation of the European Court of Human Rights. Defense is mandatory in Bulgaria if three conditions are met: (1) the defendant cannot afford to hire a lawyer, (2) the defendant wishes to have one, and (3) the interests of justice so require.\(^{35}\) If the defendant has made a specific request for an *ex officio* attorney, the courts cannot refuse to appoint defense counsel on the ground that the case does not fall within a category of mandatory defense. The court must examine whether the appointment of defense counsel is required by the interests of justice. In its examination, the court should take into consideration factors such the severity of the offense, the potential sentence, and whether any co-defendants are represented by lawyers.\(^{36}\)

Similarly, in Romania, the court may appoint defense counsel on the grounds of mandatory defense if it decides that the defendant cannot defend himself or herself.\(^{37}\) While in practice this provision is applied mainly to defendants who suffer from certain psychiatric or medical conditions, the legal doctrine indicates that defense should be mandatory if the defendant requests appointment of a lawyer due to indigence.\(^{38}\) In the Czech Republic and Slovakia, defense is also mandatory when there are doubts about the defendant's ability to defend himself or herself. This is
generally understood to refer to mental and physical disability.

In Poland, a new provision was adopted in 1997 making defense mandatory if the court finds it necessary “due to circumstances hampering the defense.” The judicial practice under this provision is still not clearly established.

Other grounds for mandatory defense include trial in absentia (Bulgaria, Czech Republic, Slovakia), trials against a soldier or other military personnel (Romania), cases in which the defendant has been charged with the commission of another intentional criminal offense (Slovakia), accelerated criminal procedure (Czech Republic, Estonia), extradition proceedings (Romania, Slovakia), and proceedings before the Supreme Court (Estonia).

2.2.2 Financial criteria

If the defendant does not hire a defense counsel in a mandatory defense case, the proceeding authority should appoint an ex officio lawyer. Mandatory defense is not related to the defendant’s financial situation.

In addition to mandatory defense, some codes of criminal procedure (Czech Republic, Poland, Slovakia) provide for the right to free or reduced-fee defense for some defendants. The proceeding authority may appoint defense counsel if it decides that the defendant cannot afford to pay for counsel’s fees, but it is not obliged to do so. Absence of defense counsel from the proceedings does not necessarily affect the outcome of the proceedings in these cases.

Despite the fact that the only criterion on which to grant legal aid is financial, there is no uniform standard for determining whether the accused possesses sufficient means. There is no income threshold, nor are there any specific requirements regarding the evidence of indigence that must be submitted. The only clear element is that the burden of proof lies with the defendant.

The lack of a uniform means test seems to be a serious problem in Poland, where defendants also have the right to ex officio defense counsel if they “adequately demonstrate” their inability to pay lawyers’ fees. The law does not explain what type of evidence should be submitted in order to satisfy the standard of “adequately demonstrate.” As a result, the judicial practice is not consistent, and no safeguards exist to prevent violations of the defendant’s right to free legal representation.

The new legal aid law adopted in Lithuania seeks to address the legislative and judicial gap in financial eligibility standards for legal aid that existed prior to the adoption of the law.

The Law on State-Guaranteed Legal Aid in Lithuania asserts that persons whose annual income and property are below specified limits established by the government are eligible for legal aid. The law further establishes a list of documents that the defendant must present in order to receive legal assistance. In addition, the law sets up five different levels of coverage for legal aid, depending on a person’s income and property.

Similarly, the Slovenian Legal Aid Act—which applies to all criminal cases except for
offenses involving insulting behavior, libel, defamation, or slander,\textsuperscript{42} provides that persons who are not able to meet the costs of the judicial proceedings without causing harm to their social position or the social position of their families are eligible for legal aid. The law presumes that the social position of the applicant will be at risk if his or her monthly income does not exceed the minimum wage determined by the government. The law describes in detail the evidence required and the methodology to be used in determining indigence.

\textbf{Post-conviction reimbursement}

If \textit{ex officio} counsel has been appointed on the grounds of mandatory defense and the defendant is found guilty, he or she can be required to reimburse the state for the costs of the proceedings, including the fees of the \textit{ex officio} appointed counsel (Bulgaria, Czech Republic, Hungary, Slovakia). In some countries, the court almost always orders full reimbursement, and only in exceptional circumstances do those courts grant a waiver of costs of the judicial proceedings (Latvia).

In other countries, when deciding on the costs and expenses, the courts can take into account the financial situation of the defendant and order a partial or full waiver of the obligation to pay the costs and expenses of the proceedings (Lithuania, Slovakia). Defendants also can appeal the decision requiring them to pay lawyers’ fees. This appeal may suspend the execution of the decision (Slovakia).

2.2.3 \textit{Other eligibility questions}

\textbf{Legal aid for non-citizens}

In all countries under review, non-citizens have the same right to counsel and to legal aid as citizens. The fact that a defendant does not understand the language of the trial is grounds for mandatory legal representation.

One clear obstacle to access to justice is the fact that interpretation is normally provided only for procedural activities before a court or another proceeding authority. In Hungary, if the defendant is a foreigner, the proceeding authorities must allow the presence of representatives of the foreign consulate during investigative activities.

\textbf{Overcoming barriers to the effective use of the judicial system faced by those with particular difficulties}

In Slovakia, a special decree of the Ministry of Justice requires that every prison institution provide assistance upon request to illiterate detainees.

Some segments of society might be at higher risk of being detained prior to trial and therefore, because of the fact of the detention, might be in a more difficult situation regarding their access to legal aid. Surveys conducted by the Bulgarian Helsinki Committee in 2000–2001\textsuperscript{43} reveal that 31.1 percent of the accused who were detained pending trial were Roma and 19.2 percent were Bulgarians. While 71 percent of the Bulgarians were released pending trial, only 59.6 percent of the Roma were released.
2.2.4 Legal aid for victims of crimes

Victims of crimes or aggrieved persons (individuals who have suffered bodily injuries, harm to property, or moral harm, or whose rights have been violated by the criminal offense) can take part in the trial proceedings and may have a number of procedural rights, including the right to be represented by an attorney.

In general, procedural laws do not provide for an explicit right to legal aid for the victims of crime. In the Czech Republic, victims can apply for legal aid under the procedure for granting legal aid to indigent defendants. The judge may grant legal aid, which will be paid for by the state. Another possibility for victims seeking legal aid is to apply to a Bar Association (as in Slovakia). The proceeding authorities, however, do not inform the aggrieved parties of this possibility. In some countries (Latvia, Lithuania), the proceeding authorities may appoint counsel if the victim is a juvenile. Under the new legal aid legislation in Lithuania, victims of crime are eligible for legal aid provided that they meet the other eligibility criteria.

In Estonia, the State Compensation for Victims of Crime Act entered into force on 1 January 2001. According to this law, the state should pay compensation to victims of crimes to a certain extent. Section 5 of this act contains a list of situations where 50 percent of the actual damages may be payable. This includes damages arising from incapacity for work; expenses for medical treatment of the victim; the victim’s funeral expenses; and other damages arising from the death of the victim. If material damage caused to appliances substituting for bodily functions (such as dentures, contact lenses, and eyeglasses) and to clothes exceeds 50 percent of the monthly income of the victim, compensation may also be claimed. After the state pays compensation to the victim, it can bring the claim against the party found guilty.

It can be argued that, in principle, the interests of the victim are partially protected by the prosecution in the trial and by other procedural rules (exemption from court costs for civil claims filed within the criminal proceedings) facilitating the victim’s participation in court proceedings. On the other hand, this approach does not serve the interests of the victim when the prosecution decides not to indict or later drops the charges.

2.3 Other cases

In addition to the three types of legal aid mentioned above—mandatory defense, free or reduced-fee legal representation provided by proceeding authorities in non-mandatory cases, and free legal representation provided by the Bar Association—no other mechanisms for granting legal aid exist in any of the countries under review. Some specialized non-governmental organizations do, however, provide free legal assistance to specific target groups, such
as victims of human rights violations, Roma, or prisoners.

2.4 Procedure for granting legal aid

The procedure for granting legal aid depends on whether legal aid is granted in the context of mandatory representation or in cases when legal representation is not mandatory.

Mandatory representation

Prior to the first interrogation, the defendant should be informed of his or her right to have legal representation and should be given the opportunity to contact a defense lawyer. If the defendant fails to hire an attorney, the relevant proceeding authority is obliged to appoint a lawyer ex officio. Failure of the proceeding authority to do so is a violation of the procedural rules and grounds for overturning the conviction.

After determining that defense is mandatory, the proceeding authority should appoint an attorney to the case. The specific procedure for selection and appointment of the lawyer to the case is not very clear. It is usually a mixture of applications of laws governing the legal profession and rules established by practice.

One possibility is that the judge may appoint an attorney from a list of all practicing attorneys in the judicial district (Czech Republic) or from a list of lawyers who are authorized to take cases of mandatory defense, prepared by the Bar Association (Hungary, Romania, Slovakia). Romania has detailed procedures for the preparation of this list.

Another possibility is that a special statement from the Bar Association designating an attorney is necessary. This is the case in Bulgaria, although in practice this is not followed. In Romania, once the attorney has been appointed by the court from the list, a special designation letter from the Bar Association is also required. Problems may arise in cases for which an attorney has to be appointed for urgent procedural activities (see section 2.6).

In Slovenia, the new Legal Aid Act creates a so-called Legal Aid Authority (the chairperson of the district court or a person authorized by him or her), which decides on the applications for legal aid and handles the procedure for appointment.

Defendants can hire a new defense counsel in addition to the court-appointed attorney, but cannot change his or her ex officio lawyer. Generally, there is no procedure for a defendant to contest the appointment of a particular attorney as ex officio counsel.

Cases for which defense is not mandatory

Indigent defendants, for whom defense is not mandatory, may apply for legal aid to the proceeding authority. Generally, the proceeding authorities should inform the defendant about his or her rights, including the right to request free legal aid (Slovakia).
There are no specific obligations for the proceeding authorities to appoint defense counsel in all of the cases where counsel is sought on this ground, nor are there clear procedural consequences for the absence of counsel from the proceedings.

Recent amendments to the Czech Code of Criminal Procedure clarified the procedure for granting legal aid for free or for a reduced fee. According to the new provision, the defendant has to file a request with the proceeding authority and must provide evidence about his or her financial status. If the court approves the application for legal aid, the mechanism for appointing an attorney is the same as in cases of mandatory defense.

**Legal aid under the rules of the Bar Association**

In theory, it is possible that a defendant or a victim of crime can request the Bar Association to grant legal aid (Romania, Slovakia). There are no clear standards as to when or how to grant free legal representation, and in practice this avenue is rarely used (see section 2.6). In these cases, legal services most often are provided on a pro bono basis by individual attorneys.

### 2.5 Scope of Legal Aid

If the proceeding authority appoints an *ex officio* counsel, this counsel has the full range of rights of a legal representative at all stages of the proceedings. In some countries, the presence of counsel is not mandatory during the pretrial stage (Hungary), or it is mandatory only for some procedural activities, such as the closing and serving of the investigation file to the accused (Poland). Investigative activities at the pretrial stage can take place in the absence of counsel (Hungary, Poland). After a 2001 amendment to the Czech Code of Criminal Procedure, attorneys are no longer allowed to be present at all investigative activities, but only at those that directly produce evidence later used at trial. In view of the generally low quality of representation provided by legal aid systems (see section 2.7), the lack of a clear procedural requirement that the defense counsel be present at the investigation may have a disproportionate negative impact on defendants with *ex officio* appointed counsel.

### 2.6 Application of the Legal Aid Norms in Practice

If defense is mandatory, the proceeding authorities will appoint *ex officio* legal aid in all cases. The absence of defense counsel from the proceedings is a serious breach of the law and grounds for overturning the conviction. In practice, however, problems may arise in cases for which the decision to grant mandatory defense relates to physical and mental disabilities and the proceeding authorities must make a decision without consulting medical experts (Czech Republic).
If defense is not mandatory, appointments of defense counsel in practice are rare. This is partly due to the lack of clear procedural rules as to when such requests should be approved (no means test for determining the granting of legal aid), and partly due to the lack of awareness of the possibility of non-mandatory appointments. Aside from the general obligation of the proceeding authorities to inform defendants about their rights, the relevant codes of criminal procedure do not place specific obligations on the proceeding authorities to inform defendants about the possibility to apply for legal aid (Czech Republic).

The limited availability of legal aid outside the scope of mandatory defense has also been confirmed by empirical studies conducted in the framework of the project Promoting Access to Justice in Central and Eastern Europe. In 2000–2001, the Bulgarian Helsinki Committee conducted two surveys on the practical application of the right to counsel at different stages of the procedure. The first survey was based on approximately 1,300 case files and the second on interviews with approximately 1,000 detainees and prisoners. The surveys revealed that at the stage of pretrial investigation, defense counsel was present at 32.1 percent of the cases in the study of criminal files, and at 50.4 percent according to interviews with detainees. Defense counsel was present before the first instance in 53.5 percent (case files) and 69.2 percent (interviews), and approximately the same percentages were seen for cases on appeal and cassation. Most of the defendants who had a lawyer were represented by an *ex officio* counsel appointed according to mandatory defense procedures (71.7 percent at pretrial stage and 77.0 percent in the cassation proceedings).

Practicing judges in Hungary stated that they are reluctant to appoint *ex officio* counsel when defense is not mandatory, because if they later find the defendant guilty, he or she will have to reimburse the state for the costs for the *ex officio* appointed lawyer. Exemption or reduction of court expenses is granted only in exceptional circumstances.

With respect to the right to free legal representation or reduced-fee legal in non-mandatory cases, the problems are exacerbated by the lack of clear means tests for proving indigence. As mentioned above (see section 2.2.2), in Poland, defendants have to “adequately demonstrate” that “they are not in a position to bear the costs of the proceedings.” The laws contain no further provisions as to the evidence that must be submitted or the minimum income that must be established. In the Czech Republic, the lack of uniform standards has led to situations where different courts hand down conflicting decisions in similar situations.

The procedure for appointing defense counsel is problematic in both mandatory defense cases and cases when legal aid is granted on the basis of indigence. The lack of transparency in the selection of appointed counsel has been raised as a problem in the Czech Republic and elsewhere. According to informal interviews, the appoint-
ment mechanisms vary in different courts. In some cases, preference is given to more “passive” attorneys who will guarantee a speedy procedure.

As stated earlier, although counsel can participate in all stages of the criminal proceedings, their presence at investigative activities is not, or not always, mandatory. This lack of procedural guarantees for the presence of defense counsel at the pretrial investigation disproportionately affects defendants with ex officio appointed counsel; as their fees are covered by the state according to modest fee scales and they are frequently paid with great delays (see section 6.3), their compensation hardly serves as an incentive for the counsel to undertake procedural activities that are not explicitly required.

Regarding the opportunity to request legal aid from the Bar Association in criminal cases, the Romanian Center for Legal Resources conducted interviews with thirty lawyers of the Bucharest Bar Association. Of the thirty interviewed, only one lawyer reported that he had been appointed by the Bar to provide legal aid, and he had done so only once in five years of practicing law.

2.7 QUALITY OF FREE LEGAL REPRESENTATION

Generally, in the countries under review, there are no specific mechanisms to monitor and ensure the quality of legal representation. The Bar Associations do not conduct any evaluations, and in most cases they do not conduct training on professional responsibilities.

The only recourse for people dissatisfied with the quality of their legal representation is a disciplinary procedure, which exists in all the countries under review. Generally, the individual can file a complaint with the executive body of the local Bar Association. The members of the executive body would then conduct hearings, and if they find that an attorney has violated the rules of professional ethics, they may impose a sanction. Sanctions may range from reprimand to disbarment for several years.

In practice, the disciplinary proceedings are rarely used. The Slovak Bar Association has registered 128 complaints in 2001 and 123 in 2000; the number in 2000 for Latvia is 70. A small fraction of these complaints were found to be justified (in Slovakia, it is approximately 7 percent of all complaints).

Despite the relatively low number of disciplinary complaints, empirical surveys show that dissatisfaction with the work of the appointed counsel is widespread. In 2001, the Polish Helsinki Foundation for Human Rights conducted a survey of client opinion about the quality of their legal representation. According to the results, 80 percent of defendants with privately retained counsel reported that they were satisfied or very satisfied with the quality of the legal services of their counsel; however, only 55 percent of defendants represented by ex officio appointed counsel were satisfied or very satisfied. Only 15 percent of the defendants with private lawyers were
dissatisfied with the services they have received, but this increased to 35 percent for defendants with ex officio appointed counsel.

The surveys conducted by the Bulgarian Helsinki Committee included a peer review on the quality of ex officio appointed lawyers. According to peer review evaluations, in 15.5 percent of cases where an appointed attorney participated before the first-instance court, there were clear grounds to plead for acquittal, yet such pleas had not been addressed in 14.3 percent of those cases. In 28.6 percent of the cases, there were sufficient grounds for a more favorable qualification of the offense, yet such pleas were not addressed in 17.8 percent of those cases.

According to a client evaluation conducted by the Bulgarian Helsinki Committee in 2000 and 2001 on the question of the main weakness of their defense counsel, defendants answered that there was lack of sufficient interest in the case (22.2 percent), inadequate performance (20.1 percent), insufficient contact with defendants (16.1 percent), and collaboration with the investigatory authorities (11.7 percent).

Similar surveys were conducted in Hungary in 1998–99 and in 1996 (Ombudsman Report 1996) and in the Czech Republic in 1997 (Tolerance Foundation), with very similar results.

3. **Civil Law: Effective Access to the Judicial System for the Indigent in Civil Cases**

3.1 **Normative Basis for the Right to Access to Courts in Civil Cases**

The constitutions of all countries under review have adopted the principle of equality before the courts and proclaim the right to judicial protection for violations of citizens’ rights (right to court). Explicit guarantees of the right to free legal representation in civil cases exist only in the Czech and the Slovak Constitutions, which proclaim the right of everyone to legal aid in court proceedings and in proceedings before administrative authorities.

Until recently, in most of the countries under review, the courts were in charge ex officio to monitor the progress of civil proceedings and to advise the parties on the specific procedural activities they had to undertake. Reforms from the late 1990s enhanced the adversarial features of the proceedings and abolished the obligation of courts to instruct the parties and collect evidence on their own motion (Bulgaria, Czech Republic, Hungary, Romania).

The codes of civil procedure have adopted two main mechanisms for facilitating the right to access to justice for the indigent: the possibility of receiving legal aid through judicial approval, and the possibility of exemption from court costs. Many of the countries (Czech Republic, Estonia,
Hungary, Lithuania, Poland, Romania, Slovakia) have adopted both methods. Others (Bulgaria, Latvia) rely on the possibility of exemption from court costs as the sole means to facilitate indigent people’s access to the judicial system.

In addition, the laws on the Bar provide for a means by which the indigent may receive legal aid through Bar Associations. As in criminal cases, the implementation of these provisions is left to the Bar Association and cannot affect the outcome of the stability of the judgment.

3.2 Civil cases for which legal representation is mandatory

Generally, legal representation in civil proceedings in the countries under review is optional. There are some exceptions when the parties to the legal proceedings must be represented by an attorney. These exceptions concern two groups of cases: cases involving a complicated procedure of judicial review, and cases filed by or against certain categories of persons.

In some countries, legal representation is mandatory in proceedings before the Supreme Court regardless of the nature of the appeal (Czech Republic, Hungary), or only for some special review proceedings such as extraordinary appeal (Slovakia). Until 31 December 2002, representation by a lawyer was mandatory in all cases of judicial review of administrative decisions in the Czech Republic. Exceptions to this principle include cases heard by a district court or cases of appeals of administrative decisions concerning pension insurance schemes or health insurance. Representation is no longer mandatory in such cases in the Czech Republic.

Representation is also mandatory in cases where the party is a person with a limited capacity to undertake legal activities (such as minors, persons under guardianship because of mental disability or other reasons, etc.). In these cases, the court should appoint a representative, or guardian ad litem. The guardian ad litem does not have to be an attorney.

3.3 Eligibility criteria for granting legal aid in civil cases

In some countries, the criteria for granting legal aid are the same as the criteria for granting exemption from court costs and duties (Czech Republic, Poland, Slovakia). Usually the decision to grant legal aid or to grant exemption from court duties involves consideration of factors related to the substance of the claim and the financial situation of the applicant.

In Hungary, a complex system is in place that allows for exemption from costs and duties for some specific categories of cases regardless of the financial situation of the individual, as well as exemption from costs due to lack of sufficient financial means, regardless of the type of case. Persons eligible for exemption from duties on the basis of any of the above criteria may
request that the court appoint an attorney (protector attorney) for their representation.

In some countries (Estonia, Lithuania, Romania), the decision to grant legal aid is based solely on financial criteria.

3.3.1 Substantive criteria

In most countries, the codes of civil procedure use vague language when defining the grounds for approving legal aid applications, thus granting excessively broad discretion to the courts applying these provisions.

In the Czech Republic and Slovakia, the conditions for approving applications include: a specific request by the interested party (see section 3.4); consideration of the financial and social situation of the applicant (see section 3.3.2); consideration of whether the claim is arbitrary or manifestly ill-founded; and objective need for better protection of the interests of the party.

In Poland, the court must grant legal aid if it finds the participation of a lawyer or legal adviser necessary in the case. Usually the courts evaluate the factual or legal complexity of the case and the ability of the applicants to protect their interests without legal representation. The appointment of counsel also can be justified if the opposing party is represented by an attorney. Free legal representation can be granted for both trial and non-trial proceedings.

In many countries (Bulgaria, Hungary, Latvia, Poland), some specific lawsuits or proceedings are exempt from court costs irrespective of the financial situation of the applicant. These include proceedings related to the establishment of parenthood, custody of a child, alimony, employment, etc. In addition, in Hungary, some specific types of legal actions (appeals and special motions) determined by the Act on Duties are exempt from court duties.

3.3.2 Financial criteria

Generally, the codes of civil procedure do not contain specific financial criteria and leave this decision to the courts. In Poland, legal aid applicants have to prove that they are unable to bear the costs of the proceedings “without detriment to their own and their family’s necessary subsistence.”\textsuperscript{48} In Romania, persons applying for legal aid must prove that the refusal to grant legal aid would damage not only their own financial situation but also the financial situation of their families.

The lack of clear and uniform criteria inhibits the effective application of these norms (see section 3.7).

The Hungarian legislation provides a more sophisticated system to establish financial eligibility for legal aid. The law allows the courts to grant a waiver from court costs or duties, or from the obligation to advance payments, if the party cannot meet the costs of the proceedings because of their income or financial situation, or, in the case of a waiver of the obligation to
advance payments, if such payment is likely to impose an unreasonable burden on the person’s financial situation. Exemption from costs must be granted if the party’s income does not exceed the minimum amount of a specific retirement pension and if the party has no immovable property beyond that necessary for “normal living.” If the income of the applicant meets these requirements, exemption can be granted by a decision of the court.

The legal aid law adopted recently in Lithuania sets up clear financial criteria and procedures and lists the evidence required for granting legal aid in civil cases. The Lithuanian law uses the same financial criteria, procedure, and evidence in civil cases as in criminal cases (see section 2.2.2).

3.3.3 Other eligibility questions

Legal aid for non-citizens
In principle, non-citizens are entitled to the same right of access to courts as citizens (Romania, Slovakia). Non-citizens are exempt from court costs if the type of lawsuit is exempt from court costs and duties (Bulgaria, Hungary). Where granting legal aid depends on evaluation of the financial situation of the applicants, practical difficulties may arise in establishing the financial status of a non-citizen, which can make the granting of legal aid unlikely in practice.

Exemption from court costs and duties is also available to non-citizens through reciprocity, if the country of the citizen and the host country are parties to a bilateral or multilateral agreement.

Overcoming barriers to the use of the justice system by those with particular difficulties
The codes of civil procedure have adopted additional guarantees for the right to legal representation to some vulnerable groups, such as disabled persons, minors, and persons with a restricted capacity to act. These guarantees include statutory representation for such persons and the right of the prosecutor to bring lawsuits on their behalf (Latvia).

In some countries (Bulgaria, Latvia, Romania, Slovakia), the public prosecutor is authorized to bring lawsuits to protect the rights and interests of persons lacking legal capacity, minors, or other persons with limited means to protect their rights. According to data from the Latvian Prosecutor’s General Office, 11,440 complaints have been filed under this procedure, and almost half of them (6,678) have been filed in civil proceedings.

Persons applying for refugee or asylum status are treated differently in different countries. In some countries, although refugee and asylum seekers are eligible to receive free legal representation, detailed procedures for implementation for this entitlement do not yet exist (Lithuania).

In Hungary, for civil lawsuits involving domestic violence, the court will not take into account the financial situation of the spouse or the parent of the plaintiff when deciding on applications for exemption from court costs filed on financial grounds.49
3.4 Procedure for Granting Legal Aid

Legal aid can be granted upon a special request filed with the court (Czech Republic, Slovakia). The application for free legal representation (where such a possibility exists) can be filed together with the application for exemption from court costs, but the decision of the court to grant exemption from court costs and duties does not automatically trigger appointment of a legal aid attorney; on the other hand, free legal representation cannot be approved if an exemption from court costs has been rejected.

The court usually does not have a specific obligation to inform the party of the opportunity to apply for an exemption from court costs or for free legal assistance. In the Czech Republic, an amendment of the Code of Civil Procedure effective from 1 January 2001 imposed a duty on the court to inform the litigants of the possibility of applying for free legal representation. However, this obligation does not apply to exemption from court costs.50

In addition to the written request for exemption or for free legal representation, applicants must submit evidence proving their financial eligibility for legal aid. In most of the countries, no uniform practice exists as to what type of evidence is required and what constitutes sufficient evidence (see section 3.6).

If the court approves the request for free legal representation, it should appoint an attorney to the case from a list of practicing attorneys within the judicial district (Slovakia) or deliver its decision to the Bar Association, which will then nominate a specific attorney (Czech Republic, Poland). In some countries (Slovakia), applicants may request a specific attorney, while in others (Hungary), selection of a specific attorney is not permitted. In the Czech Republic, legal representation in civil cases may be provided by people other than attorneys. Often employees of the court are appointed in civil cases.

The refusal to grant an exemption from court costs or free legal representation is subject to appeal, usually by a separate motion.

3.5 Scope of Legal Aid

Free legal representation, when granted, covers all stages of the civil proceedings. Opportunities for receiving legal aid for initial advice are provided by the new legal aid law in Lithuania.

Free legal representation can also be granted during enforcement proceedings, although in practice such instances are rare. If the enforcement proceedings are carried out by private agencies licensed by the state, no right to free legal representation exists (Slovakia).

In some countries, exemption from costs related to collection of evidence is covered when presented by a party who has been granted an exemption from court fees, travel costs, per diems of witnesses summoned by the exempted party, and
other related expense (Hungary, Slovakia). Fees for representation by non-lawyers are also included in some countries (Slovakia), though not in others (Czech Republic).

In some countries (e.g., Hungary), the staff of first-instance courts can provide information and advice about the filing of the lawsuit and the subsequent proceedings. Court staff hold counseling hours when they receive individuals wishing to file a lawsuit and provide assistance in drafting some court documents.

In Lithuania, under the new Law on State-Guaranteed Legal Aid, indigent persons have the right to primary legal assistance. Primary legal assistance consists of assistance and legal advice provided by a lawyer or lawyer’s apprentice. Primary legal assistance is provided pursuant to a referral from local government executive institutions.

3.6 Quality of Free Legal Representation

There are no mechanisms to monitor or to evaluate the quality of legal representation provided by appointed attorneys in civil cases in the countries under review.

According to interviews conducted by the Romanian Center for Legal Resources with nineteen judges in Bucharest on the shortcomings of the existing system, the judges identified the following problems: a lack of interest by the court-appointed attorney; difficult communication procedures between the Bucharest Bar Association and the courts; and unsatisfactory performance by the court-appointed lawyers.

In principle, individuals dissatisfied with the legal service received from a court-appointed attorney can file a disciplinary complaint under the procedure outlined in section 2.7. In reality, the number of such complaints is very low.51

3.7 Application of the Right to Free Legal Aid in Practice

None of the countries under review provides sufficient guarantees for the right to access to the courts from the outset of the proceedings. The right to be exempt from court costs and to be granted free legal representation usually attaches after filing the action. Only after the proceedings have been initiated can a party file a legal aid application with the court. In practice, it is very unlikely that indigent persons who are unfamiliar with the law and with the judicial system will be able to prepare and file the action without the assistance of a qualified attorney, or will undertake all necessary procedural steps before the court grants them free legal representation.

The criteria for granting legal aid are vague and ambiguous. Different courts within a country give different interpretations to the meaning of “interest of the applicant” (Slovakia) or “clearly unsuccessful application” and “an obstruction of the right” (criteria to refuse a legal aid application in the Czech Republic). In some countries (Czech Republic, Poland), no clear
means tests exist, which makes it difficult for the courts to decide on legal aid applications. Furthermore, the courts do not follow uniform standards regarding the evidence required for proving financial eligibility. In Slovakia, some courts base their decisions on the facts stated by the applicants and can request only minimal proof of income. Other courts request a number of detailed documents from the prior six months.

Managing legal aid funding is another area of concern. Under the existing systems, the legal aid budgets are part of the courts’ budgets (see section 6.1) and are managed by them. In an environment of competing financial needs, this fact can have some negative implications for legal aid. Polish judges interviewed by the Polish Helsinki Foundation for Human Rights stated that they feel uncomfortable deciding on legal aid applications: on one hand, they realize the necessity to grant legal aid; on the other hand, they are aware of the financial difficulties the courts are facing. Presidents of courts admit that they advise judges to be extremely careful in granting free legal representation. According to a judge interviewed by the Polish Helsinki Foundation, the president of his court explained that there was not enough funding for both legal aid and the regular functions of the court—the judges had to choose between granting legal aid and working in cold courtrooms.52

In cases of exemption from court costs, litigants are also exempt from the obligation to pay for the collection of evidence. In practice, however, there is a tendency toward cutting these costs by not collecting evidence (Slovakia).

Low fees awarded to attorneys in legal aid cases, as well as delays in payment of fees, also contribute to some of the systemic problems. (For more information on lawyers’ fees, see section 6.3.)

Considering the above-mentioned deficiencies in the application of the right to legal aid in civil cases, it is not surprising that the number of legal aid applications is relatively low.

The lack of awareness of the possibility of receiving legal aid from Bar Associations is probably the primary reason that this procedure is so underutilized. The courts are not obliged to advise the parties of the availability of legal aid provided through the Bar Association, and little information about it is available to the general public. According to data from the Slovak Bar Association, the number of applications for legal aid filed with the Bar Association in both civil and criminal cases for the last four years is between twenty and thirty. The number of appointed attorneys is below ten per year.

3.8 Other barriers to effective access to courts in civil cases

Court costs

Generally, filing fees are determined either as a percentage of the value of the claim (4 or 5 percent) or as a set figure
established by law. The cost can vary from a few euros to a few thousand euros53 in some commercial disputes. If the value of the claim cannot be established, the filing fees are determined by law. Considering the average monthly income in the countries, these costs can be prohibitive even for those who would not be considered indigent. In Poland, new regulations on filing fees are being drafted, as the court fees are deemed to be prohibitively high and an obstacle to litigation.

Accessibility

Having a sufficient number of first-instance courts, equally distributed in the country so that they may be accessible to people in remote areas, and Bar Associations, located conveniently in different geographic regions, are necessary conditions to securing the right to access to justice. Difficulties may arise when the first-instance court is a county court situated far from remote villages in a judicial district. The Bar Association usually has offices throughout the country according to the structure of the court system. In Lithuania, only one Bar Association exists, but individual lawyers are spread throughout the country. Besides this problem, courts are often inaccessible to people with physical disabilities. Courts may also be effectively inaccessible because they are often poorly marked and difficult for ordinary people to navigate.

Other impediments

Some reports have indicated other de facto barriers to the right to effective access to courts, such as long delays (Bulgaria, Romania), complex proceedings, and weak administrative capacity of the judiciary to handle the cases (Bulgaria).

In Hungary, as a result of the implementation of the Charter on Regional and Minority Languages, the courts have a duty to ensure that minorities have the opportunity to use their own language in the judicial proceedings. The courts must provide an interpreter. This right is limited to the Croatian, German, Romanian, Serbian, Slovak, and Slovenian languages. Interpreters’ fees are covered by the state.

3.9 Alternative dispute resolution (ADR) and similar schemes

In some cases, alternative dispute resolution can achieve results similar to those of the judicial system at a lower cost. In the countries under review, ADR has limited application and is primarily used for disputes involving commercial contracts. Possibilities for ADR exist in Romania for patrimonial disputes, and in Latvia for labor law disputes or disputes arising in the banking sector. In Hungary, a Conciliator Body was set up by the Consumer Protection Act to deal with consumer disputes.

In Slovakia, there is a pilot mediation program supported by the Ministry of Justice and the British government. Draft ADR legislation also exists in Latvia.
4. **Public law: Effective access to the judicial system for the indigent in administrative and constitutional cases and cases before international tribunals**

4.1 **Normative basis**

Some countries under review have constitutional provisions for individual constitutional complaints in cases of individual rights violations (Czech Republic, Hungary, Latvia, Slovakia). In Hungary, the right to constitutional petition allows anyone to challenge the constitutionality of any law in Hungary, even if that person is not directly affected. In order to file a constitutional complaint, all other judicial remedies must be exhausted first. Applicants must be represented by a lawyer.

The courts exercise control over the acts of the administration, and individuals affected by an administrative decision may appeal an administrative act before the court, usually after exhausting the procedure before the administrative bodies. Applicants in such cases are allowed to have legal representation, and in some cases (appeal against a decision of administrative court) legal representation is mandatory (Czech Republic, Slovakia).

The new Legal Aid Act in Slovenia provides for the possibility of granting legal aid in proceedings before international tribunals.

4.2 **Eligibility criteria**

In the Czech Republic and Slovakia, the Constitutional Courts may grant free legal representation. This usually happens only in exceptional circumstances, if the complaint has been accepted by the Court and if the applicant does not have sufficient means.

In some countries (Bulgaria, Hungary), there is no legal aid for administrative judicial proceedings. In other countries (Czech Republic, Lithuania, Poland, Slovakia), the criteria for granting legal aid are the same as those in civil cases (see section 3.3).

In Latvia, the new Administrative Procedure Law (1 January 2003) will authorize the administrative institution or the court presiding over the case to grant payment of the legal fee from the state budget.

4.3 **Procedure for appointment**

Free legal representation in administrative cases usually involves the same procedure as is used in civil cases (see section 3.3).

4.4 **Alternative (non-state) mechanisms**

In all countries under review, some non-governmental organizations specialize in providing legal advice and assistance in general or to some specific groups, such as ethnic minorities, women, or prisoners. University-based legal clinics also provide assistance in administrative cases.
In some countries (Czech Republic, Poland), Citizens Advice Bureaux exist. These centers provide legal counseling in civil, administrative, family law, and other matters. The first bureau in Poland opened in 1996; as of 2001, there were seventeen offices established throughout the country. These centers are privately run and usually are supported entirely by private funding.

The impact of NGOs and clinical programs is limited by scarce resources, however. They are not adequate substitutes for state-supported systems of legal aid in administrative cases.

4.5 Implementation

With regard to implementation of the right to legal aid in administrative cases, it can be noted that the present guarantees, to the extent that they exist, are not adequately applied. The courts and the administrative bodies do not inform applicants in administrative proceedings of the availability of legal aid.

In Lithuania, where there is a possibility to receive legal advice on some administrative law matters, very few applications were filed for legal aid in administrative cases in the first year of the program’s existence. According to experts, this is partly due to the relatively complicated procedure of requesting legal aid for initial advice (limited to one hour), and partly due to the lack of information about the existence of such services.

In countries that provide legal aid for constitutional complaints, this opportunity is used very rarely in practice. From its establishment in March 1993 through September 2002, the Slovak Constitutional Court appointed legal aid attorneys in only twenty-seven cases. In the Czech Republic, the Constitutional Court receives 3,000 individual complaints on average per year, but legal aid is granted in no more than 10 cases annually.55

5. Organization of the System for Provision of Legal Aid

5.1 Special State Bodies Authorized to Administer the Legal Aid System – Role of the Ministry of Justice

Although no single agency is authorized to manage the legal aid system, the Ministries of Justice have certain responsibilities in administering legal aid. In Lithuania, a 1998 regulation of the Ministry of Justice authorized the Department of Institutions of the Ministry of Justice to administer the legal aid system. The specific powers of this department have not been determined yet, however, and its functions with respect to legal aid have been taken over by the Ministry of Justice. In Slovenia, the new Legal Aid Act authorizes the Ministry of Justice to perform specific operations in the management of the legal aid system.

In Poland, the Ministry of Justice is autho-
rized to supervise the Bar and is involved in its disciplinary proceedings. It also determines the fees of the \textit{ex officio} appointed attorneys. In Latvia, legal aid expenses are paid from the budget allocated to the Ministry of Justice. Every three months, the Ministry transfers these sums to the Council of Sworn Advocates. In Hungary, the Ministry of Justice has some supervisory powers over the operation of the regional Bar Associations and the Hungarian Bar Association—primarily supervision of guidelines and statutes of the profession. The Ministry of Justice has no power to interfere with the Bar Associations in order to guarantee effectiveness of legal aid. In Romania, the Judicial Statistics Department is authorized to collect some statistical information regarding the functioning of the legal aid system.

\section*{5.2 Role of Bar Associations in the Administration of the Legal Aid System}

Bar Associations usually are responsible for designating individual attorneys to be appointed by the court in \textit{ex officio} cases or in cases of free legal representation, for ensuring the availability of on-duty attorneys on weekends and holidays (Hungary, Romania), for keeping lists of lawyers for \textit{ex officio} appointments, and for maintaining registers of lawyers.

As discussed above (see section 2.4), the Bar Associations can appoint attorneys on applications by indigent persons filed directly with the Bar Associations. In some countries (Czech Republic), the state does not make any contributions to the Bar Associations for these services, and legal aid is granted entirely \textit{pro bono}. In others (Latvia), the Council of the Bar decides on applications for legal aid in civil cases and finances it from its own funds.

After the adoption of the new legal aid law in Lithuania, the government passed a resolution that authorized the Ministry of Justice to contract with the Lithuanian Bar Association in a public procurement procedure for the delivery of legal aid services for 3 percent of the public funds allocated for legal aid. As a result, the Lithuanian Bar Association contracted with thirteen lawyers to coordinate and organize the provision of legal aid services in twelve regional offices and one central office. The coordinators organize the functions of the Bar and keep lists of lawyers who can be appointed by the court. This ensures the availability of lawyers on public holidays.

In the Czech Republic, the Bar Association organizes free legal consultations once a week in Prague and in eight other big cities. On average, these consultations are attended by forty people per week in Prague and twenty per week in other cities, on the basis of previously scheduled appointments.

\section*{5.3 Role of the Courts}

The courts appoint \textit{ex officio} defense counsel in criminal cases of mandatory defense, or lawyers whose services are paid by the
state in civil cases. The courts also approve payment for *ex officio* appointed lawyers. In most of the countries, in cases of mandatory defense or court-appointed legal aid in civil cases, lawyers’ fees are part of the court’s budget. In other countries (Latvia), the sums for legal aid civil cases are transferred to the Bar Association.

5.4 Role of the Prosecution and the Police

The prosecution and the investigative authority should appoint an *ex officio* counsel in criminal cases for which defense is mandatory, and should ensure that the defendant’s right to counsel is respected in the pretrial stage of the criminal proceedings. These authorities are also responsible for approving the payment of *ex officio* attorneys, which forms part of the budget of the proceeding authority.

5.5 State Models of Organization of the Provision of Legal Aid

The predominant model for the provision of legal aid in the countries under review is the model of *ex officio* appointed counsel, where defense counsel are appointed by the court (or the relevant proceeding authority). After taking the decision to appoint *ex officio* counsel, the court (or the relevant proceeding authority) usually selects the specific attorney from a list of attorneys provided by the Bar Association (Romania, Slovakia), or can request the Bar Association to designate a specific attorney (Bulgaria). In practice, formal rules for this selection process are not always observed, and in some urgent cases, attorneys on the premises of the court may be appointed (Romania).

After the adoption of the new legal aid act, Lithuania introduced to the region some new legal aid delivery mechanisms. The pilot public attorneys’ office (PAO)—public organizations established in an agreement by the Ministry of Justice, the Lithuanian Bar Association, and the Open Society Fund–Lithuania—operates in two cities. PAOs have contracts with attorneys who provide legal aid in criminal cases of mandatory defense. In addition, each PAO employs full-time staff for administration and office management. The preliminary evaluations of these programs indicate that the PAOs have improved the efficiency and the quality of the legal services provided in these cases. In Lithuania, legal aid can also be provided by individual attorneys, law firms, or organizations that contract with the government.

Slovakia provides for the possibility of providing legal information and advice through legal aid centers. The centers operate in eight big cities, where lawyers provide legal counseling *pro bono* on a rotational basis. While seeking to solve the problem of accessibility to legal aid for initial advice,
the centers have been criticized for failing to provide a sufficient amount of legal aid (usually advice is rendered only four hours per week) and for lacking clear financial criteria for granting legal aid.

In Hungary, the Ministry of Justice operates similar centers in twelve counties and in Budapest. These provide free legal advice about judicial procedures, judicial organs, and legal regulations, but they do not provide legal representation or assistance in drafting legal documents. Court staff may also provide legal advice (see section 3.5).

5.6 Evaluation and Training

The institutions with a mandate to administer the provision of legal aid (Bar Associations, Ministries of Justice, courts) do not conduct systematic evaluations of the functioning of the system. According to empirical research conducted in Hungary in the late 1990s, judges, prosecutors, and attorneys were unanimous in their opinion that there is a significant difference in the quality of the legal services provided by privately retained attorneys and ex officio appointed lawyers.

In the past several years, NGOs in the countries under review have undertaken a number of empirical surveys on the effectiveness of the current legal aid system. Despite the fact that such surveys highlight serious problems in the legal aid systems, this type of research cannot substitute for periodic evaluations conducted by relevant authorities.

NGOs have also taken the lead in training members of the legal profession about the needs of the indigent. For example, the Center for Environmental and Public Advocacy (CEPA) in Slovakia has organized a series of seminars for judges aimed at improving communication between courts and citizens. In addition, Bar Associations organize general professional training for lawyers, including specialized training on human rights topics (Latvia).

6. Financial aspects of ensuring effective access to justice for the indigent

6.1 Determination of the Legal Aid Budget

Legal aid allocations are usually part of the budget of the Ministry of Justice. This funding is then redistributed to district and regional courts (Poland, Slovakia). Legal aid costs are reimbursed from the budget of the proceeding authority (investigative authority, trial court, court of appeal) depending on the stage of the proceedings. In the Czech Republic, legal aid funds for pretrial proceedings form part of the budget of the Ministry of the Interior, while legal aid for the judicial stage and legal aid for civil cases is in the budget of the relevant courts and generally under the budget of the Ministry of Justice.

There is, however, no separate budget line for legal aid in the budgets of these institutions, and these funds are usually in
a lump sum together with “costs of court and public prosecutors proceedings” (Poland), forensic experts and interpreters (Bulgaria), and administration resources (Czech Republic). This lack of a separate budget line creates difficulties in determining the precise amount of funds spent on legal aid.

6.2 Number of cases supported by the state legal aid budget

Currently in all countries, there is no information regarding the number of criminal or civil cases supported by the amount allocated for legal aid from the state budget. Neither the Ministries of Justice nor courts keep statistics about the number of cases for which legal aid was granted.

6.3 Lawyers’ fees

When the lawyer is privately retained, lawyers’ fees are established through negotiations and may be determined per hour (Lithuania), or per procedural activity (Slovakia), or in accordance with specific arrangements between the attorney and the client.

In cases of ex officio appointed attorneys, the fees are usually determined in accordance with a tariff, which provides for set fees that can be awarded per hour depending on the specific procedural activities performed (Lithuania), upon completion of different stages of the proceedings (Latvia), or for each of the legal services performed (Czech Republic, Slovakia).

Fees of ex officio appointed counsel are usually lower than the average lawyers’ fees in a country and usually are considered insufficient by the legal community. For example, in Lithuania, ex officio lawyers are paid 14 to 16 litas per hour. The minimum lawyers’ fee for private lawyers is 20–30 litas per hour, and average lawyers’ fees are between 50 and 200 litas per hour. The average net monthly salary in the country is 1,088 litas.

6.4 Support for non-state initiatives

Currently the states under review do not directly support private initiatives in the provision of legal aid.

Usually NGOs providing legal aid do not receive preferential tax treatment. Some tax benefits for NGOs exist in Slovakia (such as exemption from payment of income tax if an NGO’s revenue does not exceed 300,000 SKK, or tax deductions for contributions to NGOs), but these are applicable not only to organizations providing legal aid, but to all NGOs.

7. Data collection

Comprehensive data about the functioning of the legal aid system, updated regularly, would be extremely useful for monitoring the legal aid systems, the efficiency
of spending, and the weaknesses of the system, as well as for planning future activities better. Despite the fact that public money is provided for legal aid, there are no clear mechanisms for accountability on how this money is actually spent or for evaluation of the cost-effectiveness of the system.

As the “Access to Justice Country Reports” reveal, no data about the functioning of the legal aid system is currently collected in the countries under review. Country reports point out that governments should keep statistics on the following information:

- budget allocations for legal aid, separated into legal aid provided in criminal and in civil cases;
- the number of cases for which legal aid was granted, separated into criminal and civil cases;
- the number of legal aid applications;
- the cost of each case;
- the time spent on each case;
- the number of post-conviction reimbursements ordered;
- the number of applications and appointments for legal aid granted by the Bar Associations.

8. LEGISLATIVE DEVELOPMENTS

Initiatives for reforming the existing legal aid system are in progress in several of the countries under review:

In Lithuania, the overall framework for legal aid delivery was modified to allow for the setting up of the Public Attorneys Office pilot project. The Law on State-Guaranteed Legal Aid was passed in March 2000 and entered into effect on 1 January 2001.

In Slovenia, the entire legal aid system was transformed in 2001 with the adoption of the new Legal Aid Act.

In Latvia, by an order of the minister of justice, a working group of representatives of the Ministry of Justice, the Bar Association, and the Prosecutor General’s Office has been established. The group was expected to submit a concept paper on reforming legal aid. Draft legal aid law and/or amendments to the existing law could be approved by Parliament by mid-2003.

In Bulgaria, the government elected in 2001 stated in its Strategy Paper for Reform of the Judiciary that one of its goals would be to ensure equal opportunities for access to justice. The Program on Implementation of the Strategy Paper provides an evaluation of the current effectiveness of the provision of legal aid in criminal and civil cases, develops a strategy for improving its operation, and plans to draft appropriate legislative amendments by mid-2003. The program envisages creation of a national legal aid office by the third quarter of 2003.

Initiatives for reforming the legal aid systems are under way in the Czech Republic. In 1999, the Bar Association prepared a draft legal aid law, which did not receive the necessary governmental support to become a law. Working groups are elaborating on a concept paper on legal coun-
siting and legal representation in the administrative procedures, but this effort has not been supported by the Ministry of Justice or the Bar Association.

In Hungary, the government elected in 2002 acknowledged deficiencies in the existing system and announced plans to introduce the institution of a “people’s attorney,” to provide legal aid free of charge to indigent persons.

The new Hungarian Code of Criminal Procedure will have entered into force in 1 January 2003. This new code will strengthen the procedural guarantees for the right to counsel and legal aid. In Latvia, new Codes of Criminal and of Administrative Procedure will have entered into force by January 2003, designed to provide for better guarantees of the right to legal aid for victims and for applicants in administrative procedures, respectively. A new Code of Criminal Procedure and Code of Civil Procedure will enter into force in Lithuania in 2003.

9. Recommendations

While specific needs for reform vary from country to country, the following recommendations have general significance:

1. The availability of legal aid in criminal cases should be broadened to secure the right to counsel for every individual charged with a criminal offense when deprivation of liberty is at stake. This could be achieved by broadening the scope of cases for which defense is mandatory, or by providing explicit procedural guarantees for the appointment of defense counsel on grounds of indigence.

2. Clear and unambiguous financial and substantive criteria for granting legal aid on grounds of indigence should be established both in criminal and civil cases (means tests). No right to legal aid exists if the criteria are arbitrary.

3. Clear criteria for the right to counsel outside the scope of mandatory defense should be established.

4. If mandatory defense counsel is appointed ex officio without consideration of the defendant’s financial situation, clear procedures should be established to ensure that indigent defendants will not be obliged to bear the costs of the proceedings after conviction.

5. Legal aid in civil cases should be provided. Legal aid counseling centers can advise individuals on their rights before the case is brought to court and can assist with the drafting of initial court documents.

6. Clear criteria should be established for granting legal aid in civil cases. Parties to the proceedings should be informed of all possibilities for receiving legal aid, including from the organized Bar.
7. The creation of a specialized body with a mandate to administer the legal aid system could provide for better coordination among the different agencies involved, and could improve cost-efficiency. This body could exercise some form of monitoring of the quality of services provided and could be responsible for training and developing good practices of the legal aid attorney. It could also gather data about the functioning of the legal aid system and the extent of legal needs, in order to improve budgetary and planning processes relating to legal aid.

8. Comprehensive data about the functioning of the legal aid system, updated regularly, should be collected and analyzed on a regular basis in order to monitor the effectiveness of legal aid systems, ensure quality control and efficiency, and assist future planning.

9. A separate budget line for legal aid should be introduced in the budget of the judiciary or other relevant budget.

10. Finally, in order to secure a sustainable financial future of legal aid, new funding mechanisms must be explored. These might include, among others, some form of tax exemption to individual citizens for voluntary donations, or the promotion of *pro bono* programs.

**Notes**

* This analysis is based on information provided in the following Access to Justice Country Reports: Bulgaria (Krasimir Kanev and Georgi Mitrev, Bulgarian Helsinki Committee), Czech Republic (Barbora Bukovská, Counseling Center for Citizenship, Civil and Human Rights), Estonia (Anne Adamson and Frank Emmert), Hungary (András Kádár, Mátyás Kardos, and Zsolt Zadori, Hungarian Helsinki Committee), Latvia (Solvita Harbacevica), Lithuania (Linas Sesickas, Open Society Justice Initiative; Bernotas and Dominas Glimstiedt), Poland (Łukasz BojarSKI, Polish Helsinki Foundation for Human Rights), Romania (Cosmin Obancia, Marinela Cioroaba, and Andrei Savescu), and Slovakia (Jan Hrubala and Zazana Dlugosová, Center for Environmental and Public Advocacy).


2 The 2001 Legal Aid Act in Slovenia can be found in *Access to Justice in Central and Eastern Europe: Source Book*, a companion to this volume.

3 The Project on Promoting Access to Justice in Central and Eastern Europe is a collaborative effort of four organizations—the Public Interest Law Initiative, INTERIGHTS, the Bulgarian Helsinki Committee, and the Polish Helsinki Foundation for Human Rights—funded by the European Commission and the Open Society Institute.

4 Article 50, paragraph 3, Slovak Constitution.

5 The term “proceeding authority” will be used to refer to the authorities responsible for conducting the dif-
ferent stages of the criminal proceedings: investigative authority (or public prosecutor) in the stage of pre-
liminary investigation, the first-instance court at trial, or the court of appeal.

6 Decision 25/1991 (V. 18.), Hungarian Constitutional Court.

7 Finding of the Constitutional Court of 27 July 1997, II.

8 Decision in case 2001-10-01, Latvian Constitutional Court (Satversmes Tiesa).

9 Article 37, paragraph 2, of the Czech Charter of Funda-
damental Rights and Freedoms and Article 47, par-
agraph 2, of the Slovak Constitution. While the Czech Charter declares this right unconditionally, the Slovak constitutional provision contains a limitation “under conditions provided by law.”

10 Article 7, paragraph 1, of the Hungarian Constitution states: “The legal system of Hungary accepts the gen-
erally recognized rules of international law and guar-
tees that domestic law be harmonized with inter-
national obligations.”

11 For the purposes of this report, the term “accused” will be used to refer to persons subject to pretrial pro-
cedings, and the term “defendant” will be used at trial stage and stage of appeal. The term “defendant” also
will be used in cases where a particular procedural norm applies to all stages of criminal proceedings.

12 See, for example, Article 33, paragraph 2, of the Code of Criminal Procedure in Slovakia.

13 Section 33 (1) (a) and (2) (b) of Act XXXIV of 1994 on the Police (1994. évi XXXIV. törvény a rendőrsé-
gról).

14 Article 158, paragraph 4, of the Czech Code of Crimi-
nal Procedure.

15 In Slovakia, up to forty-eight hours; Section 76 of the Slovak Code of Criminal Procedure.

16 See, for example, Article 244, paragraph 2, of the Polish Code of Criminal Procedure.

17 See, for example, Judgment No. 604, 3 October 1991, Criminal Case No. 436/91, First Criminal Division, Bulgarian Supreme Court.

18 Although in Hungary defense is mandatory in cases of pretrial detention, Section 379/A (2) of the Code of Criminal Procedure states that during the seventy-two hours of detention, if the defense counsel was noti-
ified of the hearing but fails to appear, the hearing may be held in his or her absence, with the exception of juvenile defendants, who may be heard in connection with the ordering of pretrial detention only if the defense counsel is present.

19 Article 249, paragraph 3, of the Polish Code of Crimi-
nal Procedure.

20 See, for example, Section 52 of the Hungarian Code of Criminal Procedure.

21 See, for example, Article 165, paragraph 2, of the Czech Code of Criminal Procedure, and Article 172, paragraph 1, of the Romanian Code of Criminal Procedure.

22 The survey was conducted by the Bulgarian Helsinki Committee in 2000–2001, within the framework of the project Promoting Access to Justice in Central and Eastern Europe.

23 The survey was conducted in 1998–99. For more information, see “Access to Justice Country Report: Hungary.”

24 See, for example, the Juvenile Delinquency Act in Bul-
garia.

25 Article 48, paragraph 1, of the Act on Protection of Mental Health, Poland.

26 The new Latvian Code on Administrative Procedure, which entered into force 1 July 2002, provides for a possibility of covering an attorney’s fees in adminis-
trative proceedings by decision of the court.

27 Articles 3 and 14 of the Law on State-Guaranteed Legal Aid, Lithuania.

28 Such as, for example, if someone tries to evade arrest;
in police presence, verbally abuses another person or a police officer or intentionally contaminates or destroys police equipment or property; or was caught committing a misdemeanor and there is a suspicion that he or she would continue to do so or to interfere with an investigation (Articles 14–15 of the Law on Police of the Czech Republic (Zákon o policii).

29 Sections 46 and 47 of the Alien Policing Act, Hungary.

30 Article 26, paragraph 2, of the Act on Education in Sobriety and Combating Alcoholism, Poland.

31 Article 33, paragraph 2, of the 2001 Amendment of the Code of Criminal Procedure, effective from 1 January 2002.

32 Article 6.3(c) in conjunction with Article 1 of the European Convention on Human Rights.

33 Article 56, section 6, of the Code of Criminal Pro-
cedure, Lithuania.

34 Penalties the lower limit of which is less than three years of imprisonment but the upper limit is up to twelve
years are provided by Articles 154, paragraph 2; 156, paragraph 3; 163, paragraph 3; 166, paragraph 1; and others of the Penal Code, Poland.

35 Article 70, paragraph 7, of the Code of Criminal Procedure, Bulgaria, as amended in 1999.


37 Article 171, paragraphs 2 and 3, of the Code of Criminal Procedure, Romania.


39 Article 79 of the Code of Criminal Procedure, Poland.

40 Article 78, paragraph 1, of the Code of Criminal Procedure, Poland.

41 See Article 4, paragraph 3, of the Law on State-Guaranteed Legal Aid, Lithuania.

42 See Articles 11–24 of the Legal Aid Act, Slovenia.

43 The surveys were conducted within the framework of the project Promoting Access to Justice in Central and Eastern Europe.

44 See A kirendelt védelem rendelkezési jogutartott személyek védelemhez vah jogának érvényesítésére és biztosítására szakaszában (The realization of the right to defense of detained persons with appointed defense counsels in the investigative phase of the criminal procedure), Budapest, Office of the Ombudsman, 1996, p. 7.


46 Articles 57, 58, and 59 of the Code of Civil Procedure, Estonia. Article 59 states that “the court has the right to fully or partially exempt an individual from payment for legal assistance and to charge the advocate’s fees to the state if the court finds that the person is insolvent.”

47 Article 117 of the Code of Civil Procedure, Poland.

48 Article 113, paragraph 1, of the Code of Civil Procedure, Poland.

49 Article 85(1) of the Code of Civil Procedure, Hungary.


51 According to information from the high commissioner in charge of disciplinary affairs in the Hungarian Bar Association, authorized to examine appeals against decisions rejecting complaints against lawyers, in the last ten years there have been only a few complaints filed against court-appointed (protector) attorneys. See “Access to Justice Country Report: Hungary.”


53 In Poland, for example, the amount of the filing fee varies from 30 PLN (7.5 euros) to 100,000 PLN (24,000 euros), depending on the value of the claim; in the Czech Republic, it varies from 100 CZK (3.67 euros) to 1,000,000 CZK (36,667 euros); in Slovakia, the filing fee is also determined as 5 percent of the value of the claim, but not more than SKK 200,000 (4,800 euros).


55 Information provided by the director of the administration of the Constitutional Court in the Czech Republic.

56 One euro is equivalent to 3.5 litas.

57 One euro is equivalent to 41.5 SKK.
Access to Justice Country Report: Bulgaria

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Executive Summary

Access to justice in modern societies depends on multiple and diverse factors. Sociology of law usually divides those factors into two key groups, legislative and social. The legislative group includes factors such as stability and clarity of legal norms, efficient functioning of the legal system, legislatively established systems of state assistance for vulnerable persons and groups, etc. The second group, social factors, covers trust in the system of justice, belief in the system’s accessibility, social status of the actors, and socio-psychological factors encouraging or excluding groups of citizens from the established system of justice (e.g., stigmas and prejudices in society).

With regard to legislative factors, it should be noted that Bulgarian legislation contains a number of provisions on the right to legal assistance and to free legal aid, as significant constitutive elements intended to ensure access to justice. Unfortunately, neither the scope of the assistance afforded, its implementation in practice, nor its quality is adequate. In addition, certain pieces of Bulgarian legislation and the relevant practices are contrary to explicit international standards in the area of access to justice, although these international standards have direct effect in the country.

From the social factors perspective, issues related to accessibility of mechanisms available to people in need of legal protection are of particular concern and deserve significant attention in the areas of criminal, civil, and administrative justice. Accessibility would, to a great extent, be determined by costs related to the administration of justice and the degree to which individuals belonging to various social profiles could afford these costs. The issue related to the legal needs of individuals, which they may not be able to meet for one reason or another, is also of particular significance and concern in Bulgaria, especially where precarious financial situations preclude access to justice.
No official statistics on access to justice, and in particular on access to legal counsel and the quality of defense, are available in Bulgaria. Courts regularly file statistical information on the number of cases brought up, examined, disposed of, appealed, etc. No attention, however, is being paid in the course of this statistical review to those aspects of access to justice that lend themselves to measurement. Moreover, it should be noted that the budget of the judicial system is constructed in such a way that all expenditures related to legal assistance come under the “Other Remuneration and Staff Payment” heading. Thus, the conclusion is often erroneously reached that access to justice in Bulgaria has not been at all problematic and has not been the object of concern to the branches of government.

Results of surveys conducted by the Bulgarian Helsinki Committee for the period 2001–2002 on access to justice in criminal and in civil cases indicate that, in practice, legal assistance and legal aid are not adequate. The problems related to the scope, implementation, and quality of mandatory defense, as well as the procedure for appointment of ex officio counsel, proved to be quite serious. Frequent occurrences of procedural violations with regard to appointment have been noted, and the existence of corrupt practices in the area may be argued. Mechanisms for control over legal protection are not applied, nor are any liability provisions enforced.

Guaranteeing the right to access to justice to everyone requires further action and efforts by the state and its agencies and institutions, by various non-governmental organizations, and by the Bar Association.

1. Introduction

Census data from March 2001 indicate that the current population of Bulgaria is 7,928,901. According to the census data, ethnic minorities, mostly Turks and Roma, constitute 16 percent of the total. In fact, however, the percentage is higher, as Roma often declare different (mostly Bulgarian) identity because of the stigma attached to Roma identity in society. According to expert estimates, the two groups are roughly equal in number, and the share of each is between 9 and 10 percent of the total population. The number of attorneys at law in the country is 5,880, distributed among twenty-two local Bar Associations. The number of courts in Bulgaria is now 148, as described in the Index of Judicial Districts in Bulgaria.

Currently, no official statistics on access to justice, and in particular on the right to counsel, exist in Bulgaria. There is also no academic or other research on the subject. For these reasons, in the period 2001–2002 the Bulgarian Helsinki Committee undertook a thorough research project as part of the Access to Justice Project financed by the European Commission. The project researched access to justice mostly in criminal cases. It also dealt with the quality of
representation in criminal procedure and with the need for and availability of civil legal aid. The study was carried out through a series of surveys.

The first survey, of a nationally representative sample of public prosecution criminal files in the courts of first instance, took place in August and September 2001. A total of 1,891 criminal files, disposed of between 1 January 1996 and 31 December 1999 in 109 first-instance courts, were studied through the use of a standardized questionnaire. Data was collected on access to legal protection and its effect and relationship to a number of factors inherent to the criminal justice system, as well as external to it. The researchers were lawyers who had responded to an announcement in a newspaper and were selected through interviews. This made it possible to use members of the legal profession to test peer review as a method of evaluation of the quality of performance of lawyers.

A second study was carried out in February 2002, in the prisons of Bulgaria. A total of 1,001 prisoners were approached with standardized face-to-face interviews. They included both detained people awaiting trial and convicted people already sentenced to imprisonment. The aim was to collect information on factors that could not have been established by reading criminal files, and to measure the level of satisfaction of clients with the performance of their respective lawyers.

During the summer of 2002, a survey was commissioned on a representative sample of Bulgaria’s adult population to study the legal needs in the civil and administrative areas. This provided a social profile of those in need of legal aid in such cases, as well as a description of the nature of the needs and of the degree of their satisfaction with the proceedings.

In September 2002, a second survey in four prisons was carried out, in the course of which 117 remanded prisoners were interviewed. That survey did not have the study of legal aid as its main focus. Nevertheless, it included several questions on this issue, and the results obtained allowed for some important conclusions to be drawn on tendencies in the provision of legal assistance in the Bulgarian criminal procedure.

Results of the above research indicated that both in law and in practice, legal assistance and legal aid were not adequate and that guaranteeing these would require further action and efforts of the state, its agencies and institutions, non-governmental organizations, and the Bar Association. The evaluation below of the legal aid program in criminal law and civil law will help to shed some light on both the strengths and weakness of the Bulgarian legal aid system, and should help to provide a greater understanding of the need for improvement and the means by which this change may be effected.
2. Criminal law: Effective access to the judicial system for the indigent in criminal cases

2.1 Right to counsel

The Constitution of the Republic of Bulgaria, as a supreme legislative act, contains some general provisions on the right to legal protection. The latter is further developed within the Criminal Procedure Code and other primary and secondary sources of law.

2.1.1 Constitutional guarantees of the right to counsel and right to legal aid

Article 56 of the Constitution proclaims the right to legal assistance before any state body as a basic universal right of the individual. This right is further manifested in the Constitution under Article 30, section 3, to legal representation of the detained and of the defendants in criminal cases, as well as the right under Article 122, section 1, to counsel at all stages of judicial proceedings.

The right to legal assistance is wide in scope. However, it is a duty of the state, through legislation and enforcement, to secure an effective opportunity for the country’s citizens—and especially the indigent ones—to protect their rights, which have been violated or threatened, before judicial or administrative authorities. The right to legal assistance is not solely limited to trials; it is also enforceable in matters before all state agencies and institutions.

THE RIGHT OF CITIZENS to protect their rights through legal assistance provided by counsel is an important element of the general right to legal assistance. Therefore, the provision of Article 30, section 4, of the Constitution is fundamental. It proclaims that there is a right to legal representation from the moment an individual has been detained or charges have been brought against him or her. In Judgment No. 9 of 14 April 1998, in constitutional case No. 6 of 1998, the Constitutional Court of Bulgaria indicated that:

[The right of citizens to organize the protection of their rights through the assistance of a qualified professional—defense counsel—is importantly emphasized where, in order to protect his or her rights, the citizen would need knowledge of the laws, jurisprudence, legal theory, and judicial and administrative procedures. Indeed, a citizen might rely on this constitutional right and entrust his or her defense to an attorney; however, in some cases he or she may decide he or she would not need such assistance. The right of citizens to legal representation enjoys special constitutional protection in cases where criminal proceedings have been opened from the moment of detention or once charges have been brought—Article 30, section 4, of the Constitution. The explicit specification of said right within a criminal trial has a particular significance from the perspective of the detained or indicted citizen, in view of the necessity for specialized knowledge and skills to organize and conduct a line of]
defense of his or her rights and in view also of the importance of these rights.

The provision of Article 122, section 1, provides for the right of all individuals and entities to legal protection at all stages of judicial proceedings. This right is further developed in Article 14 of the Criminal Procedure Code (Irēčmēi-ddieinnere Lēi eiāle).

In accordance with Article 14, section 1, of the Criminal Procedure Code, the right to legal protection refers not only to defendants, but also to all participants in all stages of criminal proceedings. Section 3 of this same article sets procedural guarantees for the right to legal protection. Section 4 entrusts the court and pretrial authorities with a duty to explain to defendants and other citizens involved in criminal proceedings their procedural rights and to provide them with the opportunity to effectively exercise these rights.

Rights of defendants have been enumerated in Article 51, section 1, of the Criminal Procedure Code, such as the right to be informed of the reasons for an indictment and the bases on which charges have been brought, to provide explanations related to the indictment, to read materials in the case and obtain necessary copies of documents, to submit evidence, and to appeal decisions of the court and pretrial authorities that infringe upon their rights and legal interests, among others. Also among the rights provided for in this section is the right to legal representation, which also allows for defense counsel to be present on request of the defendant at all investigative operations and activities. This allowance has also been proclaimed as a separate right of the defense counsel, as provided for in Article 75, section 1, together with some other procedural rights provided for in view of a party's capacity in criminal proceedings.

Article 73, section 1, of the Criminal Procedure Code incorporates the provision of Article 30, section 3, of the Constitution that a defense counsel may take part in criminal proceedings from the moment of detention of the individual or once charges have been brought against the individual. The second section of this same provision obliges pretrial authorities to explain to the defendant that he or she is entitled to use legal counsel services, and to provide the defendant with the opportunity to contact such counsel. Pretrial authorities may not conduct any acts or operations related to the investigation until they have performed this particular obligation. Otherwise, any and all operations or acts would be invalid, thus generating implications with regard to the validity of the proceedings in their entirety.

As a further guarantee of this protection, Article 269, section 2, item 3, of the Criminal Procedure Code indicates that court hearings are to be postponed when counsel for the defense fails to appear and a replacement is impossible without harming the legal protection of the defendant. A defendant may not be deprived of his/her lawyer once he/she has chosen to be represented in order to protect his/her rights and legal interests. The previous version of this same provision allowed postponement of hearings solely for non-appearance of counsel in mandatory defense cases. The Constitutional Court,
however, has found this part of the provision unconstitutional.

2.1.2 Right to counsel in criminal proceedings

The law

The provision of Article 70 of the Criminal Procedure Code, establishing cases of mandatory defense in criminal proceedings, is crucial to the right to legal protection. It is important to note that cases of mandatory defense in criminal cases, in accordance with legislation in force, coincide with cases of *ex officio* and free legal representation. Therefore, the regimes of *ex officio* and free legal representation will be examined below (see section 2.2).

As already stated, insofar as the progress of criminal proceedings is at stake, the right to legal protection has been provided for with regard to all stages of trial. In cases of mandatory representation, the counsel should start acting from the moment of detention or, in cases where he or she is not detained, once charges have been brought. This principle is underscored in Judgment No. 604 of 3 October 1991, in criminal case No. 436 of 1991, First Criminal Division of the Supreme Court, Judge-Rapporteur Ms. Savka Stoyanova, which stated:

[H]aving satisfied himself solely to notify defendant he was entitled to have recourse to legal representation within preliminary proceedings and having then completed all investigative activities and operation in the absence of a counsel, the official in charge of the investigation allowed a particularly significant procedural omission under Articles 73, 75, section 1, and 87 of the Criminal Procedure Code and restrained the right of defendant to legal protection. This amounts to a violation belonging to the so-called absolute grounds for rescinding a judicial act, and the case needs to be remitted for a new examination to the stage of preliminary investigation; consequently, all investigative acts and operations need to be carried out in the presence of counsel for the defense...

Pretrial detention has been envisaged under the following provisions of the Criminal Procedure Code:

Article 152a, section 3: up to seventy-two hours, where it has been imposed by a public prosecutor, and up to twenty-four hours in cases of imposition by investigative authorities, as an interlocutory measure to ensure appearance of the defendant before court for the purposes of imposition of a measure of restraint in the form of detention in custody.

Article 202, section 1: pretrial detention of a suspect up to twenty-four hours.

Where an investigator has imposed pretrial detention in the absence of the prior consent of a prosecutor, he or she must inform the suspect of the reasons for detention, offer the suspect the opportunity to provide explanations in compliance with requirements under the Criminal Procedure Code: Articles 73 and 87 (explanations and
the participation of defense counsel where mandatory representation rules apply); Article 88, sections 1, 2, 4, and 5 (time and manner of interrogation); Articles 89–91 (possible confrontations of witnesses, participation of interpreters; probity of confessions, and the obligation to collect further evidence); and Article 157 (forceful appearance). The defendant must also be allowed to make requests, comments, and objections, and to appeal various rulings in detriment to his or her rights and interests.

Articles 70–75 of the Ministry of the Interior Act and Article 54 of the Rules and Regulations provide for grounds, cases, and procedures related to police detention. Article 70, section 4, of the Ministry of the Interior Act is a repetition of a constitutional provision in the sense that it entitles individuals to legal representation from the moment of their detention. Further guarantees with regard to this right are not explicitly mentioned in this act.

The state also needs to provide the detainee held in custody with an opportunity to meet his or her lawyer in private, i.e., in the absence of prison or police personnel.

With regard to charges, the provision of Article 209, section 5, of the Criminal Procedure Code stipulates that when charges are brought, the investigator needs to allow the defendant and counsel to read the full text of the ruling outlining all charges and, if need be, to provide additional explanation with regard to those charges.

**The practice**

Research conducted by the Bulgarian Helsinki Committee indicates that access of individuals to defense counsel has been largely limited at various stages of criminal proceedings. This problem is particularly serious at the pretrial stage. The results of the two surveys, of the criminal files and of the prisoners and pretrial detainees, are summarized below (numbers indicate percentages):

### Presence of Counsel at Various Stages of Criminal Proceedings

<table>
<thead>
<tr>
<th>Stage</th>
<th>Survey of Criminal Files</th>
<th>Survey of Prisoners</th>
</tr>
</thead>
<tbody>
<tr>
<td>At the pretrial stage</td>
<td>32.1%</td>
<td>50.4%</td>
</tr>
<tr>
<td>Before the first judicial instance</td>
<td>53.5%</td>
<td>69.2%</td>
</tr>
<tr>
<td>Before the instance of appeal on the merits</td>
<td>62.0%</td>
<td>71.4%</td>
</tr>
<tr>
<td>Before the instance of cassation</td>
<td>57.6%</td>
<td>70.7%</td>
</tr>
</tbody>
</table>
The level of exclusion from access to counsel is very high at all stages of the criminal procedure. It is especially high at the pretrial stage. The survey of files indicates higher rates of exclusion because it also includes defendants who received sentences lighter than imprisonment and were therefore less likely to care about a lawyer and less likely to receive an ex officio counsel. In most of the cases, the counsel is contracted by the defendant or by the defendant’s relatives. Based on the survey of the criminal files, below are the respective percentages of the contracted vis-a-vis the ex officio counsels and relatives acting as counsels:

![Type of Counsel at the Various Stages of Proceedings](chart)

The survey of criminal cases was intentionally conducted so that the sample included only criminal cases disposed of in compliance with the legislation in force prior to 1 January 2000, when there were no provisions allowing the court and investigative bodies at the pretrial stage to appoint counsel to those who did not have the means to hire one. The question arises whether the share of accused and defendants who have not had access to counsel would still be high in the presence of the new provisions of the law. Although a precise answer to this question can be given only after conducting a study using similar methodology, the following data obtained by the survey of prisoners (with numbers indicating percentages) could be used as a basis for a general assessment:
Absence of counsel in cases initiated before and after 1st January 2000

Both during the pretrial phase and before the court of first instance, the share of respondents who said they had been unrepresented is larger in cases initiated after 1 January 2000. This might seem paradoxical, but we should take into account that responses in the study among prisoners and detainees concerning access to counsel for the period prior to 1 January 2000 were given by people serving longer sentences or, in many cases, using the services of mandatory ex officio counsel. The number of such convicts after 1 January 2000 is smaller. However, the results clearly indicate that the simple introduction of item 7 in Article 70 of the Criminal Procedure Code in 1999, which provides for the assignment of counsel to indigent criminal defendants by the court, does not at all resolve the problems with access to counsel.

2.1.3 Right to counsel and right to legal aid in non-criminal proceedings when deprivation of liberty is at stake

There are a number of situations in which the right to liberty of various categories of individuals is restricted. Some of these situations are linked to criminal activity, while others are not. All of them, however, fall well outside the scope of criminal law and process under the Bulgarian system.

Juvenile Delinquency Act

The Juvenile Delinquency Act is a law adopted under communism to address acts and omissions of juveniles not subject to criminal prosecution. These acts are called “antisocial behavior” and are, in many cases, crimes. The acts are not prosecuted under the criminal law, either because the offenders are below the age of criminal responsibility (fourteen years old under Bulgarian
law) or because they are petty crimes and not considered a serious problem for society. This law outlines a set of norms related to the organization of state activities for combating such acts. It provides for special measures and the relevant authorities to implement them. Various authorities and structures have been set up to achieve the goals and objectives of this law, such as juvenile delinquency commissions, child pedagogical facilities, social and pedagogical boarding schools, educational boarding schools, temporary placement homes for juveniles, and asylums for children without supervision.

The Juvenile Delinquency Act contains some guarantees for the rights of juveniles, such as:

- mandatory presence of at least one parent or guardian during the examination of misdemeanors;
- summoning the class master from school, which could provide an additional viewpoint on the juvenile’s character and previous behavior;
- participation of a public defender in examination of the so-called educational files concerned with infringements committed by juveniles.

Where an educational file is to be heard regarding an infringement committed by a juvenile under fourteen years old, the public defender is designated by his or her parents or the legal substitutes thereof. Where the infringement has been committed by a juvenile under eighteen years old, he or she is deemed competent to designate a public defender. Where individuals appear without defenders, the panel of the local Juvenile Delinquency Commission hearing the case would appoint ex officio a public defender.

For the most part, however, the Juvenile Delinquency Act is a source of numerous problems with regard to the legal protection of juveniles. The primary concern is that no representation by lawyers is allowed before local commissions. In practice, the appointed ex officio public defender is an individual who would be appointed from among the Commission members, the body that tries the case. Therefore, that public defender would approach his or her functions with a prejudice that in turn would render the defense weak and ineffective instead of defending the juvenile to the best of his or her ability. This law also specifies the grounds for placement of juveniles in various institutions mentioned above. It is solely with regard to educational boarding schools that this law explicitly provides for judicial review of the decisions of the Commission, which itself is an administrative body. In all other placements, no judicial hearing and no judicial review is established, even though criteria for de facto deprivation of liberty, formulated by the European Court of Human Rights, are met. And no possibility for defense is available. Thus, this procedure falls short of the international standards on liberty and security of persons and of fair trial.
Pretrial placement of defendants in psychiatric hospitals for the purposes of a forensic examination and treatment

The first-instance court is the authority competent to apply measures for placement of defendants in psychiatric hospitals for examination and treatment prior to trial. Where a request has been formulated within pretrial proceedings, the panel of the court hearing the measure is made up of a judge and two assessors. Where it has been made at the trial stage, the panel to impose the measure is the one hearing the case. The request may be formulated either by the parties during the pretrial phase or by the investigative authorities.

Grounds for imposition of this measure are objective justifications for a forensic psychiatric examination of the defendant prior to trial. Such justifications may arise from a psychiatric examination that has been ordered and reported with regard to the mental capacity of the defendant or with regard to his or her ability to provide explanations related to circumstances within the matters under examination (Article 117, section 2, items 3 and 4, of the Criminal Procedure Code). They may also arise where the psychiatric expert examination has not been able to reach an unambiguous conclusion and achieve its goal, since additional psychiatric examination of the defendant in a psychiatric hospital may be needed.

Where the above situation arises at the pretrial stage, the prosecutor must formulate a request addressed to the court. Where the same situation arises during trial, each of the parties may formulate a request. The court also may, on its own motion, commence these additional proceedings. During both the pretrial and trial phases, which are the only practical occurrences and have effectively been described in the Criminal Procedure Code, the court would hear from a forensic psychiatric examiner and the defendant. Participation of a prosecutor and defense counsel is mandatory. In the absence of a contracted counsel, a defense counsel would be appointed by the body conducting the investigation or by the judge at the trial stage.

Only the ruling of the court rendered upon a request during pretrial proceedings is subject to appeal. A three-day time limit applies. The second-instance court renders its decision in compliance with Article 154, section 4, of the Criminal Procedure Code.

The maximum time limit for conducting an examination in a psychiatric hospital is thirty days, renewable for an additional period of thirty days following repetition of proceedings under Article 155, section 2, of the Criminal Procedure Code. There is, however, no separate ground for appeal of a court ruling for placement rendered at the trial stage. The reason for this distinction is that examination is a necessary premise for reaching a decision in the case. Therefore, a decision of the second-instance court with regard to applicability of said measure would amount to an early determination on the merits of the case. Alternatively, if placement is rescinded, the court might be deprived of any possibility of reaching a decision in the case.
Civil commitment to a psychiatric institution for compulsory treatment

According to Articles 61, 62, and 63 of the Public Health Act (Četištvo i rješetvištvo), a district prosecutor may propose compulsory treatment of a person who is dangerous to himself or herself or to others because of a psychiatric condition. State and municipal authorities, medical institutions, relatives, and other interested citizens may address signals and proposals for compulsory treatment to the prosecutor. Where an individual declines, in the absence of any valid reasons, to submit to an initial psychiatric examination, the prosecutor may rule for a compulsory examination in an outpatient or inpatient facility. On 5 October 2000, the European Court of Human Rights issued its judgment in the case of Varhanov v. Bulgaria.

The court found a violation of Article 5.1 of the European Convention on Human Rights, because the commitment procedure under the law does not envisage any medical consultation prior to the prosecutor's decision for compulsory inpatient psychiatric examination. The court also found a violation of Article 5.4 of the Convention, because the initial detention by a prosecutor's decision for evaluation is not subject to judicial review.

Within two weeks following the proposal for compulsory treatment, the court hears the case in public, in the presence of the prosecutor and the individual whose compulsory treatment is requested.

If the person fails to appear voluntarily at the hearing and has no valid reasons for his or her absence, that person shall be brought before the court by force. Where he or she is placed in a medical institution and his or her state prevents the person from attending the hearing, the court is obliged to hear that person in the said medical institution. In practice, however, this happens very rarely. The court will rule on the proposal of the prosecutor after hearing the individual and issue a judgment on the basis of the evidence collected. The judgment may be appealed before the regional court within seven days of its notification. A judgment is carried out by medical authorities, who may seek the assistance of Ministry of the Interior officials if necessary.

In the absence of a contracted lawyer, courts usually appoint a counsel at the trial in civil commitment cases. However, they may proceed without a counsel for the committed. In June 1984, the General Assembly of the Chambers Hearing Criminal Cases of the Supreme Court issued a decision that held that the participation of a defense lawyer in civil commitment cases is not obligatory. Research conducted by the Bulgarian Helsinki Committee in 2001 on human rights and mental health established that the quality of legal defense in these cases is extremely poor.

There are some special provisions regarding criminal procedures for individuals with physical or mental disabilities. Besides mandatory representation in cases where defendants suffer from physical or mental disabilities preventing them from
presenting an adequate defense, the following have been provided for the additional protection of such individuals:

- The possibility for civil action to be brought by the public prosecutor. Article 47, section 1, of the Criminal Procedure Code allows the prosecutor to file a civil action in the interest of individuals who, on account of being underage or suffering from mental or physical disabilities, may not be able to defend their rights and legal interests.
- Social welfare services and legal assistance, free of charge, for those suffering from mental disease and various dependencies, to be provided by state and municipal medical institutions in accordance with Article 40 of the Public Health Act.

Right to counsel for convicts sentenced to imprisonment

The prison structure of Bulgaria has three main categories: prisons, labor correction facilities attached to the prisons, and pretrial detention centers. The last are mainly used for arresting individuals at the pretrial stage of proceedings.

Article 37, section 1, of the Sentence Execution Act allows prisoners to file petitions and complaints and to appear in person before the relevant officials of the prison, labor correction facility, or prison commuting facility, to raise points of concern to them before the latter and to advance points in their favor as regards internal disciplinary proceedings.

The second section of Article 37 provides for rules relating to petitions and complaints. These are to be immediately forwarded to the relevant authorities. Those in sealed envelopes addressed to the National Assembly, the President, the Council of Ministers, the Ministry of Justice, the Ministry of the Interior, the prosecution offices, courts, or investigation services, as well as to human rights authorities or bodies of the United Nations and the Council of Europe, may not be inspected by the prison administration.

The above procedure for examining complaints is purely administrative, and therefore the prisoner has the right to legal assistance by a lawyer of his or her own choice. There is, however, no provision of free legal assistance in such cases. Given the substantial proportion of prisoners who had not been represented during their trials, the likelihood that they will be represented in the complaint procedures inside the prison is minimal.

Since June 2002, as a result of amendments to the Sentence Execution Act, some proceedings that result in placement of a prisoner in a punishment cell for disciplinary purposes or in preventive isolation are now subject to judicial review. Participation of a lawyer is not barred, but there is no provision of free legal assistance in these proceedings.

Foreigners

By virtue of its Article 3, section 1, the Criminal Code is applied to all individuals who have committed a crime on the terri-
tory of Bulgaria, irrespective of their nationality. Therefore, foreign nationals may appear as defendants in criminal cases. According to Article 26, section 2, of the Constitution, “foreigners residing in Bulgaria enjoy all the rights and have all the obligations under this Constitution to the exception of the rights and obligations laid out in the Constitution and other legislation that require a Bulgarian nationality.” This means that the right to legal protection for foreign nationals is guaranteed to the same extent as it is for Bulgarian nationals. The same applies to legal aid. Special provisions regarding the provision of free legal aid to foreigners are contained in the Criminal Procedure Code.

Under Article 105, section 1, of the Judiciary System Act (Čerîî çî ñûäîëîíñ ê äëëñ), the language of the court is Bulgarian. The second section of this article provides for appointment of interpreters by the court where a party to the proceedings does not have sufficient command of the Bulgarian language. Expenses for the appointment of an interpreter in the criminal proceedings are borne by the relevant court. Article 70, section 1, item 4, also provides for mandatory representation where the defendant does not have sufficient command of the Bulgarian language. In order for an ex officio counsel not to be appointed, the defendant must clearly state that he or she does not wish to have a lawyer.

The Foreign Nationals in Bulgaria Act (Čerîî çî –öçäííöûñ á Dîđöåæççî Æüäåðç”) provides for legal assistance to foreign nationals under the age of eighteen. Under Article 28a, section 2, the State Child Protection Agency temporarily provides legal assistance and representation, where necessary, to foreign nationals under eighteen who have legally entered the country unaccompanied by parents or guardian, or who were accompanied, but left behind and are not protected by the Refugee Asylum Act. The State Child Protection Agency also provides material support and care to meet their basic needs.

Under the Law on Asylum and Refugees (Čerîî çî óáîécüíñ ê álëríöçênî), asylum seekers in Bulgaria are entitled to proceedings before an administrative body empowered to decide on granting them some form of protection, including refugee status. They are also entitled to a judicial review of its decision. There is, however, no provision of free legal aid in these proceedings. The program of the Bulgarian Helsinki Committee for legal protection of refugees and migrants offers free legal aid to asylum seekers and individuals who have been granted humanitarian status or temporary protection as migrants in the exercise and protection of their rights. The program is derived from principles of both Bulgarian and international law and provides legal protection before administrative authorities (e.g., the Agency for Refugees with the Council of Ministers, the police, local authorities, and social welfare services) and before the Bulgarian courts, the European Court of Human Rights, and other international or foreign judicial bodies. The program provides legal services in cases of violations of basic rights and freedoms guaranteed by the Bul-
garian Constitution and international human rights treaties. Legal aid covers consultations, information, legal briefs, and representation.

2.2 Right to legal aid: Eligibility criteria for granting legal aid in criminal cases

2.2.1 Substantive criteria

In Bulgaria the appointment of *ex officio* counsel in criminal cases is provided for in Article 70 of the Criminal Procedure Code. Defense is mandatory only in the cases enumerated in items one through seven of this article. When defense is mandatory, as specified in Article 70, the relevant authority is under the obligation to appoint as counsel a practicing lawyer. In cases arising under items four and five of Article 70, participation by counsel is not mandatory if the defendant states that he or she does not wish to have a lawyer. Enumerated circumstances for which defense is mandatory, under these seven items in Article 70, are as follows:

**Juvenile defendants (aged under eighteen)**

As a result of jurisprudential developments (e.g., Judgment No. 365 of 18 November 1994, in criminal case No. 846 of 1993), even though a defendant may have committed a crime while a minor, he or she will no longer be eligible for legal aid after having reached the age of eighteen. In practice, it often happens that an *ex officio* counsel is appointed to juvenile defendants at the pretrial stage. Some of these defendants reach maturity before the indictment is submitted to the court and are therefore not represented by *ex officio* counsel at their trials.

**Defendant suffers from physical or mental disabilities preventing him or her from assuming his or her own defense**

Once it has been determined that a defendant is unable to provide his or her own defense on account of mental or physical disabilities, and an *ex officio* counsel has been appointed, the latter should be given the opportunity to attend and take part in all procedural activities involving the defendant. By establishing mandatory appointment of an *ex officio* counsel to defendants with physical or mental disabilities, the lawmakers have sought to safeguard the right to legal assistance from the moment charges are brought through the completion of the criminal proceedings.

**Cases for which the punishment may be life imprisonment or deprivation of liberty of at least ten years**

Article 70, item 3, of the Criminal Procedure Code has been widely interpreted to require the appointment of *ex officio* counsel only for cases involving crimes for which the punishment is at least ten years. This particular provision and its interpretation are in blatant contradiction to European Court of Human Rights standards, i.e., whenever deprivation of liberty is at stake, the interests of justice require mandatory
legal representation—even a possible sentence of three months’ imprisonment would trigger the right to free legal aid. In Bulgaria, however, there is a minimum of ten years’ imprisonment before the right to legal aid is triggered.

**Defendant does not have sufficient command of the Bulgarian language**

Jurisprudence of the Bulgarian courts on this subject is consistent. In Judgment No. 68 of 20 March 1981, in criminal case No. 26/81, the Second Criminal Division of the Supreme Court declared that where the defendant does not have sufficient command of the Bulgarian language, the court is under the obligation to appoint an interpreter: “an interpreter is appointed not only for the purposes of interrogation, but also to ensure the rights to legal protection, equality of arms, and publicity of trial. The court, having not appointed an interpreter, has deprived him or her [the defendant] of the possibility to gain an adequate idea of procedural activities and be able to correctly defend his or her rights and legal interests.” In addition, the Court ruled that participation of counsel was mandatory: “Hearing is postponed where counsel for the defense fails to appear, if his or her replacement is impossible without detriment to legal protection.” In this particular case, the Court observed:

[D]efendant, along with his or her co-defendants and witnesses, has been interrogated in the absence of a counsel. The court has therefore deprived him or her of the opportunity to rely on and use the qualified services of his or her attorney in providing for his or her defense at trial. No express statement by him or her is found within the case evidencing his or her withdrawal of counsel powers to act or his or her wish not to have a lawyer. If defense counsel has failed to appear at the hearing and has not been replaced, the court is under the obligation to postpone the hearing. Besides, the court has not acted in compliance with the provision of Article 70, section 1, item 4, of the Criminal Procedure Code, whereby participation of counsel at hearing is mandatory if defendant does not have sufficient command of the Bulgarian language.

Some decisions have interpreted item 4 of this article to mean that if an individual is a Bulgarian national, it is assumed that he or she speaks Bulgarian. Thus, the scope of the provision is restricted, without proper justification, solely to foreign nationals. However, it is clear that those Bulgarians who belong to an ethnic minority group are harmed by this interpretation of Article 70. For example, members of the Turkish ethnic minority in Bulgaria often have an insufficient command of Bulgarian and are therefore not able to form an adequate understanding of procedural developments, have equality of arms, or realize their full right to legal protection.

**Interests of co-defendants are in conflict and one of them has a lawyer**

Conflicting interests of co-defendants are found when they have not acted as co-
perpetrators. In practical terms, this means it is necessary that the court determine that the several co-defendants have conflicting interests so that an *ex officio* counsel is appointed for any who do not have one. Otherwise, it would be possible for a defendant to be put at a disadvantage if one or more defendants are represented and another is not.

**Cases heard in the absence of the defendant**

Bulgarian criminal law allows trials *in absentia*. Where the case is heard in the absence of the defendant, his or her interests must be represented by defense counsel. Previously, this provision applied only to the trial stage. At present, however, defense is mandatory in all stages of the procedure if the defendant is absent.

**The defendant cannot afford to hire a lawyer, wishes to have one, and the interests of justice so require**

This last element of Article 70, section 1, of the Criminal Procedure Code, in force since 1 January 2000, is of particular significance, since economic difficulties are apparently among the main obstacles to effective access to justice. Since January 2000, there have been several Supreme Court judgments interpreting this provision.

In Judgment No. 171 of 26 March 2002 of the Supreme Court of Cassation, in criminal case No. 57 of 2002, Third Criminal Division, it was held that:

[T]he necessity for a defense counsel and, therefore, the obligation of the court to provide one, outside the scope of these circumstances [items 1–6 under Article 70 of the Criminal Procedure Code], arises in presence of several circumstances, namely: 1) defendant cannot afford to hire a lawyer; 2) he or she wishes to have one, and 3) the interests of justice so require. In the present case, in view of the criminal act under Article 196, section 1, item 2, of the Criminal Code, participation of counsel in the proceedings had not been mandatory according to the procedural norm stated above. This means the court has not been under the obligation to provide a lawyer to the defendant, unless the latter had made a request in this sense. It is only following an express statement from the defendant that an obligation under Article 70, section 3, of the Criminal Procedure Code arises for the court, i.e., to appoint counsel for defendant following the relevant procedures (sending a letter to the local Bar Association requesting an *ex officio* lawyer be designated, and appointing him or her in a separate ruling). This is precisely what the first-instance district court has done. The defendant had made a request for an *ex officio* counsel before the court. It should be noted that participation of the *ex officio* counsel (appointed following the terms and conditions under Article 70, section 3, of the Criminal Procedure Code) in some stages of criminal proceedings does not oblige subsequent judicial instances of review to automatically apply this provision and provide counsel for the defendant in the
absence of a request by him or her. For the above considerations, having examined the case in the absence of *ex officio* counsel, the appellate instance may not be held in procedural failure for restricting the procedural right to legal protection of defendant B. S. Such failure would only be found in the presence of an express request made by the defendant and an ill-founded refusal of the court to apply the provision of Article 70, section 1, item 7.

In Judgment No. 475 of 15 November 2001 of the Supreme Court of Cassation, in criminal case No. 411 of 2001, Second Criminal Division, the Court held, “In accordance with Article 70, section 1, of the Criminal Procedure Code, defense is mandatory where defendant cannot afford to pay for an attorney, but wishes to have one, and the interests of justice so require.” It has noted further that:

During examination of the merits at first instance, the defendant appeared in person. He expressly stated his wish to have an *ex officio* counsel, having declared he was in financial difficulty and had not been able to find the funds needed to contract with a legal representative. He also submitted evidence in support of his statements, namely that his wife and he had both been registered as unemployed with the local Labor Office, that his family was entitled to monthly family allowance for three children, as well as special-purpose monthly benefits. Upon receiving such a request, the court has been under the obligation to assess its merits and, if it had deemed it ill-founded, the court should have outlined its reasoning and refused to grant the request.

As noted in the minutes of proceedings from 16 May 2000, when the hearing commenced, the only reasons given for refusal contradicted the provision of Article 70, section 1, item 7, of the Criminal Procedure Code. According to this provision, representation is mandatory in cases in which the defendant cannot afford to pay the lawyer, wishes to have one, and the interests of justice so require. The interests of justice, and not only the ones of the defendant, are of decisive importance with regard to the appointment of a lawyer in the presence of the other criteria. In any event it may be argued that the defendant always has an interest in receiving qualified professional assistance of a lawyer. In the present case his interest arises from the gravity of the offense and the potential punishment, as well as from the fact that some of his co-defendants had been represented. The interests of justice require the appointment of an *ex officio* counsel who could take part in the hearing and provide his legal protection. Having refused to appoint an *ex officio* counsel, the first-instance court has infringed upon his right to legal protection...

2.2.2 Financial criteria

To prove their inability to cover expenses related to legal representation, individuals
must submit evidence such as material status declarations, certificates by competent state authorities, and any other relevant documents that the court or the pretrial investigation body may deem appropriate.

2.2.3 Other eligibility questions

Profile of defendants in the findings from the research conducted by the Bulgarian Helsinki Committee

Taking into consideration social factors having an impact on access to justice of criminal defendants in Bulgaria, the research of the Bulgarian Helsinki Committee was based on a carefully developed framework of analysis that was intended to assess the impact of ethnicity, age, education, and social status of defendants on justifications for charges, measures for restraint, and, more generally, the percentile distribution of individuals with regard to the above characteristics in various groups, relating to their access to justice.

The survey of the criminal files found that 6.8 percent of the accused and the defendants are women. This reflects the percentage among those sentenced for the period under study in the sample. In the survey of prisoners, women accounted for 3.8 percent in the sample. The difference reflects the fact that women are more often sentenced to punishments other than effective imprisonment, and that those punishments are shorter in duration.

**Ethnicity:** Presented below are the results of the research related to the ethnicity of the accused, defendants, and sentenced persons (with numbers indicating percentages):

**Ethnicity of the accused defendants and sentences**

![Graph showing ethnicity distribution](image-url)
Although the percentage of Roma is much higher in both samples than their share in the population, this percentage is in fact lower than the actual numbers. In the survey of criminal files, they are represented with a relative share lower than their actual relative share because not all cases in the study had the 1-CC statistical form available. In cases where there was no such form, the researchers were instructed to mention Roma or other ethnicity only if other data available on that case allowed for such an identification (for example, the person’s name). In case of an absence of such data, Bulgarian ethnicity was recorded for persons with Bulgarian names, and Turkish ethnicity for persons with Muslim names. In the survey of prisoners, ethnicity was determined according to the self-identification of the respondent. It is, however, well known that under such circumstances, a considerable number of people who are considered by others to belong to Roma communities prefer to identify themselves as Bulgarians or Turks.

Age: The distribution (in percentages) of the different age groups, compared to the total sample, is as follows:

![Ethnicity of the accused defendants and sentences](image)

The survey of the criminal files shows that the share of those who were underage was higher than that in persons deprived of liberty, which is normal considering that underage people generally receive lighter punishments and shorter sentences. The study of criminal files shows a higher number of people in the 19–30 age bracket compared to that of persons deprived of liberty. The cause for this is recidivism, which is a strong factor affecting the length of sentence in the higher age groups.

Education: The distribution (in percentages) of different levels of education, compared to the total sample, is as follows:
Education of the accused, defendants and sentences

The data clearly show that the lower the education, the greater the probability of a sentence of deprivation of liberty being passed on the accused, as the shares of those with primary and basic education is higher among respondents in the survey of prisoners than among the defendants in the criminal files survey.

Social status: Selected indexes, including type of employment, measured social status. The results from the two surveys (in percentages) are as follows:

Social status of the accused, defendants and sentences
The share of the unemployed is lower, and the share of the unqualified workers is higher, among defendants in the prisons compared to those in the criminal files. This may be due to a systemic error, as those deprived of liberty may refer to jobs that they have ever had or to their level of education rather than to their actual social status. In response to another question in the survey of prisoners, 57 percent of the respondents seemed to have been jobless at the time they had committed the act for which they had been sentenced.

The research also revealed that 41.8 percent of the people covered by the criminal files survey had families, compared to 38.5 percent from the survey of prisoners, despite the fact that the latter were older. This demonstrates the negative influence of the deprivation of liberty on marriage. The same effect has been confirmed by the higher percentage of the divorced among those deprived of liberty (14.1 percent) compared to the defendants in the criminal files survey (8.4 percent).

2.3 Other cases

Apart from the described cases, no other possibilities for receiving free legal representation exist in the context of criminal procedure.

2.4 Procedure for granting legal aid

Officials have a number of obligations to explain, ensure, and provide assistance with regard to the effective exercise of defendants’ rights. Failure to meet these obligations amounts to a procedural failure and leads to deficiencies in related activities. Individuals who are eligible for mandatory representation under Article 70 of the Criminal Procedure Code must be informed of their right to ex officio counsel, and the court must appoint one for them. In cases of mandatory representation, irrespective of statements of the individuals to the contrary, the court or authorities at pretrial must appoint counsel for the defense on its own motion. Cases where statements of individuals have some effect with regard to representation are referred to as “optional” cases of mandatory defense, in the sense that if a defendant by an explicit statement waives his or her right to counsel, absence of counsel will not

2.2.4 Legal aid for victims of crimes

Bulgarian law provides that victims of crimes may take part in criminal proceedings as private prosecutors and civil claimants. The Criminal Procedure Code provides for a number of rights for such individuals, including the right to legal representation or to hire a lawyer. There is, however, no duty on the part of the authorities conducting the proceedings to offer any type of legal aid if the private prosecutor and civil claimant cannot afford to hire a lawyer. There is therefore no provision similar to Article 70, section 1, item 7, of the Criminal Procedure Code that grants legal aid to victims of crimes.
be in violation of the procedural rules. These
covers lack of sufficient command of the
Bulgarian language and cases of contradicto-
ry interests of co-defendants. However, in
all circumstances where an individual has
hired a lawyer to represent him or her before
court, the participation of *ex officio* counsel
is no longer mandatory and the *ex officio*
counsel is eliminated from the hearing.

*Ex officio* counsel is appointed by the
court at the trial stage of proceedings, and
during the pretrial phase by investigating
authorities or the prosecutor. A practicing
lawyer is appointed as counsel.

A number of problems arise with regard
to *ex officio* representation. Infringements
occur with regard to appointment of coun-
sel by certain panels of the courts or by rel-
ent pretrial authorities. According to Ordin-
ance No. 2, establishing rules for lawyers
and the professional responsibilities of
lawyers, a court may appoint *ex officio* only a
lawyer who has been approved by the Coun-
cil of the local Bar Association. The issue of
the quality of legal representation is a very
serious concern, which will be discussed
below (see section 2.7).

No express rules have been provided for
appealing the appointment of a particular *ex
officio* counsel. The only possibility to effect
a change is for the individual to designate a
contracted attorney, which would annul the
participation of *ex officio* counsel in the pro-
ceedings.

The lack of legal representation in cases
where it is mandatory amounts to a proce-
dural failure that may result in the rescis-
ion of the judgment made under such cir-
cumstances.

In cases of mandatory representation,
appointment of counsel would be made *ex
officio*. An express request of the individual
for appointment of counsel is needed only
under Article 70, section 1, item 7, of the
Criminal Procedure Code. The request of
the defendant for appointment of an *ex officio*
counsel must be supported by written
evidence submitted following the instruc-
tions of the court or investigation body, if
the defendant’s financial status cannot be
established from data contained in the case.

### 2.5 Scope of Legal Aid

Legal aid covers all operations and activities
of counsel for protection of the rights and
legal interests of the individual. This
includes consultations, legal briefs, his or
her activity during all kinds of investigative
operations at pretrial, appearance at court
hearings, appeals of judicial decisions and
acts of pretrial authorities, etc. No limita-
tions to the scope of legal aid have been
enumerated in the law.

### 2.6 Application of the Legal Aid Norms in Practice

Results from the surveys conducted by the
Bulgarian Helsinki Committee have indi-
cated an extremely high degree of exclusion
of criminal defendants from access to
counsel, both *ex officio* and contracted, at all
stages of criminal proceedings. In regards
to the current system of legal aid, not only
is it too restrictive, but the level of dissat-
isfaction among users is quite significant. The following elaborates further on some problematic aspects regarding access to justice for indigent criminal defendants, as found in the research undertaken by the Bulgarian Helsinki Committee.

As the data from the survey of criminal files below indicate, by far the largest percentage of criminal cases end at the first instance. There is no doubt that inadequate legal assistance keeps defendants from appealing their sentences to higher courts.

**Distribution of cases according to the instances of review at which they ended**

- 78% of the cases are closed at first instance with no further appeal;
- 15.7% are closed at second instance;
- 6.3% are closed at cassation.

**Gravity of charge**

The survey of criminal files shows that 40 percent of all indictments are for minor offenses, with deprivation of liberty for less than five years being the proposed punishment; the remaining 60 percent are for felonies, with the potential punishment of imprisonment exceeding five years.

When there was an amendment, in 6.6 percent of all cases it was due to facts leading to an even graver indictment. In 4.5 percent of the total number of cases, it was due to facts leading to an identical or lighter indictment.

In 26.4 percent of the cases, the prosecutor sent the case back for further investigation.

Only in 3.2 percent of all cases did the reporting judge send the case back for further investigation.

**Types of outcome of criminal proceedings**

The different outcomes of criminal proceedings are described below (in percentages):
Types of outcome of criminal proceedings

According to the survey of the criminal files, the total average duration of the imposed deprivation of liberty is 48.5 months (or about four years). The punishment is longer than the average sentence actually served, especially for people in correction centers of the open or semi-open type.

The survey of prisoners found that the average duration of deprivation of liberty imposed is said to be 78.7 months, or about six and a half years. This is higher than in the survey of criminal files, because the prisoners constituting the basis of the sample in that survey were longer-term prisoners than those in the criminal files. But this average is also shorter than the average length of the sentence actually served by these same people, as there are several ways to shorten the term of imprisonment, from which most of the prisoners benefit.

One thing that is striking in the above data is the very low percentage of acquittals. There are lots of reasons for this, but inadequate legal assistance, no doubt, plays a significant role.

2.7 Quality of Free Legal Representation

No official statistics on the quality of free legal representation are available, and no evaluation of free legal representation has ever been made by the Ministry of Justice, the judiciary, or the Bar Association. It is hard to adopt a uniform measure for the quality of lawyers’ defense, since it is influ-
enced by a wide variety of factors, some of which do not lend themselves to exact measurement. Nevertheless, in its two surveys, the Bulgarian Helsinki Committee made an attempt to develop a set of procedures for this purpose. Three different evaluation approaches of lawyers’ performance were used where possible. They included the scope of activities undertaken by lawyers and their effect; peer review; and client evaluation. None of the three approaches is sufficiently objective or indisputable. Still, an illustration of the results of the study is necessary.

**Scope of activities undertaken by lawyers and their effect**

It is very hard, bearing in mind the limitations of a study of the criminal justice system, to conduct an evaluation of all possible implications of counsel involvement in a particular case. Factors such as comparative frequency of acquittals or detentions and length of imposed imprisonment certainly cannot serve as the sole basis for such an evaluation. However, there are some factors that can be used as indicators in this respect. The level of appeals before higher instances may be used as an element for evaluation in a quantitative survey, because the appeals usually, though not always, reduce the punishment set by the initial verdict. Participation of counsel at the pretrial stage would considerably increase the chances of the case being brought before a second or even a third instance of judicial review. According to results from the survey of criminal files, where counsel did not take part at the pretrial phase, 13.1 percent of the cases were addressed before the appellate court and only 3.4 percent before the cassation courts. When counsel did take part, the corresponding shares were much higher: 21.4 and 12.4 percent, respectively.

Counsel’s participation during the pretrial stage increases the probability that the prosecutor will resubmit the case for further investigation. This occurred in 32 percent of the cases where there was counsel, but in only 18 percent where there was none. The presence of a counsel in the pretrial stage also increases the probability that the reporting judge will resubmit the case for further investigation. This occurred in 6.1 percent of the cases where there was counsel, but in only 1.9 percent where there was none.

Needless to say, the more active the counsel at the pretrial stage, the better the chances of the defendant in any subsequent appeals. In practice, however, even when there is either an *ex officio* or contracted lawyer, in certain cases the latter may not have attended certain investigative proceedings of considerable relevance to the outcome of pretrial or subsequent proceedings. This is illustrated in the following chart, summarizing the findings from the survey of criminal files:
ABSENCE OF COUNSEL FROM CERTAIN PROCEDURAL ACTIVITIES

% indicate the shares of cases in which the counsel was absent

The absence of attorneys during these important investigative activities comes as a possible result of the fact that they had not been summoned to appear. Still, the survey of criminal files shows that a small number of attorneys (only in fifty-five of the cases) have filed a petition to participate in all investigative activities. On the other hand, it becomes obvious that in cases where they had addressed the court with such petitions, they were usually granted the opportunity to participate (in 81.6 percent of the cases).

Peer review

Peer review is an appropriate method for evaluation of a professional performance and was used in the survey of criminal files. The reviewers were lawyers who were hired by the Bulgarian Helsinki Committee to review the cases, fill out the questionnaire, and evaluate the work of the lawyer where there was one. Some of the results are listed below.

One finding is that in 7.2 percent of the cases where an attorney had taken part at the pretrial stage, comments and objections raised by the attorney during presentation of the investigation were deemed to be inappropriate, according to peer review observations.

When it comes to counsel performance at first-instance proceedings, evaluation by fellow attorneys has sometimes been even more rigorous:

- In 15.5 percent of the cases where an attorney had participated before the first instance, researchers were convinced there had been clear and convincing evidence to plead for acquittal. Such pleas had not been addressed in 14.3 percent of those cases.
- In 28.6 percent of the cases, there had
been sufficient grounds to plead for a more favorable qualification of the incriminated act that would be to the advantage of the defendant. Such pleas had not been addressed in 17.8 percent of those cases.

• In 24.8 percent of the cases, there had been sufficient grounds to plead for a lighter alternative punishment. Such pleas had not been addressed in 19 percent of those cases.

• In 47.6 percent of the cases, there had been sufficient grounds to plead for the enforcement of Article 55 of the Penal Code, to reach under the limits of the envisaged punishment. Such pleas had not been addressed in 27.1 percent of those cases.

• In 28.2 percent of the juvenile cases, there had been sufficient grounds to plead for the imposition of administrative measures instead of criminal sanctions. Such pleas had not been addressed in 51.5 percent of those cases.

Client evaluation
Evaluation by clients was limited to the accused and the defendants who had later been sentenced to imprisonment. Such an evaluation was asked for in the survey of the prisoners. This fact alone has limited the validity of the evaluation process, as the respondents were influenced by their present condition. A number of other factors, such as their education, ethnic background, and social status, as well as their initial expectations of the outcome, also played a role.

In response to our request for evaluation of pretrial attorneys (both contracted and ex officio), 38.8 percent of the respondents who had an attorney at this stage of the proceedings assigned the lowest possible mark to his or her work (2, or poor, according to the Bulgarian educational system). Only 11.9 percent conceded their attorney had been excellent (marking him or her with 6, the highest mark). The average mark was 3.41. In response to the request for indications of the main weaknesses of attorneys, the accused and defendants most often mentioned a lack of sufficient interest (22.2 percent), inadequate activity (20.1 percent), insufficient contact with the accused/defendant (16.1 percent), and collaboration with the investigative bodies (11.7 percent).

Attorneys in first-instance proceedings got better marks. The average was 3.69, or good. In all, 29.8 percent gave poor marks to their counsels, while 15 percent gave excellent marks. Again, in responses to our request for indications of the main weaknesses of attorneys, the respondents mentioned inadequate activity (20.9 percent), lack of sufficient interest (18.4 percent), and insufficient contact.

Comparison with regard to the outcome of proceedings
A comparison, along those lines, between the ex officio and contracted lawyers has also been conducted, and the results are given below (in percentages). Data were sorted to verify at which judicial instance cases have ended, depending on availability and type of pretrial counsel on the one
hand and before the first instance on the other. According to the survey of prisoners, the number of cases that have ended at the first instance involving both types of counsel is lower. This is no surprise, of course, given that the higher courts usually reduce the sentences. They are still lower in the cases in which the lawyer was contracted, which by itself is a case for better performance of the contracted counsel:

**The instance at which the case ended according to type of counsel at pretrial**

With regard to the outcome of proceedings, there is also data from the criminal files survey. Results obtained were divided into two main categories: sentences imposing deprivation of liberty, and other outcomes of proceedings. Results (in percentages) are given below:

**Type of punishment imposed**
In 77.9 percent of the cases where the outcome of criminal proceedings was something other than deprivation of liberty, defendants had been using the services of contracted attorneys at the pretrial stage. Where defendants were represented by contracted attorneys during the first instance, the outcome was something other than deprivation of liberty in 82.0 percent of the proceedings. This indicates that contracted attorneys often achieve a more advantageous outcome for their clients.

As noted previously, the increase in both the percentage and the number of contracted attorneys before the first-instance courts is definitely impressive. This is because at the moment the indictment is lodged with the court, defendants can mobilize all their resources and engage an attorney to represent them before the court, even without the means to pay.

In relation to the outcome of proceedings, the survey of prisoners has generated data on the relationship between the type of attorney and the term of imprisonment imposed, given below (in percentages).

**Duration of the Sentence Imposed v. Type of Counsel before the First Instance**

Data from the chart above do not illustrate a drastic discrepancy in the sentences between cases where there was representation by contracted and *ex officio* counsel at the first instance. But it is not clear to what extent the conditions, e.g., the gravity of the criminal charge to trigger the term of sentence imposed, are equal in both cases. However, the share of proceedings that ended in a manner other than deprivation of liberty is higher in the case of contracted attorneys. Besides, in the case of *ex officio* attorneys, there is an uneven increase of the shares in the sentencing ranges, whereas increases in the case of contracted attorneys are comparatively even up to the sentencing range of up to ten years.
Comparison of participation by counsel at various stages of investigative procedural activities

The criminal files survey also provided data regarding the participation of counsel in the presentation of the investigative file after the conclusion of the investigation but before the indictment is drafted. The graph below also presents (in percentages) evaluations of the counsel’s activities by his or her peers.

### Activities of Counsel at Presentation of the Investigation

- **Presence at presentation of the investigation**: 88.3% **Ex officio**, 84.6% **Contracted**
- **Requests, comments, and objections raised**: 9.6% **Ex officio**, 26.7% **Contracted**
- **Appropriate requests, comments, and objections**: 84.6% **Ex officio**, 94.7% **Contracted**

It is clear that even though the share of *ex officio* lawyers who took part in this key investigative activity was higher, it was only in 9.6% of the cases (in contrast to 26.7% with contracted attorneys) that they made any requests, comments, or objections related to the case. This is most likely the reason that the final decree of the investigator was to terminate proceedings in 5.1% of the cases involving contracted attorneys compared to only 2% of the cases involving *ex officio* attorneys. There might be a similar explanation for the fact that in 34.1% of the cases involving a contracted attorney, the prosecutor resubmitted the case for further investigation, whereas this occurred in just 24% of cases involving *ex officio* counsel.

In the course of the prisoner survey, information was collected about the contacts of the defendants with their lawyers. Respondents were also asked to evaluate their performance at the pretrial and at the trial proceedings. This data too allows a comparison between contracted versus *ex officio* attorneys.
The following are answers (in percentages) to the question as to whether the accused, at the pretrial stage, had met with his or her counsel during detention.

**At pretrial, while being detained, did you meet your counsel?**

![Bar chart showing the percentage of respondents who met their counsel at pretrial.]

- **Contracted:**
  - Yes: 75.7%
  - Ex officio: 61.4%
  - No: 6.9%
  - Not detained: 17.4%

- **Ex officio:**
  - Yes: 61.4%
  - No: 26.2%
  - Not detained: 12.4%

Obviously, contracted attorneys met with their clients more often. The following results were obtained regarding how often the accused had the opportunity to use the services of his or her attorneys.

**How often did you have the chance to use your counsel’s services?**

![Bar chart showing the percentage of respondents who had the chance to use their counsel’s services.]
Here too, contracted attorneys have obviously been more active. The same question was asked with regard to first-instance trial. The responses confirmed the above trend.

Comparison of client’s subjective assessment of lawyers’ weaknesses

In light of the fact that only 20 percent of the people who have used *ex officio* legal services believed they had enough time to prepare for court hearings during the meetings with their counsel, the results below (in percentages) come as no surprise. Marks given to counsel ranged from 2 (poor) to 6 (excellent). These “grades” are shown for both the pretrial and the trial stages.

**Assessment of counsel performance at pretrial**

<table>
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<th>Grade</th>
<th>Percentage</th>
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<tr>
<td>Excellent 6</td>
<td>17.8</td>
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<tr>
<td>Can’t judge</td>
<td>5.8</td>
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</table>

**Assessment of counsel performance at the first instance**

<table>
<thead>
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<th>Grade</th>
<th>Percentage</th>
</tr>
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<tbody>
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<td>39.7</td>
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<tr>
<td>Average 3</td>
<td>12.8</td>
</tr>
<tr>
<td>Good 4</td>
<td>22.8</td>
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<tr>
<td>Very good 5</td>
<td>17.2</td>
</tr>
<tr>
<td>Excellent 6</td>
<td>18.1</td>
</tr>
<tr>
<td>Can’t judge</td>
<td>5.9</td>
</tr>
</tbody>
</table>
Quite obviously there are many poor marks for the *ex officio* counsels at the pre-trial stage—56.2 percent of those who had an *ex officio* counsel. This is more than twice the level of complete non-satisfaction with the contracted lawyers. The percentage went down somewhat at first instance, though it remained relatively high—39.7 percent, which is, again, much higher than in the case of the *ex officio* lawyers.

Below (in percentages) are the reasons given by the prisoners for the weaknesses of their counsel:

**Weaknesses of Counsel**

![Weaknesses of Counsel Diagram]

Obviously, problems with *ex officio* counsel are at least twice as frequent. The areas that were identified as the most problematic in terms of counsel’s conduct, at the pretrial phase and at the first instance, include: lack of interest, insufficient activity, and insufficient contact.

A separate area of interest is collaboration of *ex officio* counsels with the investigatory body at pretrial, which is a consequence of the current defective system for appointment of *ex officio* counsels at the pretrial phase. The value of the same variable (collaboration of *ex officio* counsels with the investigatory body) in first-instance trial proceedings is again high. However, problems in this respect are less obvious at this stage of the proceedings. This is also evidenced by the increase in the number of “no weaknesses” responses regarding the conduct of the *ex officio* counsel during first-instance proceedings. The decrease of values with regard to lack of interest and insufficient contact indicates that *ex officio* counsel themselves take their tasks at the trial stage more seriously. There is also a pronounced decrease in the number of responses relating to collaboration with the prosecution and decision-making authorities.

Several conclusions can be drawn from this comparative analysis:
1. Activities of contracted attorneys are more favorable to their clients. This is the main indicator of the weakness in the present system of legal aid.
2. Activity of *ex officio* counseling during all phases of the proceedings, but especially at the pretrial stage, is still standard.
3. Clients’ assessment with regard to *ex officio* defense indicates that, by and large, it does not meet their needs.

Mechanisms for ensuring the quality of legal aid are among the powers of the Bar Association in this area. These will be covered in section 5 below, regarding the role of the Bar Association in providing legal aid. Where a criminal defendant remains dissatisfied with the quality of legal aid provided by an *ex officio* counsel, he or she may approach the local Bar Association. The Bar Association will discipline the *ex officio* counsel if it is found that he or she failed to perform the required duties under the Bar Association Act.

3.2 Civil cases for which legal representation is mandatory

Traditionally, under the Bulgarian system the court is in charge to *ex officio* monitor the progress of proceedings, and parties are not obliged to file motions for each and every specific act during examination. However, the reform in 1997 enhanced the adversarial features of proceedings, eliminating the duty of the court to instruct parties and collect evidence on its own motion. The issue thus arises of how to ensure equality of arms when one of the parties appears in person without representation,
the subject matter is complex, and the Court does not instruct the non-represented party. Lawmakers have established several legal means to ensure protection of the rights and legal interests of individuals. These means include special representation, participation of public prosecutors in civil proceedings, and legal representation provided by trade union organizations, etc.

When individuals lacking legal capacity (including minors) have no legal representative and urgent legal protection is required, courts will assign custodians. The court will also assign a representative to the incapacitated where a conflict is found between his or her interests and those of his or her parent(s) or custodians (e.g., a defendant mother in paternity proceedings). In addition to representation of the incapacitated, representation of citizens acting in full capacity is also allowed where they have disappeared or are absent (Article 16, section 4, of the Civil Procedure Code), or are the heirs of unoccupied estates (Article 59 of the Inheritance Act). Those people, if their absence has been officially proclaimed, are represented by their heirs, and all other individuals are represented by special representatives appointed by the court. Proceedings performed in the absence of an appointed representative are invalid.

The participation of a prosecutor aims at securing the legality of proceedings. The law has expressly provided for cases where participation of a public prosecutor is required, e.g., in adoptions, judicial incapacitation, invalidation of marriages, etc. The public prosecutor does not act on behalf of the individual. Rather, he or she acts in the individual's interests and ensures that no infringements occur.

The possibility provided in the Civil Procedure Code for the representation of employees by trade union organizations and their branches is another measure facilitating access to justice. This enables employees to obtain good-quality representation without the need to pay for the services of a lawyer.

Apart from these situations, there is no state-sponsored system of granting legal aid for representation or legal advice.

Under Article 35, section 1, of the Bar Association Act, lawyers provide legal aid free of charge to individuals in financial difficulty and those entitled to alimony. They may also provide free legal aid to close acquaintances, relatives, and other lawyers. Once claims in such proceedings have been honored, the court determines the lawyer's remuneration in accordance with an Ordinance of the Supreme Council of the Bar Association and sentences the other party to pay. The remuneration is always determined to be at least equal to the minimum amount set for the particular type of work. This provision, however, is not applied with regard to indigent claimants, as there are no criteria to determine eligibility and no effective mechanism for enforcement.
3.3 Eligibility Criteria for Granting Legal Aid in Civil Cases

In the hypotheses of mandatory representation outlined above, the law clearly defines the groups eligible for free legal representation. They are easily identifiable through the documents attesting their status and through their appearance or nonappearance in the court. No other groups are eligible for state-sponsored free legal assistance.

In addition, when the financial status of the individual prevents him or her from covering the costs of judicial proceedings, the court exempts that person from paying the requisite fees. These costs include state fees collected in court cases and amounts determined in the State Taxes and Tariffs Act thereto, as well as other costs in relation to the proceedings.

According to Article 63 of the Civil Procedure Code, fees and costs will not be paid by claimants listed in Article 5, items c—g\textsuperscript{13} of the State Taxes Act, nor will it be paid by individuals who have filed declarations of material status to the district or regional court judge when the latter has determined that they have insufficient means to pay the fees and reimburse the costs for the proceedings. In addition, fees and expenses for claims brought by the public prosecutor will not be required to be paid. In these cases, expenses deriving from proceedings are covered by the state budget. Once the claim is honored, they are assigned to the party that lost.

Article 5 of the State Taxes Act provides for exemption from fees and expenses in proceedings for alimony, rights of employees under labor contracts, remuneration for inventions, etc. All documents and papers are exempted from taxes in the following proceedings:

- criminal cases initiated by a public prosecutor;
- some family law proceedings—for alimony, custodianship, establishment of parenthood, and the determination of allowances to mothers with many children;
- social welfare proceedings;
- proceedings for social protection of juveniles;
- determination of the right to pension;
- registration of cooperatives and subsequent amendments thereto.

A further facilitation involves a mechanism for determination of fees with regard to certain proceedings on the basis of the taxation valuation of estates, not their market price, which is higher.

3.4 Procedure for Granting Legal Aid

As the cases of mandatory representation are very simple and clear, the court has no difficulties in identifying them and appointing a representative immediately upon this determination.

When the court deals with the exemption from costs, there are two situations:
1. The necessity to grant free legal aid has been clearly established by lawmakers so that the court itself is able to identify the respective category and to rule on the exemption immediately upon identification;

2. In other cases, assessment is performed by the court, upon request from the interested individual. The individual must submit a declaration with regard to his or her material status and other evidence requested by the court, e.g., a certificate for the amount of pension received. A written statement refusing the request for fee waivers may be subject to appeal.

3.5 Scope of legal aid

Free legal aid covers exemption from state fees for filing a claim, the expenses for expert and other witnesses borne by the state, as well as additional free legal representation before all instances in compliance with the above provisions.

3.6 Quality of free legal representation

No official assessment of the quality of the free legal representation in the cases of mandatory representation has ever been conducted in Bulgaria. Mechanisms for control of the activities of legal aid lawyers in civil cases are the same as those covered with regard to legal aid in criminal cases. In a survey commissioned by the Bulgarian Helsinki Committee on the level of satisfaction of the legal needs of the citizens, 32 percent of the respondents who had ever used a lawyer in civil proceedings claimed that they were not satisfied with the lawyer’s services, whereas 68 percent claimed that they were satisfied.

3.7 Application of the right to legal aid in practice

The courts ensure mandatory representation. As the proceedings performed in the absence of an appointed representative are invalid, the courts would normally appoint a representative.

The provisions of the Bar Association Act with regard to free legal aid are not often applied in practice, especially in its parts dealing with indigent claimants. The application of Article 35 of the Bar Association Act, mentioned above, is left to the goodwill of each lawyer who may be contacted for assistance.

In August 2002, the Bulgarian Helsinki Committee commissioned a survey on the level of satisfaction of citizens in relation to their basic legal needs in the areas of civil and administrative law. The survey was conducted on a representative sample of the adult population in Bulgaria by Sova-Harris, Bulgaria, and was based on a questionnaire developed by the Bulgarian Helsinki Committee.
The employment status of respondents in the sample is characterized by the following groups:

- retired, 42.9 percent,
- employed under labor contracts, 44.6 percent,
- other (self-employed, students, housewives, etc.), 12.5 percent.

The largest accumulations with regard to monthly income per family member were found in the following categories: up to BGN 100, 41.6 percent; up to BGN 150, 16.1 percent; and above BGN 150, 10.6 percent. The distribution of men and women was correspondingly 44.7 percent and 55.3 percent.

The following responses were obtained in answer to the question of whether individuals could afford to hire a lawyer:

- 59.8 percent did not need to hire one;
- 5.9 percent had already hired a lawyer;
- 2.7 percent intended to do so;
- 4.6 percent believed that their need to hire a lawyer was not sufficiently important;
- 12.8 percent answered that even though they needed to hire a lawyer, they were unable to afford to do so because of financial constraints.

Individuals who needed consultations, preparation of various documents, or legal representation mentioned the following areas where this assistance would have helped:

- personal status issues, 2.9 percent
- real estate issues, 6.7 percent
- contracts and tort, 3.9 percent
- employment relations, 4.4 percent
- family relations, 1.6 percent
- inheritance issues, 4.5 percent
- taxation issues, 1.9 percent
- social security issues, 0.9 percent
- administrative disputes, 3.3 percent
- insurance contracts, 0.6 percent
- relations involving the police, 1.3 percent

The above figures show clearly the inadequacy of the Bulgarian civil legal aid system and its inability to deal with the needs of the poor. They indicate that if indigent Bulgarian citizens had an opportunity to benefit from an adequate legal aid system, they would have brought more than 1 million civil cases in the courts and before the administrative bodies. If this happens, it would substantially affect the capacity of the entire justice system. So many unresolved civil matters undermine the very idea of the rule of law in Bulgaria. While it is not clear whether all those who indicated that they are in need of free legal assistance would in fact bring their matters before a court if they had recourse to an affordable legal aid system, there is also no doubt that some of those who responded that they do not need legal assistance would find a way to benefit from such a system if they had an access to it.

As can be seen, the state needs to establish a system for meeting the legal needs of citizens in the civil and administrative areas.
Further, it must establish a system for monitoring the level of user satisfaction achieved both by means of the civil process and outside it. The state also needs to introduce mechanisms for control of services with regard to legal needs, such as those of lawyers. Guaranteeing an affordable and fair civil administration of justice in the foreseeable future would considerably increase confidence in the judiciary system.

3.8 Other barriers to effective access to courts in civil cases

Increasing the availability and number of first-instance courts in suitable geographic locations is necessary to secure affordable civil proceedings for those in need of protection. The same applies to local bar associations, which at present number twenty-two. In Bulgaria, the judicial system has been conceived to guarantee equal access to all citizens, irrespective of their place of residence within the territory of the country. Travel costs incurred by the parties count for judicial expenses and will be assigned or apportioned in accordance with the Civil Procedure Code. However, Bulgarian court buildings are still not adequately user-friendly; most lack basic amenities. This has been noted in a number of reports concerned with judicial administration in Bulgaria.16

Practical impediments to access to justice are, to a large extent, a result of the large delays and backlog of civil cases in the courts, the complex procedures, the weak administrative capacity of the Bulgarian judiciary, the lack of clarity regarding the outcome and duration of proceedings, and the high fees determined in proportion to the amounts claimed. Lawyer remunerations, the low levels of legal education among the general public, and the scope of parties’ activity in the proceedings are all factors that further contribute to restricting access to justice in civil proceedings.

4. Public law: Effective access to the judicial system for the indigent in administrative and constitutional cases and cases before international tribunals

4.1 Normative basis

Constitutional cases

Provisions regarding the establishment and powers of the Bulgarian Constitutional Court are contained in Chapter 8 of the Constitution. No opportunity is available for individual constitutional complaints; hence, citizens may not be parties to constitutional cases. In accordance with Article 150 of the Constitution, the following officials and groups have the right to file a motion with the Constitutional Court: a group of at least one-fifth of the Members of Parliament, the President, Council of Ministers, the Supreme Court of Cassation, the Supreme Administrative Court, and the Chief Prosecutor. Municipal coun-
cils have limited powers to approach the Constitutional Court, as outlined in the Constitution. When the Supreme Court of Cassation or the Supreme Administrative Court finds lack of consistency between the Constitution and legislation, they have to suspend proceedings and refer the issue to the Constitutional Court; thus, the two courts have powers to initiate constitutional proceedings.

**Administrative cases**

In accordance with Article 120, section 1, of the Constitution, the courts exercise control over the legality of the decisions and other acts of administrative authorities, while citizens and legal entities may appeal all administrative acts that have an impact on their situation, except those expressly excluded by virtue of the law. Article 9 of the Judiciary System Act contains a similar provision. Article 8 of that act states that the right to legal protection must be available at all stages of proceedings.

The two main legal instruments in the area of administrative justice are the Administrative Proceedings Act and the Taxation Proceedings Code. Both of these (Article 45 of the former and paragraph 21 of the latter) refer to the provisions of the Civil Procedure Code, regarding matters not expressly set out therein. Therefore, what has been stated above with regard to the rights of legal protection and free legal aid in civil cases is relevant in administrative procedural law as well.

In contrast to civil proceedings, the *ex officio* principle is still quite active in proceedings for appeal of administrative acts. The opportunity for the courts to collect evidence without a request of the parties, as well as their obligations to investigate issues under Article 43, section 3, of the Administrative Proceedings Act, facilitate, to a certain extent, the protection of citizens against illegal acts of the administration. However, this does not mean that a citizen would under all circumstances be able to effectively exercise his or her right to protection without consultation and/or representation by a lawyer. In fact, in judicial administrative proceedings a complainant would usually face an official authority that may always count on competent legal assistance and is in an incomparably better position to obtain evidence needed in support of his or her own statements.

**International procedures**

Bulgaria ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1992. Therefore, individuals residing in its territory may approach the European Court of Human Rights in Strasbourg. If their financial status does not allow them to meet the expenses of such an action, they are entitled to legal aid as provided for in the Convention and Rules of the Court. Many people who have lodged applications to this Court have benefited from the legal aid schemes.

However, national legislation does not provide for legal aid with regard to international complaints, including applications to the European Court of Human Rights.
4.2 Alternative (non-state) mechanisms

Various non-governmental organizations and lawyers’ offices offer legal aid. In the absence of any clear institutionalized system for legal aid, however, their existence may only emphasize the problems related to legal aid and access to justice in civil cases, rather than contribute to resolving these issues in any significant manner.

5. Organization of the system for provision of legal aid

5.1 Role of the Bar Association in the administration of the legal aid system

Article 21, section 1, of the Bar Association Act indicates that a ruling of the courts for appointment of an ex officio lawyer is sent to the local Council of the Bar Association, which will designate the lawyer from the local chapter of the Bar Association. The relevant court needs to send the Bar Association a letter requesting the designation of a lawyer, who will then be appointed as ex officio counsel in a separate ruling.

The Bar Association Act lays out a number of duties and obligations for lawyers in their capacity as ex officio counsel. For failure to perform these, they will be disciplined. According to Article 62 of this act, the Council of the Bar Association has the power to open and conduct disciplinary proceedings against lawyers from the respective Bar Association. The act contains a list of disciplinary infringements and the applicable sanctions that may imposed. Any failure to perform duties and obligations outlined in the Bar Association Act and Regulations of the Council is regarded as an infringement, as are the following:

- any omissions or delays in the performance of the lawyers’ duties that have led to damaging clients’ rights and interests;
- failure to perform duties listed under Articles 20–31;
- undermining the prestige of the profession on the occasion and during the exercise of their duties, as well as on other occasions;
- failure to comply with professional ethics, morality, and the requirements of good working relations;
- circumventing relevant taxation provisions.

Article 101, section 1, of the Bar Association Act lists possible sanctions:

- reprimand;
- a fine of BGN 0.1–1;
- deprivation of entitlement to hold elected positions in bodies governing the Bar Association for a period of one to three years;
- deprivation of entitlement to practice law for a period of up to one year;
- deprivation of entitlement to practice law permanently.
5.2 Role of the Courts

In accordance with Criminal Procedure Code provisions, the court appoints *ex officio* counsel at the trial stage of criminal proceedings. Corrupt practices in relation to enforcement of this provision have been examined above.

In accordance with Civil Procedure Code provisions, a special representative will also be appointed by the court in cases where his or her participation in trial is required.

The courts are not entitled on their own motion to monitor the quality of representation, collect data regarding the representation, or keep track under a separate heading of costs and expenses incurred for legal representation and legal aid.

5.3 Role of the Prosecution and the Police

Appointment of *ex officio* counsel at pretrial is made by the investigator, police officer conducting the investigation, or prosecutor, depending on the particular circumstances of the case. These officials are not in a position to monitor the quality of legal representation and are, in fact, often interested in its low quality and in the lack of legal representation. On the other hand, they are the ones interpreting the “interest of justice” as a substantive criterion, under Article 70, section 1, item 7, of the Criminal Procedure Code.

5.4 The Role of Non-Governmental Organizations in the Process of Evaluation of Access to Justice

In relation to the evaluation of access to justice in Bulgaria, a National Access to Justice Forum was held in Sofia in April 2002; it was organized by the Bulgarian Helsinki Committee, the Ministry of Justice, and the Open Society Foundation-Sofia within the framework of the project “Access to Justice in Central and Eastern Europe.” The partners in this project are the Bulgarian Helsinki Committee, INTERIGHTS (London), the Public Interest Law Initiative (New York and Budapest), and the Helsinki Federation for Human Rights (Warsaw).

Results from the survey of the criminal files were presented at the forum. On the basis of the problems identified in relation to the guarantee of legal aid, the provision of legal aid and its quality were raised and submitted for discussion.

The Bulgarian Helsinki Committee has also assisted several applicants in bringing complaints before the European Court of Human Rights in Strasbourg, under Article 6.3 (c) of the European Convention.


There is no separate budget line in the budget of the judiciary for allocation of funds
for legal aid to individuals who cannot afford legal representation. Expenses are covered by the budget of the relevant court.

The judiciary budget is constructed in such a way that all expenses relating to legal aid come under the “Other Remuneration and Staff Payments” heading. That is why funds spent for legal aid are being accounted for together with those for translation, expert witnesses, other experts, cleaning, etc.

7. DATA COLLECTION

No official statistics are available in Bulgaria allowing for any conclusions with regard to access to legal aid and representation in criminal and civil cases.

8. LEGISLATIVE DEVELOPMENTS

Access to justice in Bulgaria has been a point of concern for the European Commission. The Bulgarian government also adopted reform initiatives in the area. At the National Access to Justice Forum, held in Sofia in April 2002, the Ministry of Justice expressed its firm position of respect for human rights and, in particular, for a fair and affordable trial for all.

The 2001 Regular Report of the European Commission expressed its concern that in “over a third of criminal cases defendants do not have access to a lawyer during trial before a court of first instance. Bulgaria needs to take steps to ensure that fundamental human rights are fully respected, especially through ensuring that in practice all detained individuals who cannot afford a lawyer have access to legal aid.”

The Strategy Paper for the Reform of the Judiciary in Bulgaria, prepared by the government in 2001, provided that one of its goals was:

Ensure equal possibilities of access to justice

SHORT-TERM PRIORITIES

preparation of legal amendments in order to improve the free legal aid in civil and criminal procedure

MEDIUM-TERM PRIORITIES

creation of a national legal aid office

The Program for the Implementation of the Strategy for Reform of the Bulgarian Judiciary further envisaged:

EQUAL ACCESS TO JUSTICE

Short-term priorities

Drafting legal amendments aimed at the improvement of free legal aid in civil and criminal cases.

Action:
1) Review and assess the effectiveness of all legislation affecting the provision of free legal aid in civil and criminal cases, including the Law on the Advocature; the civil and criminal procedure codes[;] and the Judicial System Act;
2) Develop a strategy for improving the operation of the system of providing such free legal services;
3) Draft appropriate legislative amendments consistent with the strategy.
   Responsible State Entity: MOJ [Ministry of Justice] in cooperation with the Supreme Council of Advocates
   Critical Assumptions: Availability of technical/financial resources to compensate drafting group experts.

**Medium-term priorities**
Creation of a national legal aid office
Action:
1) Implement legislative changes in accordance with the strategy and draft amendments referenced above;
2) Create national legal aid office to coordinate and implement legal aid assistance throughout the country.
   Timeframe: Third Quarter 2003
   Responsible State Entity: Dependent upon strategy and legislative amendments.
   Critical Assumptions: Passage of amended law(s) by legislature.

At present, a joint pilot project by the Ministry of Justice and the Open Society Foundation–Sofia is working to establish procedures, rules, scope, and financing of a public defenders office in Bulgaria.
In light of these developments, the European Commission’s 2002 Regular Report on Bulgaria’s Progress Towards Accession still notes:

Whilst the legal framework for access to justice and legal aid is essentially adequate,\(^1\) there are significant problems in implementation and ensuring sufficient budgetary resources. Neither the Ministry of Justice nor the judiciary keeps official statistics, but surveys conducted indicate that in around 50% of cases at the pre-trial phase and around 30% of cases during the trial, defendants do not actually have legal representation. Funding for this comes out of the general budget for the judiciary, which remains very low. However, the Strategy for the Reform of the Judiciary... foresees improvements in the medium term through establishment of a National Bureau for Legal Aid.\(^1\)

The situation of access to justice in Bulgaria, from the perspective of protection of the rights of individuals within judicial proceedings, has remained unchanged. There is, however, a clear political will for reform. Still, that will needs to be vested in practical action if the goals and objectives stated are to be achieved in compliance with the political commitments so far assumed.

**9. Recommendations**

In view of the above, the normative specification of the right only to legal protection and its procedural guarantees is not sufficient to provide for and ensure effective
and equal access to justice. An entire system of authorities, procedures, and criteria for granting legal aid needs to be set up, as well as the provision of material and financial resources necessary for its operation.

The government needs to undertake an overall assessment of legal needs in the country in order to be able to define the areas where operation of the future legal aid system will be needed. This, in turn, will pre-determine the institutional model that will best satisfy the legal needs thus identified.

Besides this, the establishment of expense-tracking mechanisms and systems for monitoring quality and other elements related to legal aid is necessary in the country. In addition, the collection of detailed statistical data and analysis of that data are needed, in view of the accumulation of data for comparison that will allow for competent managerial decisions for improvement, if needed, of the systems operating at any given point in time.

The government also needs to take into consideration the existence of clear, explicit, and unambiguous international standards in the area of access to justice, which moreover are binding, in particular by virtue of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The government of Bulgaria will need to decide on the scope, structure, and manner of funding of the new legal aid system, on the basis of statistical information, the assessment of legal needs, and international standards. It will have to consider the legal aid models established across the European Union in various branches of the law.

Irrespective of any specific legislative or managerial decisions, however, the government needs to be reminded that the legal aid system must be:

- comprehensive, with regard to the branches of law (civil, administrative, criminal), judiciary, extrajudicial needs, and individuals (eligibility based on need);
- effective, which also means collecting data on operations, analyzing that data, and responding to needs for improvement where problem areas are identified; and
- sustainable, so that its operation is secured through financial and other resources.

Unless all of the above activities are performed successfully, problems with regard to the access to justice will remain unresolved.

Notes

3 See State Gazette no. 5 of 2002, where a list of all registered attorneys-at-law is published.
5 No explanations may be provided without effective access or appointment of counsel.
7 Interpretative Decision No. 39 of 7 June 1984, criminal case No. 31/84, GACCC.
9 See European Court of Human Rights, Judgment of 10 June 1996, in the case of Benham v. U.K, which indicates that where the punishment for a crime is imprisonment, the interests of justice would generally require legal representation by a lawyer.
10 For example, Decision No. 42/28, October 1985, General Assembly of the Chambers Hearing Criminal Cases of the Supreme Court, in criminal case No. 35/85.
12 See section 2.1.2.
13 c) claimants—employees—with regard to claims concerned with determination of salary, as well as with regard to other claims based on employment contracts;
14 d) claimants—members of labor and industrial crafts cooperatives—with regard to claims for remuneration for work therein;
15 e) (Repealed, State Gazette No. 62/2002);
16 f) claimants—with regard to claims based on their rights as inventors;
17 g) claimants—with regard to claims for alimony.
18 See section 2.7.
19 See section 3.7.
22 In the light of the present report, this statement appears to be incorrect.
ACCESS TO JUSTICE COUNTRY REPORT: CZECH REPUBLIC

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EXECUTIVE SUMMARY

The importance of effective access to legal services by indigent individuals in a democratic society has not yet been recognized in the Czech Republic. Currently, the country fails to guarantee equality before the courts as mandated by Article 14, paragraphs 3(b) and 3(d), of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights. Although legal aid is both rare and beyond the means of many parties, the government has failed to specify mechanisms for the provision of legal aid. The unavailability of legal aid makes it extremely difficult for many people either to defend themselves against criminal charges or to seek to vindicate their rights through the legal system, including the protection of their human rights at the Constitutional Court. Other procedural defects, such as the costs of representation, court fees, and the possibility of being required to pay the legal costs of the opponent, add to the difficulties in attaining vindication of rights. These provisions often block indigent people’s access to justice, since they have a disproportionate impact on vulnerable groups such as ethnic minorities, women, pensioners, and prisoners.

The constitutional provisions of the Charter of Fundamental Rights and Freedoms guarantee everyone the right to legal aid in proceedings before courts or other state authorities, from the beginning of the proceedings. However, these guarantees have not been sufficiently incorporated into substantive law. The existing provisions are scarce and vague and in practice cannot secure effective access to justice for the poor.

In criminal proceedings, the law offers the possibility of free legal representation to the defendant who proves that he or she does not have sufficient financial means to pay for his or her defense. This right applies whether or not representation is mandatory due to the accused’s personal circumstances and the gravity of the possible
penalty. However, no uniform means test criteria have been established by the state to determine who exactly is entitled to free legal aid; in practice, this determination is made on a case-by-case as well as a court-by-court basis. Another serious flaw in the system of legal aid in criminal cases is the absence of selection mechanisms of individual attorneys. The procedure for selection of the attorney is vaguely mentioned by an internal regulation of the Ministry of Justice. However, the regulations do not ensure the transparency, fairness, and quality of defense. With regards to the requirement of an independent judiciary, it is a point of concern that the presiding judge or judge (in pretrial proceedings) is appointing defense attorneys based on his or her own broad discretion, limited only by vague recommendations of the Rules on Court Administration. Moreover, practice indicates that in cases of indigent defendants, the judges tend to appoint attorneys who do not prolong the case and are passive in their conduct.

In civil proceedings, every individual is responsible for obtaining his or her own legal aid. The court decides on submitted allegations and admissible evidence and does not inform the party of relevant substantive law. Thus, in the absence of legal counsel, a passive or unskilled party could lose the case even though facts and law were on his or her side. There are no established provisions with regards to free legal aid in civil suits. The law merely states that the judge will appoint a representative for a person only if he or she meets the requirements for exemption from court fees and if the defense of the party’s interests so requires. When appointing attorneys in civil cases, the wealth of the party has no bearing on the decision. The party’s property or income is taken into consideration only in waiver of court costs. The Law on Court Fees sets fees either by fixing an amount or by calculating a percentage of the total expenses involved in the case. In some cases, court fees may be waived upon request if the applicant cannot afford them and if his or her claims are not manifestly ill-founded. The applicant for the exemption has to provide information about his or her property and income. However, a detailed, transparent, and functioning means test has not been established, and the decision is left to the discretion of a particular judge. While applications for court fee exemption are frequent, requests for appointment of a representative in cases of a waiver are rare, and in practice courts rarely grant either.

In administrative proceedings, there is no procedure with regards to the provision of free legal aid, with the exception of the administrative justice proceedings that went into effect as of 1 January 2003. No free legal aid mechanism exists for proceedings before the Constitutional Court.

In all proceedings, parties unable to hire a lawyer may ask the Bar Association to designate an attorney for them. The Czech Bar Association has its own rules on granting legal representation. Applicants are not necessarily means-tested but must show that they have privately approached and
been refused by two other attorneys. It must be stressed that this procedure is not explicitly linked to the right to free legal aid, but falls within the provisions governing the rights and obligations of the specific profession. Thus, in many instances it appears to be a rather makeshift response to the need to implement a constitutional right. The Bar Association’s system cannot be considered an effective mechanism for providing legal aid to the poor, due to a very low awareness of it. The Bar Association has not undertaken any large-scale publicity campaign aimed at informing the general public of the possibility of such assistance. The information is only placed on the Bar’s Internet site. It is highly unlikely that vulnerable groups will gain information about the mechanism via the Internet, as they generally have neither access to the Internet nor the skills necessary to use it.

Furthermore, the Ministry of Justice does not record the number of cases per year in which the courts grant legal aid, nor do the public and the decision makers know how many of these cases involve free legal aid. There is no special legal aid budget, and no information is available as to the actual funds spent on free legal aid.

Fee-shifting provisions in Czech law and court fees are other major disincentives facing indigent individuals who seek protection of their rights in the courts.

In addition, the quality and effectiveness of legal aid vary significantly in practice. Given the lack of mechanisms available for reviewing the quality of legal representation, it is uncertain whether the system of delivering legal services to indigent individuals fosters effective representation.

In conclusion, the Czech Republic’s current provisions for free legal aid simply do not rise to the standard mandated by its constitutional and international obligations. In order for the Czech Republic to improve the situation, it must create a mechanism by which indigent complainants or defendants can obtain legal aid that is effective and independent.

1. Introduction

The constitutional provisions of the Charter of Fundamental Rights and Freedoms very generally guarantee everyone the right to legal aid in proceedings before courts, other state institutions, or public administration authorities from the beginning of the proceedings. This legal aid should be understood broadly and includes not only legal representation in the courts (litigation) in criminal, civil, administrative, and other matters but also legal counseling if such aid is needed “in the procedure.” Legal representation means contractual representation or representation similar to contractual representation if a representative was appointed to an individual. Legal representation, according to the Charter, is not statutory legal representation as in the case of children or persons without procedural capacity; nor is it legal counseling in proceedings other than those before the institutions specifically listed in the Charter. Legal aid also does not cover drafting legal
documents outside of proceedings, such as contracts or last wills. These are not part of the right to legal aid guaranteed by the Charter.  

Thus, the access to legal aid in the Czech Republic is a fundamental right guaranteed by the constitutional order. Accessibility of legal aid does not, however, depend only on the offer of legal services. Accessibility also depends on the availability of these services. While the offer of legal services in the Czech Republic is broad and comparable to those of the countries of the European Union, the issue of availability of legal services to poor and low-income groups in the population is addressed only briefly and marginally in practice.

In 2001, the Czech Republic had 10,291,927 inhabitants. The judicial system consists of district (okresní), regional (královský), and upper (vrchní) courts. In Prague, the district (obvodní) courts and the Municipal Court (Městský soud) carry out the tasks of the district and regional courts, respectively. In Brno, there is only the Municipal Court (Městský soud). There are a total of eighty-six district courts, eight regional courts, and two upper courts (in Prague and Olomouc). The highest court of appeal is the Supreme Court (Nejvyšší soud). As of 1 January 2003, there is also the Supreme Administration Court (Nejvyšší správní soud). The separate Constitutional Court (Ústavní soud) serves to protect the constitutional order of the state and respect for constitutional rights and freedoms.

Legal aid is usually provided by professionals—that is, by persons who, according to the law, are entitled and, in some instances, obliged to provide legal aid as a part of their profession. There are different types of legal professions that can provide legal aid in a legally determined framework: attorneys, notaries, tax advisers, patent representatives, etc. The position of attorneys in providing legal aid is unique in that only attorneys are entitled to provide legal services in all matters. In general, to become an attorney a law school graduate must work as an attorney in training, as a “concipient” for another attorney, for three years and pass the Bar Association exam. The Bar Association has its registered office in Prague and maintains eight regional centers. Membership in the Bar Association is obligatory for all attorneys. Currently, there are about 6,200 licensed attorneys registered with the Bar Association.

Before 1990, when it was privatized, the Czech advocacy had the nature of a state service, even though formally it kept certain attributes of independence. Conditions for providing free legal representation were regulated by laws of the legal profession. There was a provision that legal representation was provided for lower prices or for free in cases when justified by the personal and financial means of a citizen or when there were other special reasons. The decision on granting such legal assistance was issued by a chairman of the advocacy center (advokátní poradná) in which attorneys were working. In this system, it was possible to ensure free legal assistance by attorneys in such a way that attorneys were oblig-
ed to carry out this duty. Those individuals who fulfilled conditions for reduced fees or free legal aid submitted evidence justifying their request to an attorney, who requested a decision from his or her supervisor. The attorney had only a limited interest in the financial results of his or her work, so the attorney did not have any reasons to deny free representation. Thus, although the state did not subsidize or pay from its budget the costs of free legal aid, legal aid functioned relatively well in the framework of a semi-state system of advocacy. The system of redistribution throughout an entire profession created financial resources for covering costs of free legal aid or legal aid at reduced prices.

During the period of transition from communism, the existing system was significantly modified. The Advocacy Tariff, valid from July 1990 to June 1996, permitted attorneys to provide legal aid for free only in matters of simple information or with the consent of the Board of the Czech Bar Association. An attorney could reduce his or her fee by half if desired. Currently, there are no limitations on attorneys with regard to providing their services for lower fees. For detailed information on the current system, see the discussion below.

Currently, administrative authorities are obliged to provide individuals and legal entities with aid and information in order to prevent them from harm in proceedings resulting from their lack of knowledge of legal norms in administrative proceedings. A similar obligation used to be imposed on courts in civil cases. However, after 31 December 1991, this was reduced to a duty to inform the parties of their procedural rights and duties and to give them the full opportunity to exercise their rights.

2. Criminal law: Effective access to the judicial system for the indigent in criminal cases

2.1 Right to counsel

2.1.1 Constitutional guarantees of the right to counsel and the right to legal aid

The constitutional order of the Czech Republic establishes the right of the individual to legal aid as a special individual right. This right is derived from the principle of equality of parties in the process and from the right to judicial protection of rights and legitimate interests that belong to everyone, not only to citizens.

The judicial protection of rights in the Czech Republic is based on Article 90 of the Constitution, which makes the protection of rights a primary task of the courts. The constitutional principle of judicial protection is further developed in the Charter of Fundamental Rights and Freedoms (hereinafter, the Charter). Section V guarantees the right to judicial and other legal protection and establishes the basic principles of this right.

Equality of parties before the court is guaranteed by Article 96, paragraph 1, of the Constitution as a universal principle
applicable to all proceedings before the court, including criminal proceedings. Article 37, paragraph 3, of the Charter (in connection with the principle of judicial or other legal protection) guarantees the principle of equality in proceedings and equality of arms of the parties in the proceeding. In the rules on criminal procedure (the Code of Criminal Procedure), the equality of arms is not explicitly stated, however. It is derived from the so-called “accusation principle” of Article 2, paragraph 8, of the Code of Criminal Procedure. This principle is applicable only to criminal proceedings before the court and does not apply to pretrial criminal proceedings.

In addition, promulgated treaties, which the Parliament has consented to ratify and which bind the Czech Republic, form part of the legal order of the Czech Republic. In cases in which a treaty adds to or conflicts with a law, the treaty applies.

As for the right to legal representation, Article 37, paragraph 2, of the Charter guarantees the right to legal aid in all proceedings before courts, other state institutions, or authorities of public administration, from the beginning of the proceeding. For criminal proceedings, the Charter specifically sets out the right of the accused to defend himself to herself either pro se or with the assistance of counsel, and it establishes the basis for mandatory defense. The Charter further states that the law shall specify the situations in which the accused is entitled to counsel free of charge.

2.1.2 Right to counsel in criminal proceedings

The right to legal aid belongs to the main principles of criminal procedure and is exclusively governed by the Code of Criminal Procedure. All criminal procedure authorities are obliged, in every stage of a criminal proceeding, to inform the accused of the rights facilitating full implementation of his or her defense as well as the right to choose an attorney.

The right of the defendant to legal representation, that is, to choose an attorney, is further set out in Article 33, paragraph 1, of the Code of Criminal Procedure. The specified rights can be enjoyed by the indicted person even if he or she lacks legal capacity or if the person’s legal capacity is reduced. The legal assignee can exercise these rights to the advantage of the defendant even against the defendant’s will. If the legal assignee cannot exercise these rights and if there is a risk of default, the presiding judge or the state’s prosecutor in the preliminary proceedings can appoint a guardian to exercise these rights. The defendant can select two or more attorneys for himself or herself.

Extent of legal aid

The defendant is entitled to legal aid from the beginning of the process and has a right to consult his or her lawyer even dur-
ing operations performed by criminal procedure authorities. He or she can ask to be interrogated in the presence of a lawyer and request that a lawyer take part in other pretrial operations. From the beginning of the procedure, the attorney is entitled to be present at all investigative acts if the results can be used in the proceeding before the court (unless the performance of the act cannot be postponed and the attorney was notified). If the defendant is in pretrial detention or in prison, he or she can talk to his or her lawyer without a third person present.

However, before the amendment of the Code of Criminal Procedure in 2001, an individual summoned to provide an “explanation” was not entitled to the presence of an attorney. According to Article 158, paragraph 3, of the Code of Criminal Procedure, the police can gather necessary evidence and explanations in order to clarify and examine facts on suspicion that a crime was committed. Within these guidelines, they can ask individuals (including “suspects” or potential future defendants, before notification of accusation) to provide them with an explanation, which is a form of interrogation used before the commencement of the criminal proceeding.Prior to the amendment, investigators used to tell those persons: “You are not accused, and only an accused person has a right to legal aid”—despite the fact that the Decision of the Constitutional Court from 5 June 1996 interpreted the relevant provisions in such a way that legal aid also covered in providing an explanation. Thus, everyone should have been entitled to the presence of an attorney during such an operation. In the reasoning of its decision, the Constitutional Court stated that its legal opinion was not influenced by the fact that “there is a lack of explicit legal provisions . . . because there is an absolutely clear regulation contained in the norms of the highest legal power, i.e., the Charter and the Constitution.”

A new provision of the amended Code of Criminal Procedure, effective 1 January 2002, states: “[W]hen providing an explanation, everyone is entitled to legal aid of an attorney. If the explanation is provided by a minor, his or her legal assignee must be notified about the operation in advance; this does not apply when the operation cannot be postponed and the presence of the legal assignee cannot be secured.” The provision is aimed at eliminating the widespread practices of the police and investigators of ignoring the legal opinion of the Constitutional Court. From a comparison of these two sentences, it is obvious that if the individual providing an explanation insists on the presence of the attorney, the operation cannot be carried out without the attorney’s presence, even if it is not possible to postpone the operation and secure the presence of the attorney without delay. If the attorney is present when the explanation is provided, his or her rights and duties are similar to those in the criminal proceeding. However, so far, there is no data available regarding any changes
in practice, and the practical impact of the amendment cannot be determined yet.

In the accelerated preliminary procedure,\textsuperscript{30} which is carried out by police authorities and should be principally terminated in fourteen days, there appears a new procedural subject, the “suspect.” According to Article 179b of the Code of Criminal Procedure, an individual becomes a suspect in the accelerated criminal procedure from the moment of the beginning of an interrogation, at which time the person must be informed about the basis of the suspicion against him or her. From this moment, the individual has the same rights as an accused person, including the right to select an attorney and consult with him or her without the presence of a third person. If the suspect does not choose an attorney before a given deadline, the attorney will be appointed for him or her for the period of detention.

Failure to secure the full enjoyment of the right to a defense can be a reason for the presiding judge to order a preliminary hearing of the indictment, if the violation of procedural rules cannot be redressed in the proceedings before the court.\textsuperscript{31} In addition, the appellate court should cancel the verdict if, in the first-instance proceedings, the provisions securing the right to defense were violated and if that violation could have an impact on the correctness and legality of the reviewed part of the decision.\textsuperscript{32}

2.1.3 Right to counsel and right to legal aid in non-criminal proceedings when deprivation of liberty is at stake

**Proceedings for placement in juvenile penitentiary**

Legal aid in the proceeding for placement of a child into a reformatory depends on the procedure by which the child is placed in such an institution. Determination depends on the age of the child and the seriousness of the offense.

*Criminal proceedings*: The court can decide to place the child in a reformatory in a criminal proceeding against a minor.\textsuperscript{33} In such a case, the child (minor) is subjected to a mandatory defense and is provided with legal representation by an attorney from the beginning of the proceeding.\textsuperscript{34}

*Civil proceedings*: The court will impose institutional protective care on a child who has reached the age of twelve and is younger than fifteen if he or she committed an act for which the Criminal Code\textsuperscript{35} allows imposition of the exceptional punishment of imprisonment exceeding fifteen years, or imprisonment for life. The civil court can also do so if such a decision is necessary for ensuring due education of a child younger than fifteen who committed an act that would otherwise be a crime.\textsuperscript{36} The procedure is governed by the Civil Procedure Code. The child must be represented by his or her legal assignees, and the
provision on legal aid in civil cases applies accordingly (see below).

**Proceedings for placement in special psychiatric institutions, drug users, alcoholics, etc.**

Legal aid in proceedings for placement in a special psychiatric institution also depends on the type of the proceedings where such a decision is taken.

If the decision is imposed in criminal proceedings, all provisions of the Code of Criminal Procedure, including those on legal representation, apply accordingly. Execution of the treatment is subject to the control of the district prosecutor.

However, if the placement is not ordered in a criminal proceeding, Czech legislation does not contain any specific provisions on legal aid in relation to administrative placement into psychiatric institutions or other specialized medical institutions, including institutions for drug users or alcoholics. The individual has to rely on the insufficient provisions of administrative procedure or, eventually, civil procedure. The placement itself is governed by the Health Care Law and the general provisions of administrative law apply (see below).

The decision on placement into an institution for alcoholics or drug addicts is issued by a medical institution to which a specialized institution belongs. Institutional care is obligatory only if ambulatory care was insufficient or if a person declines voluntary treatment. All civil law provisions apply accordingly, including those on legal aid, though insufficient.

**Police detention**

Apart from an arrest in a criminal proceeding, an individual can be detained based on the provisions of the Law on Police. Detention in a police cell cannot last longer than twenty-four hours. A police officer has to inform the detainee about his or her rights. However, at this stage, there is no specific provision on legal aid relating to this category of detainees.

**Proceedings in connection with violations of immigration laws**

In addition to police detention, foreigners can be limited in their liberty in two other situations: in a case of administrative expulsion, and in a case of extradition according to an international treaty. The Law on Foreigners contains no specific provisions on the right to legal representation in proceedings on administrative expulsion or in proceedings on eventual subsequent detention. Proceedings on administrative expulsion fall within the category of administrative proceedings, where there is no legal aid provided based on the law. However, judicial review of the proceedings (civil procedure) requires representation by an attorney (see below). The proceeding of judicial review of expulsion detention is governed by the provisions on civil procedure, and all the relevant provisions (including inadequate ones on legal aid) apply. Accordingly, police authorities are obliged
to provide a participant with an opportunity to fully defend his or her rights, and obliged to provide him with help and information in order to prevent harm because of lack of knowledge of legal norms.

**Expulsion custody**

A foreigner can also be detained for an execution of the expulsion sentence imposed in a criminal procedure. The decision on expulsion custody is issued by the presiding judge if there is a danger he or she will hide or otherwise hinder the execution of the expulsion. For the procedure on expulsion custody, all the provisions on custody apply accordingly. As for legal aid, according to Article 36a of the Code of Criminal Procedure, the defendant falls into the category of mandatory defense (see section 2.2.1) during the enforcement proceedings (expulsion is a type of enforcement proceedings), where the court decides in a public hearing that the defendant must have an attorney *inter alia* if he or she is in custody.

**Prisoners**

In assertion of their rights and legitimate interests, individuals serving an imprisonment sentence can file complaints and petitions to respective institutions, and the Law on Execution of the Imprisonment Sentence gives a convict the right to the legal aid of an attorney in this regard. The attorney is then—within the scope of his or her representation—entitled to correspond with the inmate and talk to him or her without the presence of a third person. The law does not contain any provisions for free legal aid. It can be assumed that the only option of an inmate to obtain free legal aid in related matters is through the Bar Association.

Similar opportunities are not provided to persons held in pretrial custody. Moreover, there are limitations on contact with the attorney who is representing the detainee in other matters than the criminal proceedings for which he or she is detained. If the reason for pretrial custody is the danger that the defendant would influence unheard witnesses or co-defendants or interfere in clarification of important issues in the investigation (“collusion custody”), he or she can receive a visit from an attorney representing him or her in another matter only with the permission of the authority in the criminal proceeding.

### 2.2 Right to legal aid: Eligibility criteria for granting legal aid in criminal cases

#### 2.2.1 Substantive criteria

The Czech criminal process determines a certain area of cases where the defendant has to be represented by an attorney regardless of whether he or she wishes to be—the so-called mandatory defense. The law establishes rather precisely the possibilities and conditions for mandatory defense. The defendant must already be represented by an attorney in the preliminary pro-
ceedings and remain so until the end of the whole criminal proceeding, that is, until an effective judgment, under the following circumstances:\textsuperscript{51}

- if he or she is in pretrial detention, in prison, or under medical observation in a hospital in order to evaluate his or her mental state for the purposes of the criminal proceeding;\textsuperscript{52}
- if he or she is deprived of his or her legal capacity, or if it has been limited;
- if it is a proceeding against a minor;\textsuperscript{53}
- if it is a proceeding against a fugitive;\textsuperscript{54}
- if the court and, in the preliminary procedure, the state attorney find it necessary, especially when there are concerns that physical or mental deficiencies of the defendant may affect his or her ability to defend himself or herself;\textsuperscript{55}
- if a proceeding takes place with respect to a criminal act where the law specifies punishment of imprisonment with the upper penal limit exceeding five years;\textsuperscript{56}
- if a detainee is subject to an accelerated procedure\textsuperscript{57} in an extradition proceeding or a proceeding where imposition of protective medical treatment is decided, with the exception of anti-alcoholic protective medical treatment.\textsuperscript{58}

During the enforcement proceeding,\textsuperscript{59} where the court makes its decision in a public hearing, the defendant must have an attorney under the following circumstances:\textsuperscript{60}

- if he or she is deprived of his or her legal capacity, or if it has been limited;
- if a minor is paroled who has not reached the age of eighteen as of the public hearing date;
- if he or she is in pretrial custody;
- if there are doubts about his or her capacity to defend himself or herself adequately.

The defendant must also be represented by an attorney during proceedings against effective judgment, namely, in proceedings based on a breach of law complaint, which is an extraordinary remedial measure of the minister of justice to the Supreme Court;\textsuperscript{61} in proceedings for appellate review (an extraordinary appellate procedure to the Supreme Court);\textsuperscript{62} and in proceedings for permission on a renewal proceeding (if circumstances or evidence unknown to the court were found that could have caused another result in the criminal proceeding), under the following circumstances:\textsuperscript{63}

- if his or her personal liberty is restricted, or he or she is deprived of legal capacity;
- if it is a crime for which the law requires punishment of imprisonment with the upper limit exceeding five years;
- if he or she is a minor and has not
reached the age of eighteen on the day of public hearing on the breach of law complaint or the renewal permission proposal;

• if there are doubts about his or her capacity to defend himself or herself adequately;

• if it is a proceeding against a defendant who has died.

Once a defendant falls into the category of mandatory representation, he or she is faced with the obligation of finding legal representation. If he or she does not choose an attorney by himself or herself, an attorney is appointed by the court (ex officio attorney). An ex officio attorney is not necessarily provided for free. The state covers the expenses of the attorney, but if the defendant is convicted, he or she is obliged to reimburse the state for the costs of the legal defense, unless entitled to representation free of charge (see section 2.2.2).64

2.2.2 Financial criteria

To a certain extent, the legal bases for granting free legal aid were improved after the 2001 amendment of the Code of Criminal Procedure. The amended Code of Criminal Procedure provides the possibility of defense free of charge or for a reduced fee for the defendant who proves that he or she does not have enough money to pay for defense expenses. In such a case, the expenses of the defense are carried by the state.65 The obligation to prove that the defendant does not have sufficient means to pay for his or her defense rests with the defendant himself or herself.

Theoretically, the right to free legal aid goes beyond the mandatory defense as established by the Code of Criminal Procedure.66 Every defendant (even outside the category of mandatory defense) can request an appointment of a lawyer.

The process of determining whether the defendant is indigent is arguably one of the most important decisions the courts will make in resolving the issue of representation. Given the significance of this decision, it is surprising that even current legislation does not provide formal criteria for determining whether a defendant is indigent. The question remains: how should the defendant prove his or her negative financial situation? There is no income level or property amount established by the law, so it should be possible to consider a whole range of documents: tax declarations, statements by the defendant’s employer about the level of the defendant’s income, statements from the labor office on unemployment benefits, pension determination sheets, declarations of a spouse, etc. A full list of possible proofs of financial situation should not be exclusive. However, administrative problems might occur, and some defendants will certainly submit only a statement of affirmation, e.g., that they are homeless. It is not clear how the court will evaluate the submissions.

In light of this fact, it must be men-
tioned that the law does not set any deadline by which respective institutions are obliged to decide on the defendant's request.

The Code of Criminal Procedure does not prevent a situation in which an indigent defendant selects an attorney, grants power of attorney, and informs the attorney about his or her difficult financial situation. Such an attorney can submit a given request on the defendant's behalf. The language of Article 33, paragraph 2, does not lead to the conclusion that the obstacle in granting free legal aid is the fact that the defendant selected the attorney by himself or herself. If the defendant proves the insufficiency of his or her proprietary situation, the court should grant free or reduced-fee representation. While this is not explicitly written in the law, it is an argument that is made by attorneys and is therefore a theoretical possibility.

2.2.3 Legal aid for victims of crimes

A similar right to free legal aid or to legal aid for reduced fee was granted to an indigent victim of a crime by the 2001 amendment of the Code of Criminal Procedure. The amendment of the Code of Criminal Procedure No. 265/2001 significantly broadened the rights of victims to include the possibility of free legal representation (or, eventually, representation for a reduced fee) to a victim who files a request for compensation. This right is not conditioned by a specific outcome of the criminal proceeding against the perpetrator. This does not apply, however, if, in regard to the nature of applied compensation or its amount, the representation by a representative would appear redundant. The representative in this case does not need to be an attorney. A weakness of the current legislation is that the right extends only to victims who file for compensation in the criminal proceeding. Those victims who do not do so or cannot do so are excluded. Those applying the law in practice will also have to find meaningful criteria for determining when the representation would be “redundant.”

The law assumes the same procedure for granting legal aid in these cases as in cases of indigent defendants: an indigent victim must file a submission, including proof, for granting legal aid via the state prosecutor. As with the indigent defendant, the law does not specify what type of evidence must be submitted in order to prove insufficient financial resources. The difference is that in the case of a victim, the state prosecutor accompanies the proposal with his or her own statement.

If the conditions are met, the presiding judge or the judge in the preliminary procedure appoints an attorney to be a representative. The costs related to such a representation are carried by the state. If the reasons that led to the appointment of a representative for a victim cease to exist or the representative cannot further represent the victim, the presiding judge or the judge in the preliminary proceedings decides ex officio on dismissal of the obligation to represent the victim.
New provisions on legal aid to the victim are connected to provisions on the right of a victim to request that the state carry the expenses for any expert opinions that the victim requests.\textsuperscript{73}

2.3 Other cases

Indigent defendants who do not meet the criteria for judicial appointment or do not succeed in their requests to the court for attorney appointment can turn to the Bar Association. According to Article 18, paragraph 2, of the Law on Advocacy,\textsuperscript{74} the Bar Association will appoint an attorney to one who cannot obtain legal aid elsewhere. However, the law does not establish any obligation of the Bar to do so. Moreover, the appointment of the attorney by the Bar Association is not directly linked to the financial situation of an applicant. The practice of the Bar Association is to appoint an attorney if the applicant was refused at least by two attorneys, for whatever reason.\textsuperscript{75} There is no means test required by the Bar Association.

2.4 Procedure for granting legal aid

Mandatory defense

If the defendant does not select an attorney in a case of a mandatory defense, a deadline is set for him or her to choose one.\textsuperscript{76} Upon the expiration of this deadline, even if the defendant explicitly rejects or does not want to choose an attorney, he or she is appointed an attorney without unnecessary delay for the period of the mandatory defense. If there is more than defendant in a case and their interests in the criminal procedure do not conflict, one attorney is usually appointed for all of them.\textsuperscript{77} The decisions on appointment of the attorney and on cancellation of the appointment if the reasons for mandatory defense cease to exist are issued by the presiding judge or, in the preliminary proceeding, by the judge.\textsuperscript{78} The attorney is appointed by a written measure that has to be delivered to the defendant as well as to the attorney. No appeal is permitted against this measure. The fact that the attorney was appointed does not eliminate the right of a defendant to select an attorney later.

The appointed attorney is obliged to take over the defense. However, for serious reasons or at the defendant's request, the attorney can be released from the defense obligation upon him or her, in which case another attorney is appointed instead. Release from the defense obligation is granted by the presiding judge in a trial proceeding or by the judge in a pretrial proceeding.\textsuperscript{79}

The relationship between the defendant and the attorney is created by the appointment. No further expression of will from the defendant or attorney is necessary; for example, the defendant does not sign a power of attorney for his or her \textit{ex officio} representative.
Appointment in cases when representation is not mandatory

Before the 2001 amendment of the Code of Criminal Procedure (which became effective in 2002), the provisions for granting free legal aid had a merely declaratory character. Criminal procedure completely lacked any procedural provisions on the manner of implementation of this right, because it did not state who was supposed to decide whether the defendant was entitled to free legal assistance, nor did it establish any remedies for the defendant in such a case.

The 2001 amendment brought certain improvements. Procedures by which an indigent criminal can obtain a free legal defense are outlined in a new paragraph 2 of Article 33 of the Code of Criminal Procedure, which states that “if the defendant proves that he or she does not have sufficient financial means to cover the costs of his or her defense, the presiding judge in the trial procedure, or the judge in the pretrial procedure, decides that he or she has a right to legal aid for free or for reduced fee. In this case, the cost of the defense is fully or partially covered by the state.” The proposal has to be filed by the defendant through the state prosecutor in the preliminary proceedings and, in the trial proceeding, directly to the court deciding in the first instance. With the proposal, the defendant must submit attachments justifying his or her request. Against a decision not to grant legal aid, the defendant can file a complaint that has a suspending effect on the procedure on payment of the fee. The same procedure is applied in the case of an indigent victim of a crime. The only difference is that the victim has to file an application in the preliminary proceedings through the state prosecutor, who then accompanies it with his or her opinion.

Mechanisms

The law does not regulate the mechanisms of attorney selection. The selection procedure is very vaguely governed by the Rules on Court Administration, which is an internal regulation issued by the Ministry of Justice. According to the Rules, the judge should usually appoint an attorney in three days. If the matter cannot be postponed, he or she should decide immediately, or when he or she is available, and deliver the file to the investigator or to the state prosecutor. The Rules suggest that distribution of the cases of mandatory defense to attorneys should be more or less equal, so the court keeps a List of Attorneys residing in the district of the court. The attorneys who deliver to the court a written declaration that they are not interested in ex officio defense are marked differently, with a special note next to their names on the list. The court should respect those declarations if providing legal aid is not endangered or harmed with respect to the number of other attorneys available. When appointing a specific attorney, the judge should take into consideration the number of appointments of that particular attorney in a calendar year, in order to ensure equal appointment of those attorneys who are interested in this type of work. The appointment is marked
on the list with the number of appointments of the attorney in a given year, the number of the case in the given court, and the number of defendants if the attorney was appointed to several defendants in one case.\textsuperscript{85} There is no express obligation to update the list on a regular basis, but it is updated with respect to new memberships of attorneys in the Bar Association.

The mentioned provisions are, however, applied only to cases of mandatory defense. The procedure for the selection of attorneys in cases outside the scope of mandatory defense is not prescribed, nor is the deadline by which the presiding judge or pretrial judge should decide on the application.

2.5 Scope of legal aid

The defense attorney is obliged to provide the defendant with all necessary legal assistance and to apply the means and manners\textsuperscript{86} of defense as listed in the law, in order to defend the defendant’s interests efficiently, especially to take care that any facts exonerating the defendant or mitigating his or her guilt are duly and timely clarified in the proceeding, and thus contribute to correct clarification and decision of the case.\textsuperscript{87} In the pretrial proceedings, the attorney is entitled to make proposals on the defendant’s behalf, to file requests and corrective instruments on his or her behalf, and to look into the files and to take part in investigative activities. From the beginning of the proceedings, the attorney can be present at investigative acts if the results can be used as evidence in the proceedings before the court.\textsuperscript{88} Within the trial proceeding, the attorney is entitled to take part in all activities in which the defendant is entitled to take part. If the defendant is lacking legal capacity or if his or her legal capacity is restricted, the attorney can execute these rights, even against the defendant’s will.\textsuperscript{89}

Appointment of the attorney expires upon any termination of the criminal proceedings that is an effective and binding decision of the criminal court deciding as last instance, unless the authorization specified otherwise. On the defendant’s behalf, the attorney is then entitled only to file a request for an appellate review (dovolání), to participate in the proceedings on appellate review before the Supreme Court, and to file a petition for presidential pardon and a punishment deferment request.\textsuperscript{90} The representation does not cover a constitutional complaint.

However, if the attorney is not representing the client based on a private contract where the conditions for reimbursement are specified, the reimbursement of the attorney’s costs is governed by the provisions of the Advocacy Tariff (Advokátní tarif)\textsuperscript{91}. According to these provisions, the attorney can be fully reimbursed for the following acts:\textsuperscript{92}

- the first consultation with the client, including taking and preparing for defense;
- another consultation with the client, exceeding one hour;
- a written petition with a court or anoth-
er authority associated with the case itself;
• participation in pretrial procedure investigation operations—each two started hours;
• study of the file after the end of the investigation—each two started hours;
• participation in a hearing before the court or another authority—each two started hours;
• preparation of a written analysis of the case;
• an appeal, petition for an appellate review, and proposal for renewal of procedure (and ultimately, a complaint against dismissal of the proposal for renewal of procedure), and comment on them;
• an incentive to lodge a breach of law complaint and comment on it;
• the writing of a document on a legal operation.

The law also lists some acts for which the attorney is reimbursed at half of the tariff price, such as performance consisting of:

• a proposal for a preliminary measure, if it takes place after the proceeding has been initiated, or a proposal for securing evidence;
• a proposal for correction of a decision’s reasoning, for elimination of consequences resulting from a failure to meet a deadline, and for changing a decision by which the client was sentenced to pay benefits payable in the future or to make payment in installments;
• an appeal against a decision, unless it is an appeal in the case itself, and comment on such an appeal;
• proposals and complaints in cases where decisions are made in a public hearing, and comment on them, with the exception of an appeal, a proposal for procedure renewal, and incentives to breach of law complaint;
• in the event of a decision execution, the first consultation with the client, including taking and preparing for representation, writing a proposal for initiating a procedure, commenting on the proposal, representing the client at hearings, and writing appeals against decisions;
• participation in a hearing during which only a decision was declared.

2.6 Application of the legal aid norms in practice

Mandatory representation

In practice, legal representation is ensured for every defendant whom the law requires to be represented according to Article 36, paragraph 1, of the Code of Criminal Procedure. If the right to counsel is violated, courts reject the indictment and return the case back to the state prosecutor or the police; ultimately, appeal courts return it to the first-instance court. The following case can be mentioned as an example:
The Upper Court in Prague returned to the Regional Court a case in which the defendants had not selected, and had not been appointed, an attorney, and in that situation they were interrogated by the police in the presence of an attorney who was later appointed to them. The Upper Court stated that the lack of presence of an attorney at a time when no attorney was appointed was not remedied by the fact that there was an attorney present who was appointed later in due course of law. Thus, the decision of the first-instance court was canceled in all parts relevant for defendants and returned back to the first instance for a revision and new decision.\(^n\)

Certain problems arise in regard to other forms of detention (custody) outside the main court proceedings. This applies in particular to expulsion custody, which is part of the enforcement proceedings. Some courts are refusing to appoint an attorney to defendants detained in expulsion custody, although, according to the Code of Criminal Procedure, they are entitled to mandatory legal representation to the extent that the court decides in the public hearing. At the same time, the upper courts were usually remedying the situation within the appeal proceedings. For example:

The City Court in Prague canceled the decision of the District Court for Prague 1 on the extension of the expulsion custody of the defendant R.S. and ordered his release. In the decision, the City Court \textit{inter alia} declared a violation of the defendant’s right to defense, due to the fact that the District Court decided the case without giving the defendant the right to choose an attorney or appointing an attorney for him. The Court stated that “from the point of view of defense rights and according to provisions on expulsion custody... it is necessary to analogically apply provisions ...on mandatory defense. In the same condition, a defendant serving an imprisonment sentence would be entitled to the presence of an attorney at his interrogation prior to court decision.”\(^n\)

The practice of lower courts was recently affirmed by an interpretation of the Supreme Court that decided on the issue upon the initiation of the minister of justice, in order to unify varying practice of lower courts. The Criminal Panel of the Supreme Court, in its Opinion from 7 August 2002, declared that the mere fact that the defendant is detained in expulsion custody does not justify \textit{ex lege} obligation of the mandatory defense.\(^n\) The Court issued this opinion despite a negative statement from the ombudsman office and the Regional Court in Plzeň. They had objected that during certain procedural acts of expulsion custody, a qualified legal representation would be desirable, in particular in regard to the length of the custody and its eventual extension. They believed that in such instances, a legal counsel would be immensely helpful to the detainee, because he or she not only can assist with petitions
and complaints against the length and legality of custody, but also can assist the detainee with the acquisition of necessary documents for expulsion.

Notwithstanding the requirement of a mandatory defense in the case of Article 36, paragraph 2, of the Code of Criminal Procedure (when the court or state prosecutors find it necessary that the defendant be represented, due to physical or mental conditions), there exist no guidelines for criminal procedure authorities on when to apply these provisions. Criminal procedure authorities must rely on their own estimation, and apparently the appointment is applied only in very limited circumstances. Moreover, judges rarely make use of the provisions of Article 36, paragraph 2, and appoint attorneys only in the cases explicitly listed in the law. The criminal procedure authorities and the Ministry of Justice do not keep any statistics on the use of this instrument in practice and have not been able to provide any indications upon which an estimate could be made.

The main problems in mandatory defense cases, however, arise where indigent defendants are concerned. Selection of an attorney for those defendants who possess necessary financial resources is fairly simple: they retain private counsel to represent their legal interests. The majority of those who do not exercise the right to select an attorney are defendants who lack sufficient means.

*Ex officio* representation is often only a formality as far the quality of legal services is concerned. Mandatory case representa-
tion does not necessarily mean that the defendant is not paying the costs of legal defense. On the contrary, upon conviction the defendant is required to reimburse the state for the costs of his or her legal defense unless entitled to free legal representation.96 Many defendants, however, are not aware of this fact and often learn about this obligation only after they are convicted. In the meantime, they regard their attorney as someone who is provided to them for free, and therefore they do not demand better performance. Formality and lack of effective legal aid has a disproportionate impact on the Roma minority and foreigners or other minorities living in the Czech Republic, e.g., Vietnamese or Chinese defendants, who are unable to defend themselves against criminal charges. To illustrate this, the following case should be mentioned:

A defendant of Chinese origin was tried by the Regional Court in Ústí nad Labem for the suspected murder of three persons and attempted murder. He was provided with an *ex officio* attorney. The proceeding suffered clear violations of the fair trial requirements. For example, the court interpreter, though certified, was unable to speak Chinese properly, to which defendant himself and other members of Chinese community in the country objected. The defendant filed requests for a change of interpreter, but these were rejected. Despite the severity of the charges and difficulties in evidence procedure, the *ex officio* attorney visited his client in pretrial custody only
once, was totally inactive during the whole proceeding, and did not file against any shortcomings of the proceeding. The defendant—unfamiliar with the legal system—thought that the attorney was acting on his behalf as a charity and, unable to communicate in Czech, did not object to the quality of legal aid provided. Upon the termination of the trial, in which he was sentenced to life imprisonment, a cellmate informed the defendant about the possibility of filing a constitutional complaint—a procedure not considered to be an act within the mandatory defense—and helped him to write a request to the Bar Association for an appointment. The Bar Association acted immediately and even appointed an attorney who could speak Chinese. The attorney appointed by the Bar Association visited the client in prison and subsequently contacted the original ex officio lawyer and requested him to provide him with the file without a delay, as the deadline for the submission of the constitutional complaint would expire in three days. The ex officio attorney informed him that he had already filed a petition for the submission of a breach of law complaint and was working on the constitutional complaint as well. He suggested it would be better if he filed the complaint, as the study of the court file would take several days while the constitutional complaint was on the way. None of this was true, and the deadline for the constitutional complaint expired.  

Free legal aid

Despite certain legislative improvements with regard to granting free legal aid to indigent defendants, the practice has not yielded any significant improvements. This is caused mostly by the lack of sufficient and effective information provided to defendants. The Code of Criminal Procedure does not impose any explicit obligations on the police, state prosecutors, and courts to inform the defendant about his or her right to free legal aid in particular. They have only a general obligation to inform him or her about all of his or her rights. Overall information is provided on a form with a list of rights, which forms a part of the file. The form is handed to the defendant to sign. The defendant is merely asked to read the form and sign it as a confirmation that he or she understands it.

As described above, Czech legislation lacks a uniform means test for indigent defendants and victims who are unable to pay for the costs of their legal representation. Thus, individual judges use different criteria for determination. For example, the judge of the Regional Court in Brno says that, in general, he requires similar evidence to that required in family disputes on children’s alimonies. His requirements, however, depend on the facts of the particular case and what the defendant claims. If the defendant says he or she is receiving a disability pension, proof from the social security bureau on the type and amount of pension would be required; in a case of social benefits, the judge would require statements from the social department; and so on. A court officer from the Regional Court in
Prague claims that the court would also require proof of the housing situation of the defendant: what type of housing he or she has, what rent is paid, whether allowances are received in regard to housing, and the like.\textsuperscript{100} The court officer from the Regional Court in Hradec Králové told the author of this report that before September 2002, the court used to proactively gather necessary evidence on a defendant’s social situation. The court would write requests for information to the place of the defendant’s permanent residence, for example, to the unemployment office or social offices as to his or her income, and to the police on whether he or she owned a motor vehicle and what type. This practice was abolished by decision of the Upper Court in Prague, which ruled in one case that provisions of the Code of Criminal Procedure must strictly apply and that the defendant must submit the evidence by himself or herself without active involvement by the court.\textsuperscript{101} At the same time, all interviewed individuals agreed that the requirement to prove their insufficient financial situation is burdensome, particularly if the defendant is in pretrial custody or imprisoned and thus limited in the ability to search for evidence. Moreover, the decision cannot be based on what the defendant claims; rather, it is based on what he or she can prove.

The Ministry of Justice claims it does not keep any data as to the number of attorneys appointed \textit{ex officio}, the number of requests for free legal aid after the 2001 amendment, and the number of defendants who were granted free legal defense upon conviction.\textsuperscript{102} Relevant statistics are not kept by individual courts either. They claim that in order to do this, they would have to examine every single criminal file of the court in order to provide statistics for the study, and they do not have the capacity for such a daunting job.\textsuperscript{103} Apparently, however, the number of relevant cases is so small that it does not constitute a statistically significant group. The Bar Association has provided the following figures, but there is no data on the nature of particular cases.\textsuperscript{104} The figures represent the number of all attorneys assigned in a given year by the Bar Association in general for all types of proceedings, although, according to the rough estimation of the Bar Association representative, approximately 20 percent were appointments in criminal cases.\textsuperscript{105}

<table>
<thead>
<tr>
<th>Year</th>
<th>1998</th>
<th>1999</th>
<th>2000</th>
<th>2001</th>
<th>1st Q 2002</th>
</tr>
</thead>
<tbody>
<tr>
<td>No. of requests granted</td>
<td>665</td>
<td>1,104</td>
<td>1,743</td>
<td>2,800</td>
<td>3,000</td>
</tr>
<tr>
<td>No. of requests granted free of charge</td>
<td>654</td>
<td>1,092</td>
<td>1,739</td>
<td>Not available</td>
<td>Not available</td>
</tr>
</tbody>
</table>

As was suggested above, the Code of Criminal Procedure does not prevent a situation in which an indigent defendant selects an attorney, grants him or her a power of attorney, and informs him or her about the defendant’s difficult financial situation. The attorney can then submit a given request on the defendant’s behalf.
There is no information available concerning whether this is happening in practice. In any case, due to the financial limitations of the ex officio defense, attorneys are hesitant to proceed in the suggested manner.

Another shortcoming of legal aid in criminal matters is a lack of transparency in the selection mechanisms of individual attorneys. The current selection is not based on the law but on the mentioned internal instructions of the Ministry of Justice in the Rules on Court Administration. Some have pointed out that the appointment of attorneys varies significantly throughout the state and at individual courts. For example, some judges assign as counsel those attorneys who are notoriously passive in the proceedings and are a guarantee of a “speedy” proceeding. Some appoint those with whom they have a relationship, e.g., former judges or prosecutors or friends. Some use a formal list of eligible attorneys or a systematic rotation method. There have been complaints made by some attorneys interested in ex officio representation that they are never appointed because they are too active in their defenses.  

Therefore, it can be concluded that there is no fair and transparent appointment system; “positive” and “negative” lists are created, but a preference for “friends” prevails. Moreover, despite the fact that the attorney is appointed by the court, very often the crucial component is how much the investigator who prepares the case likes the particular attorney. That mostly depends on whether the attorney does not cause “problems.” The investigator, who has the opportunity to influence a judge’s decision through direct intervention, often “advises” an indigent defendant to demand a certain attorney. Judges tend to respect this “wish” of the defendant.  

The lack of sufficient appointment mechanisms can in no way be remedied by the possibility of receiving an attorney from the Bar Association. Moreover, in contrast to the judicial appointment, the appointment of the Bar Association does not carry the force of a constitutive act—it is a mere order of a professional association to its member to provide a legal service. Based on this order, the attorney is obliged to provide legal services, but this obligation does not necessarily correspond with the wishes of the defendant with respect to his or her ideas about certain legal strategies or a whole defense.

Scope of the legal aid services

Certain doubts can also be raised with regard to the scope of the provided legal aid. Under the current Code of Criminal Procedure, the emphasis of an attorney’s work is on the trial proceeding, where the activity of the attorney is not limited. Since the 2001 amendment of the Code of Criminal Procedure, the attorney is no longer entitled to be present at all of the pretrial proceedings. According to the Ministry of Justice, the goal of the amendment in this part was to “limit income that attorneys very easily gained within the pretrial procedure by uselessly sitting at the interrogations of insignificant witnesses.”  

Further,
thermore, the attorney can be present only at the performance of an act that can be used as proof in the trial proceedings. It is true that the presence of some attorneys at some pretrial operations was not motivated solely by materiality to the defense and that they misused this service for fee reasons.\textsuperscript{111} However, there are other checks and balances to the possibility of such an abuse. The submission for the reimbursement of fees is reviewed by the court after conviction, and the defendant has the right to complain against the court decision on fees, e.g., that he or she did not give consent to the presence of his or her attorney at some operations and the attorney should not have been present at those operations without his or her consent.

Financial barriers

Financial aspects of the \textit{ex officio} representation also have a negative effect on the legal aid provided to indigent defendants. An \textit{ex officio} attorney has the right to have his or her fee and direct expenses reimbursed by the state pursuant to the regulations of the Advocacy Tariff. The request for reimbursement has to be filed within one year from the day when the attorney learned that his or her obligation to represent was terminated; otherwise, the claim ceases to exist. The amount of the fee and compensation for direct expenses is determined, upon the attorney’s proposal, by the criminal procedure authority whose final decision terminated the criminal prosecution and should be determined without unnecessary delay, two months from the proposal at the latest. In a court proceeding, the decision is made by the presiding judge of the first-instance court.\textsuperscript{112} The law also presupposes the possibility of providing an appointed attorney with an advance payment of fees and expenses before the termination of the criminal proceeding, if there are serious reasons justifying such a payment. The relationship between an appointed attorney and the defendant is not contractual but is provided based on the law of the court appointment. This has an impact on an attorney’s fees, as an attorney can be paid only for non-contractual fees determined by the Advocacy Tariff (see section 6.4). The reimbursement of the fees and expenses should be paid without unnecessary delay within thirty days of the decision.\textsuperscript{113}

This is what the law says. Nevertheless, the practice is that the attorneys have to wait several months and sometimes even a year before they receive their fees. Apart from delays in the delivery of decisions to the parties, the reasons behind the problem are issues like the exhausted budgets of courts, which lack funds for basic payments and expenses of courts, and the unsystematic and often negligent work of judges, state prosecutors, and judicial institutions. These institutions are then targets of complaints by attorneys even in cases for which they are not responsible. Before the amendment of the Code of Criminal Procedure in 2001, the main reason for delays was basically the failure to decide on the claim because the law had not established any deadline for the decision on attorneys’ fees. This should
have been eliminated by the amendment, but the practice shows that the deadlines are not strictly observed and attorneys still await decisions on requests filed as long as six months earlier.

The *ex officio* attorneys are paid and reimbursed for their services to the extent specified in the Advocacy Tariff (see section 2.5). However, if the attorney is supposed to provide a necessary legal assistance to the defendant and to apply the means and manners of defense, he or she should be able to prepare for the defense. This preparation, in a form other than a written submission to the court or participation in the operation, is not paid because it is not considered to be a performance under the Advocacy Tariff. The attorney also is not reimbursed for the time he or she spends awaiting an interrogation of a witness who fails to appear or appears late, unless the attorney obtains written permission from the criminal procedure authority—and then he or she is paid only for part of the performance. If the defendant is in custody, the attorney is reimbursed only for the time that exceeds one hour, and only if he or she has written confirmation from the prison on this. The preparation for the trial can take several hours, as can other performance that is usually provided to the client, such as submissions to the authorities not having the form of an operation, but these are covered only to the extent specified in the Advocacy Tariff.\(^{114}\)

Moreover, the fact that the decision on reimbursement is issued at the very end of the proceedings motivates *ex officio* attorneys to have the proceedings finished as soon as possible and influences their activities in the proceedings.

Unfortunately, the failure of the state to secure free legal aid to indigent defendants does not seem to be a pressing issue with the responsible institutions, in particular with the Ministry of Justice. The opinion was raised by a prominent Ministry official that “if the attorneys were more broad-minded, they could do it more or less for free.”\(^{115}\) Czech officials have yet to realize that the responsibility for creating functioning and effective legal aid lies with the state and not with individual legal professionals.

2.7 Quality of Free Legal Representation

The obligations of attorneys to their clients are specified by the criminal procedure and by broader standards of professional obligations. According to the Code of Criminal Procedure, the attorney is obliged to “provide necessary legal assistance, to apply the means and manners of defense in order to defend the defendant’s interests efficiently”. According to the Law on Advocacy, the attorney is obliged to “protect and promote the rights and legitimate interests of the client and to follow his or her instructions.” The attorney is not bound by the client’s instructions if they conflict with the law or any professional regulation, however, and the attorney is obliged to instruct the client accordingly. When engaged in
the legal profession, the attorney is obliged to act in an honest and diligent manner, and to “apply consistently all legal means subject to which he must use anything in the interest of the client he deems beneficial.”

The law does not provide definitions of what is meant by “necessary assistance”; however, if it is read in connection with the Advocacy Tariff, the attorney is indeed entitled only to reimbursement for performance outlined in the Advocacy Tariff.

Despite a lengthy history of requiring mandatory defense in criminal matters, there have been no attempts to examine the system for the appropriateness, effectiveness, or quality of provided legal representation. The only instruments for checking the quality of the attorney’s performance in a proceeding is established by Article 40a of the Code of Criminal Procedure. According to these provisions, the presiding judge and the judge in the pretrial proceeding can decide ex officio on dislodging an appointed attorney if the attorney repeatedly fails to attend operations of the criminal proceeding where his or her presence is necessary and does not secure the presence of a substitute when he or she was duly informed about the operation. Before the decision, both the attorney and the defendant must be given a chance to give an opinion on the issue. There are no safeguards available to the court against strictly formal but inactive conduct of an attorney, or his or her failure to communicate with the client and follow the client’s instructions.

The defendant can turn to the Bar Association and complain about the performance of his or her chosen or appointed attorney, as, according to the Law on Advocacy, the attorney and attorney-in-training (concipient) are liable for disciplinary offenses, which are serious or repeated violations of the Law on Advocacy or the internal rules of the Bar Association.

For a disciplinary offense, the following can be imposed on an attorney: a written admonition, a written admonition announced to other attorneys, a fine of up to one hundred times the minimum monthly salary, temporary prohibition from conducting the advocacy profession for a period from six months to three years, or removal from the List of Attorneys.

However, an assessment of the quality of provided legal aid is prevented by the fact that the Bar Association claims it does not distinguish between complaints against privately hired attorneys and those against ex officio appointed attorneys, and does not even differentiate between the complaints on conduct in criminal, civil, and other proceedings. The Bar Association was even hesitant to disclose to the author of this report the number of complaints dealt with by the Bar Association Disciplinary Committee, as it considered this to be “sensitive” information that could not be released to the public. In 2000, according to the treasurer of the Bar Association, there were 1,283 complaints against attorneys filed with the Bar Association, out of which 189 disciplinary proceedings were initiated. Approximately 70 percent were filed for
violation of ethical rules in general. In 2001, the Bar Association received 1,279 complaints and initiated 141 disciplinary proceedings, while 83 percent of complaints were aimed at violations of ethical rules, including providing insufficient legal services. Up to 30 June 2002, the Bar Association received 726 complaints and filed 70 disciplinary cases. According to the Bar Association representative, the low number of disciplinary proceedings (14.7 percent in 2000, 11 percent in 2001, and 9.6 percent in 2002) shows that a majority of complaints are “unjustified and querulous.”

One can get some indications from the monthly bulletin of the Bar Association, which publishes decisions on disciplinary measures, some of them concerning ex officio appointment. The decisions do not reveal the identities of the attorneys. Examples:

The Disciplinary Senate of the Bar Association decided on 14 May 1999 on a complaint about an ex officio appointed attorney who never visited his client in detention, never consulted with the client about defense strategy, and never requested the client’s release from pre-trial custody. After the defendant filed for release himself and was rejected, the attorney did not appeal the decision. He also failed to inform his client about the development of the case. In the disciplinary proceedings, he objected that the client never asked him for a visit and that he did not file for the release because he considered it useless due to the client’s lengthy criminal record. The Senate found the attorney guilty and imposed a fine of 10,000 CZK (approximately 320 euros)."

On 8 June 2001, the Bar Association Disciplinary Senate dealt with a case of an attorney who was appointed to the defendant because of the severity of possible punishment, but who was not in pretrial detention. The attorney never contacted his client, did not visit him, and did not send him a suggestion for a meeting where defense strategy could be discussed. At the same time, the Disciplinary Senate addressed another complaint against this attorney for failure to provide appropriate assistance in a civil matter to a client who granted him power of attorney. The attorney reacted only to the complaint of the client in the civil proceeding, where he admitted his failure and requested a just punishment. For the issue of the defense in the criminal matter, he did not provide any explanation. Because it was a repeated disciplinary proceeding against this particular attorney, the Disciplinary Senate imposed a fine of 25,000 CZK (approximately 806 euros) for both cases together.

Some indications have resulted from studies conducted by non-governmental organizations. However, none of these studies were aimed at evaluating the system and effectiveness of state legal aid in the Czech Republic. For example, research by the Tolerance Foundation in 1996, which reviewed more than 200 cases in which former citizens of the Czech and Slovakia Federation Republic were sentenced to life expulsion.
from the Czech Republic, brought the following findings: more than 50 percent of the defendants complained that they had been dissatisfied with their *ex officio* representation. The most common complaints were that their attorneys “did not care about the case,” failed to visit them in pretrial detention, did not respond to their correspondence, or failed to explain to them the ramifications of the penalty so that the defendant could make an informed decision about the appeal.\textsuperscript{122} Another survey by the Tolerance Foundation, carried out in 2000, which interviewed 420 defendants serving prison sentences in Czech prisons, also gathered their opinions on the performance of their attorneys. The research used both open- and closed-ended questions and reached similar conclusions. Moreover, the research asked the inmates to rank the quality of provided legal aid on a scale of 1–5 (1 meaning fully satisfactory defense; 5, totally unsatisfactory defense). Evaluation by the clients was as follows:

<table>
<thead>
<tr>
<th>Grade</th>
<th>Evaluation of <em>ex officio</em> attorneys</th>
<th>Evaluation of privately hired attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>27.7%</td>
<td>44.5%</td>
</tr>
<tr>
<td>2</td>
<td>18.2%</td>
<td>19.0%</td>
</tr>
<tr>
<td>3</td>
<td>21.2%</td>
<td>20.6%</td>
</tr>
<tr>
<td>4</td>
<td>11%</td>
<td>12.7%</td>
</tr>
<tr>
<td>5</td>
<td>21.9%</td>
<td>3.2%</td>
</tr>
</tbody>
</table>

The issue of the quality and effectiveness of legal aid definitely deserves closer attention from both the government and the Bar Association.

3. **Civil Law: Effective Access to the Judicial System for the Indigent in Civil Cases**

3.1 **Normative Basis of the Right to Access to Courts in Civil Cases**

As for the civil procedure, the Constitution (Article 96, paragraph 1) and the Charter of Fundamental Rights and Freedoms (Article 37, paragraph 3) guarantee the equality of parties in the proceeding, as well as the right of an individual to legal representation before the courts from the beginning of the proceeding.\textsuperscript{123} These principles are reflected in Article 18 of the Civil Procedure Code, which further stipulates the obligation of the court to ensure the same/equal opportunities for application of these rights.\textsuperscript{124} This applies to civil, labor, family, commercial, and all other disputes that are handled by the courts in the civil procedure, as well as to the judicial review of matters decided by another institution.\textsuperscript{125} The equality principle is reflected in other provisions of the civil procedure, especially in those governing the course of the pro-
procedure, evidence procedure, and measures of the court during a whole proceeding. The right to legal aid here should be understood in a broader sense, and it also covers the right to legal information, according to Article 5 of the Civil Procedure Code, section 183, paragraph 2, of the Civil Procedure Code, on judicial guardianship over the property of a minor, etc.

The main principles of procedural representation in civil cases are set out in the Civil Procedure Code in a section on general provisions related to participants in the procedure. It provides for several possibilities of representation. These are:

- statutory representation (representation either directly prescribed by the law—e.g., assignees of children who are the children's parents—or based on decision, usually a guardian appointed by the court);
- representation based on awarded power of attorney;¹²⁶
- appointment of the representative based on request.

Only the two latter types fall within the legal aid guaranteed by the Charter. The appointment of the representative is facultative; mandatory representation in civil cases is rare. As the statutory representation is not relevant here, a short discussion on just the two latter types follows.

**Representation under power of attorney**

A representative can be selected by any participant with procedural legal subjectivity. If the participant does not have procedural subjectivity, his or her legal assignee or a guardian appointed by the court can grant power of attorney to a selected representative. A representative in the civil procedure can only be a natural person, unless the representative is a trade union or the Office for the International Protection of the Child (OIPC). Trade unions and the OIPC can, however, represent the participant only within their competencies as established by the law. The participant cannot be represented by a legal entity.

In a single matter, the participant can have only one representative at a time; the power of attorney granted to more than one representative at the same time is invalid. If the participant selects another representative and previously awarded power of attorney has not been canceled or otherwise terminated, the act of granting a new power of attorney cancels the previous one.¹²⁷

A participant can also be represented by another participant in the proceeding. However, if their interests in the proceeding collide, the power of attorney is not valid in the other participant.¹²⁸

The representative of the participant in the civil proceeding can always be an attorney (member of the Bar). For an attorney, power of attorney always has to be granted for the complete proceeding (“procedural power of attorney”). Power of attorney granted to an attorney only for certain acts in the proceeding (e.g., only for the proceedings before the first-instance court and the like) would be invalid. Except in cases where mandatory representation by an
attorney is required, another attorney or
his or her concipient or other employee.\textsuperscript{129} can be substituted for the attorney.

The representative of the participant can also be a notary. Compared to the attorney, the notary can represent the participant only within his or her competencies established by the law, e.g., in judicial review of administrative decisions, probate proceedings, deposit proceedings, etc.

In general, however, a representative in a civil proceeding can be any natural person who has full legal and procedural subjectivity. He or she does not need to have a legal education and does not need to be a Czech citizen. Such a representative cannot be substituted. However, the court can deny the representation if:

- the selected representative is apparently not capable of representing properly (especially if he or she cannot perform properly the procedural acts, and there is a reasonable belief that a represented party could suffer a harm to his or her rights);\textsuperscript{130}
- he or she repeatedly serves as a representative.\textsuperscript{131}

In the latter instance, however, no fixed number of permitted representations has been established. Courts usually consider the representation to be repeated if the individual is representing two participants in cases that are not linked, or the same participant in more than two cases, or similar circumstances. Even then, a large gap in time between individual cases may lead to the conclusion that the activity of the representative is in fact rare or not repeated.\textsuperscript{132}

If the court reaches the conclusion that the representation is not permitted, it issues a decision of denial, which must be delivered both to the participant and to his or her representative. Against such a decision, a complaint can be filed. Until the decision is final and effective, the proceeding cannot continue unless the power of attorney is terminated.

If the power of attorney is granted only for certain acts of the proceeding, it is called “simple power of attorney” and applies only for those specified acts.\textsuperscript{133} Procedural power of attorney, on the other hand, cannot be limited.\textsuperscript{134} Power of attorney can be given in writing or orally into the protocol.\textsuperscript{135} Signatures on the power of attorney, its cancellation, or its termination have to be verified by a notary only if the law specifically requires.\textsuperscript{136}

**Appointment of the representative by the court**

The Civil Procedure Code also presumes appointment of a representative to a participant who fulfills conditions for a waiver of court fees. This type of representation is the only option for access to free legal aid in civil proceedings for indigent participants (see section 3.3). The appointed representative has the same position as a representative who has been granted power of attorney.\textsuperscript{137} If an attorney was appointed as a representative, he or she has the same rights and obligations as an attorney granted power of attorney.\textsuperscript{138}
3.2 Civil cases for which legal representation is mandatory

Mandatory legal representation in civil proceedings is unusual. The Czech civil process currently recognizes only one type of proceedings for which legal representation is required: the appellate review (dovolání), according to Article 241 of the Civil Procedure Code.¹³⁹

Appellate review

Appellate review is an extraordinary relief measure against a decision of the appellate courts, which is handled by the Supreme Court. The law permits appellate review only in very specific cases established by the law¹⁴⁰ and based on explicitly determined reasons.¹⁴¹ The purpose of the appellate review is to revise decisions of appellate courts and provide remedies in cases where the decision of the appellate court was inadequate—especially regarding legal evaluation of the matter, conclusions of fact by the court in evidence procedure, and the legality of the proceeding. The reasons for mandatory representation in this type of proceeding are probably based on the need to provide the participant with qualified legal representation to ensure that the filed petitions for appellate review meet the formal requirements and to facilitate the decision of the Supreme Court without unnecessary delays and without a hearing.¹⁴²

The requirement of mandatory representation covers only the submission of the petition for appellate review. Nevertheless, this part of the appellate review procedure should be understood in a broader sense, i.e., it covers not only the moment of filing the petition itself but also the submission that would replace possible mistakes in the original application, the additional submission of supplements, the limitation of an original submission or the submission extending the petition itself, and reasons for the petition or the petition proposal. If the applicant decides to cancel his or her petition for appellate review, such an act can be done by the applicant himself or herself.¹⁴³

The applicant must be represented by an attorney or, in certain cases, by a notary. Mandatory representation is not, however, absolute. It is not required if the applicant graduated from law school or if the applicant is the state, a region, a district, or a legal entity and its legal representative graduated from law school.¹⁴⁴

Mandatory representation is a special condition of the appellate review procedure, without which a legally binding decision cannot be issued. The requirement is not met if the applicant selects an attorney after filing the petition, because a required part of the representation is the fact that the petition was drafted by the attorney or notary. So if the applicant selects an attorney only after filing the petition, the selected representative will have to replace the filed petition or supplement it with his or her own petition. Ultimately, the attorney will have to request that the court consider the filed petition to be his or her own.¹⁴⁵
3.3 Eligibility criteria for granting legal aid in civil cases

3.3.1 Substantive and financial criteria

In the civil procedure, the substantive and financial criteria for granting legal aid overlap.

Article 30, paragraph 1, of the Civil Procedure Code provides for the appointment of a representative (not necessarily an attorney), upon request, to a participant in the civil procedure who meets the requirements for exemption from court fees, and if the protection of his or her interests so requires. In cases of mandatory legal representation, or if the protection of the participant’s interests requires, the trial court must appoint an attorney.146 Thus, the criteria for the appointment of a representative in a civil proceeding are: request, meeting requirements for exemption from court fees, and the interest of the applicant.

Request

With regard to the request, the inconsistency between the provisions on exemption from court fees and the appointment of the representative for the protection of the participant’s legal interest must be mentioned. The court has a legal obligation to inform the party about the right to file a request for an appointment of a representative. This obligation was created by the amendment of the Civil Procedure Code, effective 1 January 2001. However, an obligation of the court to inform the party about the possibility of exemption from court fees is not explicitly imposed on the court; it can be derived only from a general obligation of the court to inform the participant about his or her procedural rights.147

Meeting requirements for exemption from court fees

The conclusion that the participant fulfills criteria for exemption from court fees depends solely on the conditions set out in Article 138 of the Civil Procedure Code: “[T]he court can grant a full or partial exemption from the court fees in cases where it is required by the situation of the party and if there is not pursued an arbitrary or clearly unsuccessful application or obstruction of the right.” The fact that, in the given proceeding, there is no court fee issued or that the participant is statutorily exempted from court fees is irrelevant to the decision. The appointment of the representative is not conditioned on the fact that the court fee waiver has already been granted. The law does not provide any guidelines concerning the situation of the applicant or arbitrary and unsuccessful pursuit of rights. The general practice is that the courts take into consideration the financial and social situation of the applicant and the state of his or her health. Clearly unsuccessful pursuit of the right would be a situation where it is obvious that the request cannot be granted. Arbitrary pursuit or obstruction would be, for instance, a personal intimidation or purposeful postponement by a debtor to avoid paying his or her obligation.148

It must be noted that the necessity of
determining whether the applicant in the
civil procedure is pursuing an “arbitrary or
clearly unsuccessful” claim means that the
court has to review the subject of the case
before the decision on the matter is issued.
If the judge concludes that the claim is
arbitrary, it does not mean that the case is
dismissed, only that the waiver of the court
fee will not be granted.

The interest of the applicant
The criterion of the interest of the applicant is very vague and abstract, and there is
no framework established by the law—
maybe with an intention to give courts
space to consider any possible circum-
stances. On the other hand, this lack of a
specific framework does not guarantee the
same consideration of all applicants. The
interest of an applicant can depend on his
or her medical, social, or financial situa-
tion, and any combination of these or other
factors that would prevent the party from
defending his or her rights. Nevertheless,
questions can be raised as to why the law
limits the appointment of the representa-
tive only to the protection of interests and
not the protection of rights, which would
 correspond with the constitutional com-
petence of courts. Interests of the parties
do not necessary correspond with their
rights. Moreover, the legal order uses, in
similar connections, the term “legitimate
interest.”

3.3.2 Other eligibility
questions
No other eligibility criteria are set by the law.
Legal representation in civil proceeding is
not limited by citizenship, and the formu-
lation of substantive criteria (interest of
the party)—if applied—should be broad
enough for providing legal representation
to those with particular difficulties, such as
the physically handicapped, individuals with
difficulties accessing the courts, foreigners,
iliterate people, etc.

3.4 Procedure for granting
legal aid
The party wishing to exercise his or her
right to the appointment of a representa-
tive in the civil procedure must file a request
with the court. The court must inform the
party about this possibility. Upon con-
sideration of other requirements, the court
should appoint a representative without
other limitations. It is within the discretion
of the court, however, to decide who is
appointed as a representative.

In general, any individual with legal sub-
jectivity can be appointed a representative
in the civil procedure. Some have argued
over whether it is appropriate if the court
appoints as a representative an employee of
the court, e.g., administrative personnel of
the court, judicial administrator, judge in
training, and the like. It appears that this
is the most common solution in practice.
The court will appoint an attorney only if
it concludes that the interests of the party so require, or if it is a case of mandatory representation. Compared to the criminal procedure, the law does not prescribe how the court should proceed when it decides to appoint an attorney. The Rules on Court Administration contain only provisions on how to proceed in cases of mandatory defense in criminal cases. In practice, courts usually deliver their decisions to the Bar Association, which subsequently selects an attorney, or the courts decide based on informal contacts with individual attorneys. Thus, the selection process is entirely incidental and depends on the activity of a judge and the willingness of an attorney.

Legal representation in civil proceedings can also be granted based on a decision of the Bar Association (see section 2.3).

There are a number of other entities that provide legal aid in civil proceedings through contracted attorneys or through a simple informative counseling by their own staff. These include, especially, non-governmental organizations and trade unions. For example, the Trade Union of Health and Social Issues of the Czech Republic provides free legal aid to individual organizations of the union, their representatives, and members of the trade union. Legal aid can also be provided to the family of deceased members of the union, if claims from employment relations pass to them or if those claims are related to their employment relations. This legal aid is limited to the labor relations of the members, including salaries, payments, and working conditions. The legal aid comprises providing consultations and advice, answering questions and requests, dealing with employers, and collective bargaining. If a mere consultation is not sufficient, the trade union arranges for representation before the court. The legal aid can be requested only by a member of the union who can prove his or her membership. The court representation is decided by the chief of the union, based on a written request. The decision is based on whether the claims are in contradiction to the law, whether the existing dispute can be solved through settlement, and whether a successful result for the member can be presumed.152

Of the NGOs that provide legal aid, mostly in the form of legal consultation and information, the most significant is the Association of Citizens Advice Bureaux (see section 3.7, NGOs).

3.5 Scope of legal aid

If representation is not granted for a certain performance in the proceeding, the representative can perform any acts that the participant himself or herself may perform. However, a representative of a party in the civil procedure is entitled to remuneration for his or her performance only if he or she is an attorney or notary. Other natural persons appointed to serve as representatives do not have a right to remuneration unless the law establishes otherwise, and eventual payment for his or her representation does not belong to the costs of the procedure. The compensation for
the fee of the representative—which is decided according to the outcome of the procedure—is included in the procedural costs only if the representative is an attorney or notary.153

If the appointed representative is an attorney, the general rules on legal professional responsibility apply. The attorney is obliged to defend and protect the rights and legitimate interests of his or her client and follow the client’s instructions, unless they contradict the law or the attorney’s professional obligations. The attorney must apply all legal measures that he or she considers beneficial for the client.154 Nevertheless, the appointed attorney is then remunerated only for the following performance:

• the first consultation with the client, including taking and preparing for the defense;
• another consultation with the client exceeding one hour;
• a written petition with a court or another authority associated with the case itself;
• participation in a hearing before the court or another authority, each two started hours;
• preparation of a written analysis of the case;
• negotiation with an opponent, each two started hours;
• a petition for preliminary measure if it is conducted before the beginning of the procedure, an appeal, a petition for an appellate review, a proposal for renewal of the procedure (a complaint against dismissal of the proposal on renewal of procedure), and comments on them;
• the writing of a document on a legal operation.

3.6 QUALITY OF FREE LEGAL REPRESENTATION

Compared to criminal proceedings, where the judge can at least remove the appointed attorney for failure to appear at certain procedural acts, the civil law does not establish even limited control of the court over the appointed attorney’s performance.

As for the Bar Association, see section 2.7.

3.7 APPLICATION OF THE RIGHT TO LEGAL AID IN PRACTICE

Since 1989, civil procedure in the Czech Republic has undergone several important changes, resulting in an increased responsibility of parties to the procedure for its course and outcome. The result of the proceeding depends more and more on the activity of the parties and their involvement in the process.

The first crucial amendment of the Civil Procedure Code, dating from 1991,155 radically changed the provisions on the broad obligations of the courts to assist parties to the proceeding in the application of their rights, and to ensure that no one suffers harm because of their lack of knowledge
of the law. This was replaced by an obligation to inform the parties about their procedural rights and duties.\textsuperscript{156} Currently, the court cannot inform the parties about relevant substantive law. Thus, an unskilled party can lose the case even if the substantive law and the facts are in his or her favor. Another important change was the omission of the so-called principle of material truth, which, during communism, was a main principle of the civil procedure. According to this principle, the court had to discover evidence on its own initiative in order to find out the truth of the matter, regardless of the evidence presented by the parties.\textsuperscript{157}

The tendency to increase the role of the participants is especially clear from the last amendment of the Civil Procedure Code, effective from 1 January 2001.\textsuperscript{158} Conceptually, the amendment creates conditions for the evidence proceeding to be finished before the first-instance court. If the participant wants to obtain a favorable decision, he or she must present to the court of the first instance all legally important bases of claimed facts and proposed proofs of his or her allegation. The amendment introduced into the contradictory proceedings the so-called concentration of the procedure. This institution forces parties to concentrate all the evidence and allegations at the beginning of the proceedings and present them before the end of the first hearing. At the same time, concentration limits the right to appeal: in the appellate proceeding, it is not possible to submit new facts and propose new evidence. The amendment also introduced a new procedural institution, called a “default judgment,” under which, if the defendant fails to appear at the first hearing without a reason, the court shall accept the alleged facts and decide in favor of the plaintiff. No appeal is permitted.\textsuperscript{159}

Although all of these changes have increased the complexity and demands of the civil procedure, the extent and availability of legal representation for free or at reduced costs have been left untouched by the mentioned amendments. Of course, no one is prevented from pursuing a judicial dispute without legal representation, but it is very risky. A participant without legal education and sufficient orientation in procedure can be defeated and lose the case even if the substantive law is on his or her side.

From what was said above, it is clear that, although the law provides several options for how the party can be represented in the civil procedure, there is no clear and functional system of legal aid for those who want to exercise their right to legal representation by a qualified professional.

The conditions under which one can obtain legal representation for free depend on judicial discretion, which evaluates the circumstances of the applicant with regard to exemption from court fees and the nature of the matter in which the exemption is requested. For the circumstances of the applicant, no means test criteria are established; indeed, the courts argue that they find effective criteria for deciding on
the applicant’s circumstances only after “great obstacles.” Only general rules on evidence procedure apply, according to which the applicant should prove the burdensome nature of his or her situation. Then, it depends solely on an individual judge whether he or she determines that the situation is indeed burdensome and that the need has been proved.

In current judicial practice, model forms are used for confirmation of the personal, proprietary, and income conditions of the applicant. Their content is governed by the Information of the Ministry of Justice.\textsuperscript{160} However, nothing prevents applicants from proving their financial and personal means in a different manner. Submission of the model form is not considered to be a condition of the decision.

The lack of specific rules on consideration of whether the “interests of the party” require representation leads to a diverse and \textit{ad hoc} evaluation of individual participants by individual judges. The same situation of an applicant could be considered by one judge to be sufficient for the court fee exemption while another judge could have a different opinion. Certain guidelines can be provided by the jurisprudence of the Supreme Court or upper courts, but they are delivered on the case only after substantial delay, and providing the case even reaches them. It appears desirable to establish at least overall objective criteria directly in the law.

Both an exemption from court fees and the request for court-appointed representation, a prerequisite for the appointment of representation, presuppose a certain familiarity with legal provisions that is generally not evident among those in need of legal aid. In this context, the effectiveness of the system should be evaluated based on statistical data. The Ministry of Justice does not keep any statistics on the number of requests for a waiver of court fees, only on the number of the decisions where the exemption was granted—which the Ministry declined to release.\textsuperscript{161} Nor does the Ministry keep statistics on the number of granted representations by an attorney.\textsuperscript{162} On average, there are, for instance, 230,000 submissions filed and 270,000 decisions in civil courts per year, but there is no record of how many of these cases involved requests for legal representation, in how many they were granted, and in how many the cost of legal representation was carried by the state.

The author of this study attempted to obtain the respective statistics from individual courts. The only court that was able to provide any information was the District Court for Prague 2. The court, however, stated that it was unable to determine how many requests for court fee exemptions it received each year and how many representatives it appointed, as “those data are recorded neither in registries of courts nor in statistical sheets issued upon the termination of the procedure.” All it could provide was an amount paid to appointed representatives in 2001 and 2002. The information revealed that in both years, the remuneration was paid to four representatives.\textsuperscript{163}
From the available data, no accurate conclusion on the extent of legal aid provided in civil cases can be made.

Nor was the Bar Association able to provide information on how many representations in civil cases were granted. Its statistics are kept only for requests for appointment of an attorney in general, without specification of the type of proceeding.\textsuperscript{164} The Bar Association representative indicated that in 2001, it appointed attorneys in about 1,000 cases other than criminal and constitutional complaint cases, most of which could be cases of civil proceedings (about 47 percent of all appointments).\textsuperscript{165} According to the same source, in weekly informative counseling meetings on the premises of the Bar Association, most of the information concerns civil procedure.\textsuperscript{166}

**Financial disincentives of attorneys**

As with \textit{ex officio} attorneys in criminal cases, the state is obliged to reimburse the appointed attorney for his or her fees and expenses. The obligations are prescribed in Article 140, paragraph 2, of the Civil Procedure Code. The court decides on the request, usually together with the decision by which the proceeding is terminated. Also in this proceeding, the attorney can be provided with an advance payment for his or her expenses and an honorarium.\textsuperscript{167} The civil procedure suffers from the same failures, such as late payments, as the criminal procedure but on a much smaller scale, due to an insignificant use of the appointment in civil cases.

**NGOs**

There are a number of non-governmental organizations that provide legal counseling and also, to a limited extent, representation in civil cases. Systematic legal aid by NGOs is restricted by two factors. According to the Law on Advocacy, only attorneys can provide legal services (that is, representation of the client in the proceedings before the court or other authorities, defense in matters of criminal law, legal consulting, writing of documents, preparation of legal analysis, and other forms of legal assistance, so long as they are provided continuously and for a fee). At the same time, advocacy is a free profession, and attorneys are prohibited from entering into an employment contract. Some NGOs often 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 representative. Based on this, NGOs are unable to provide legal representation on a regular basis and through attorneys who would be members of their staff. Some NGOs cooperate with attorneys through informal contacts or based on the volunteer work of attorneys. To the knowledge of the author of this report, only one Czech NGO cooperates with an attorney based on a mandate contract.

The number of individuals who turn to NGOs with a request for help with their legal problems can be a certain indication as to the extent of the need for such legal aid. According to information from the Association of Citizens Advice Bureaus,
an NGO uniting fourteen independent Citizens Advice Bureaus from all around the country and providing social and legal counseling, the number of people seeking counsel has tended to increase since 1997. In 2000, they served 8,059 clients and responded to 12,057 questions. In 2001, the number of clients reached 10,890, and the number of questions, 17,192. Out of those, 16 percent concerned problems related to housing, 16 percent family issues, 14 percent court protection, 10 percent employment relations, 8 percent social benefits, 5 percent social aid, 4 percent insurance, 3 percent consumer protection, and 1 percent health care.\footnote{168}

3.8 Other barriers to effective access to courts in civil cases

Apart from inadequate legal aid mechanisms, a serious impediment to access to justice is the financial burden of the process. Parties are generally obliged not only to cover the attorneys’ fees but also to pay the court fees and cover other legal expenses of the process.

Court fees

Court fees in the Czech Republic are governed by the Law on Court Fees,\footnote{169} which was substantially amended recently.\footnote{170} The fees for the proceeding are established either by a fixed amount or by a percentage of the substance of the fee (percentage fees).\footnote{171} The fees for individual acts are established by a fixed amount.\footnote{172}

Court fees differ enormously depending on the type of the particular court proceeding. They can range from 100 CZK\footnote{173} to 1,000,000 CZK,\footnote{174} depending on the type of proceeding. For petitions initiating a procedure where a financial payment is not pursued, costs range from 1,000 CZK to 10,000 CZK, depending on the basis of the case.

In general, the petition initiating a civil procedure where a financial payment is sought is subjected to a court fee of 600 CZK\footnote{175} for a claimed amount of up to 15,000 CZK.\footnote{176} If the claimed amount is higher than 15,000 CZK, the court fee is 4 percent of the claimed amount.\footnote{177} The same amount has to be paid for lodging an appeal.\footnote{178}

Court fees can form a barrier to access to justice in an actual case to pursue rights in a proceeding, especially in cases of discrimination.

The Law on Court Fees recognizes two possibilities for the court fee exemption: the so-called material exemption (determined by the types of cases that are specifically listed in the law) and an individual exemption (based on the subjects that are specifically enumerated in the law). The possibility of waiving the payment of the court fees is also established directly in the Civil Procedure Code.

Exemptions determined by the Law on Court Fees do not represent any substantial help to a possible indigent party to the civil proceeding. Material exemptions specifically concern procedures regarding children, e.g., appointment of a guardian, protection of a minor, adoption, permission
for minors to enter into marriage, mutual alimony obligations between parents and children or proceedings on limitation of legal subjectivity; as well as cases regarding social, pension, and illness insurance, social benefits and incentives, the right to vote, probate proceedings in the first instance, etc.\textsuperscript{179} A broad individual exemption is given by the law mainly to certain legal entities, such as the state and state funds, municipalities in certain proceedings, diplomatic missions, and other institutions. From possible indigent groups, an individual court fee waiver is granted to a petitioner seeking a compensation for health damage, an unwed mother in the proceeding for a birth supplement, a foreigner in an asylum proceeding, a petitioner pursuing rehabilitation, or a petitioner in proceedings on financial compensation caused by a criminal activity.

A court waiver is conditioned on the request of the party. The court will not decide on it if the party does not apply for the waiver. The request for the court waiver can be lodged either directly, with submission of the petition, or during any stage of the proceeding. The obligation to pay the court fees usually lies with the plaintiff.\textsuperscript{180}

Costs of the other party
The risk of exposure to fee-shifting provisions is another serious disincentive for those who might wish to pursue their rights in the civil procedure. Participants who lose in the proceedings can be ordered to cover the costs of the other party if that person was fully or partially victorious in the matter.\textsuperscript{181} This is particularly discouraging for victims of racial discrimination, whose only option to seek damages under the current law is a tort claim.

3.9 ALTERNATIVE DISPUTE RESOLUTION (ADR) AND SIMILAR SCHEMES

The Czech civil procedure does not provide for alternative dispute resolution. The only proceeding is a reconciliation procedure that can be performed on all issues belonging to the jurisdiction of the court. It is considered a preliminary part of the judicial proceeding. If the nature of the dispute allows, a proposal to the court to perform an attempt at reconciliation can be filed. The proceeding is handled by the respective judge, and if the case is decided by a panel of judges, it is handled by the presiding judge.\textsuperscript{182}

4. PUBLIC LAW: EFFECTIVE ACCESS TO THE JUDICIAL SYSTEM FOR THE INDIGENT IN ADMINISTRATIVE AND CONSTITUTIONAL CASES AND CASES BEFORE INTERNATIONAL TRIBUNALS

4.1 NORMATIVE BASIS

Administrative procedure
The right to legal aid in administrative proceedings is derived from the Charter, which guarantees everyone the right to legal aid before “other state institutions or public administration authorities.”\textsuperscript{183} This pro-
vision can be interpreted extensively as a right to legal representation in proceedings before any administrative or state institution, as well as before authorities of municipalities. The right to legal aid covers a whole proceeding from the beginning to end—that is, until a legally binding decision is issued. It applies to all instances of any administrative proceeding, including an enforcement proceeding, disputable or non-disputable proceedings, and the like.

Under Czech administrative law and public administration, administrative proceedings can be divided into general and special administrative proceedings. General administrative proceedings are governed by the Code of Administrative Procedure,\(^{184}\) which provides procedural rules for all levels of state administration and, in some cases, municipalities as well. However, in many cases, exceptions are established by special laws. Those are, for instance, regulations on construction or water management, but also on misdemeanor proceedings, citizenship, social assistance, and others that are governed by special rules.

According to Article 4, paragraph 2, of the Code of Administrative Procedure, all parties to the proceeding have equal procedural rights and duties, and administrative authorities are obliged to protect the rights and interests of the citizens and organizations. They are always obliged to give them the opportunity to defend their rights adequately and to provide them with help and information and thus prevent them from suffering harm because of their lack of knowledge of legal norms.\(^{185}\)

Legal representation in administrative cases is possible in relation to the parties to the administrative proceeding. A party to the proceeding can be a natural person or a legal entity. A participant in the procedure must have not only legal subjectivity but also procedural subjectivity. A participant who cannot act independently must be represented by his or her legal assignee, eventually a guardian appointed by the court.\(^{186}\) Participants can perform their procedural acts independently, or they can select an attorney or other representative.\(^{187}\) The representation is established by a power of attorney either for all procedural acts or for certain acts. Power of attorney can be written into protocol or oral. In undoubted cases, the administrative authority can waive the obligation to show power of attorney.\(^{188}\)

The Code of Administrative Procedure does not contain any provisions on appointment of a representative or on representation free of charge.

**Administrative justice: Judicial review**

Since 1 January 2003, there is a new Code on Administrative Justice Procedure that introduces a modified judicial review of administrative proceedings.\(^{189}\) New administrative justice courts\(^{190}\) provide protection to subjective rights of individuals or legal entities in cases of:

- petitions against public administrative decisions issued by executive institutions, by regional self-administration
institutions, or by individuals or legal entities or other institutions exercising granted authority on rights and duties in the area of public administration;

- protection against failure to act by an administrative authority;
- protection from illegal interference by an administrative authority;
- competency disputes.\textsuperscript{191}

Protection can be sought only after exhaustion of all remedies. Against a decision of the administrative court, a cassation complaint can be filed with the Supreme Administration Court. The Code of Administrative Justice Procedure sets the restrictions as to the basis of the cassation complaint.\textsuperscript{192}

**Legal representation**

Unless the law specifies otherwise, a participant in the administrative justice procedure can be represented:\textsuperscript{193}

- by an attorney or other individual who provides specialized legal counseling (e.g., notary, patent representative, tax adviser, and the like);
- by a trade union in which he or she has membership (an appointed member or employee acts on behalf of the trade union);
- in cases of discrimination—based on gender, social or racial origin, national or ethnic origin, skin color, language, religion, belief, opinion, political or other convictions, physical handicap, age, property, family or other position, or sexual orientation—by an association (NGO) that, according to its status, performs activities aimed at protection from that discrimination (an appointed member or employee acts on behalf of such an NGO);
- by any individual with full procedural subjectivity. The court can refuse this representative in cases of doubts about proper representation or if an individual repeatedly is a representative in different cases.

The participant can have only one representative in a given case.

In a cassation procedure (an appeal against an administrative court decision), representation by an attorney is mandatory unless the participant himself or herself, his or her employee, or the member who is representing him or her is a law school graduate.\textsuperscript{194}

The law further imposes an obligation on the court to inform parties about their procedural rights and duties to the extent necessary to prevent them from suffering harm in the proceeding.\textsuperscript{195}

**Proceedings before the Constitutional Court**

The Constitutional Court is established by the Constitution as a judicial institution of constitutionality control. Its main agenda consists of control over compliance with legal norms of the Constitution and of decisions on constitutional complaints. Proceedings before the Constitutional Court are of a special type, and representation is
specifically governed in the proceedings before it. The nature of the proceeding is characterized by its professional complication. From a financial point of view, the procedure is very demanding.

Current law on the Constitutional Court requires individuals and legal entities who are participants or collateral participants in the proceeding before the Constitutional Court to be represented by an attorney or a notary. The argument for this solution is two-fold. First, it aims to prevent the Constitutional Court from being overwhelmed with unsubstantiated and confused proposals by non-professionals. Second, mandatory representation is intended to protect applicants, as, without sufficient knowledge of the law, they could not use all available means to their benefit. Some have argued that this requirement itself could be unconstitutional, as it creates formal barriers to access to the highest protection of fundamental rights. If evaluated from the principles of equality of parties and access to justice, the construction of mandatory representation before the Constitutional court has certain weaknesses (see below).

Proceedings before the Constitutional Court are governed by the provisions of the Civil Procedure Code. Nevertheless, the practical application of these provisions to the Constitutional Court is often very problematic.

Mandatory representation is required for a whole proceeding before the Constitutional Court, including filing the petition to initiate the proceeding. If the representative fails to appear at the hearing, the participant will not be allowed to act on his or her own. Through the representative, the participant must exercise all his or her procedural rights, e.g., statement to the proposal, proposing further evidence, etc.

4.2 Eligibility criteria

Despite the constitutional guarantees, administrative procedure before administrative authorities does not contain any rules on free legal representation, and no eligibility criteria are established.

As for the administrative justice proceedings, in general, all parties must carry their expenses, including those for legal representation. Conditions for being granted free legal aid in the proceedings are as follows:

- by request. The decision is issued in the form of a decree by the presiding judge.
- fulfilling criteria for exemption from court fees. The Code of Administrative Justice Procedure states only that the participant who proves to be lacking sufficient means can file a request for exemption from court fees. The court will refuse this waiver if it concludes that a claim pursued will clearly be unsuccessful. A granted waiver can be canceled anytime during the proceeding, eventually also with reversal effect, if before the end of the proceeding it becomes clear that the situation of the participant does not justify such a waiver. The law does
not set any means test specifications for the participant’s situation. An actual waiver of court fees itself is not a condition *sine qua non* for granting free legal representation: If the participant was not granted a fee waiver, he or she can still be granted free legal representation.

- it is necessary for the protection of his or her rights.

The appointment is granted by decree, and the representative’s costs and fees are then carried by the state.

*Representation before the Constitutional Court* is mandatory, and, in principle, participants are not entitled to compensation of their procedural expenses. All expenses incurred by participants or collateral participants, e.g., disbursement, compensation for lost salary, fees for representation, etc., must be covered by the participants themselves from their own pockets and without the right to compensation.

Only in exceptional cases, if the personal and financial situation of an applicant requires, especially if he or she does not have sufficient means to cover expenses necessary for representation, and if the constitutional complaint is not rejected, the judge reporter can decide that the expenses of the representation are covered fully or partially by the state out of the budget of the Constitutional Court. The law does not provide any criteria for the evaluation of the “personal and financial situation of an applicant.” Moreover, the decision can be made only upon the admissibility decision.

4.3 Procedure for Appointment

The *administrative procedure* does not presuppose an appointment of a representative, and no procedure is available for those who would like to exercise their constitutional right when unable to retain a representative by themselves.

In *administrative justice procedure*, a representative is appointed on request. The law does not provide any specifications as to appointment procedure, and there is no deadline set for the decision on the request, etc. For the time between lodging the request for the appointment or the court fee waiver and the decision on this request, the law states only the deadline for filing the initiative petition for the proceeding itself.

The procedure for the appointment of the attorney for the *proceeding before the Constitutional Court* is not provided either. In this context, only the provisions of the Civil Procedure Code relevant to the appointment of a representative can be used. There does not seem to be any obstacle to applying Article 30 and following articles of the Civil Procedure Code. In favor of the application is the fact that the proceeding is one of the rare cases of mandatory representation in our system. This conclusion also supports a special system of eventual reimbursement of the expenses of the proceeding before the Constitutional Court. It is evident that these
provisions are intended to solve problems of legal representation for poor and otherwise disadvantaged applicants. It seems acceptable that the Constitutional Court appoints the representative to the applicant itself through the use of applicable provisions of the Civil Procedure Code.

As for reimbursement of the costs of representation, the applicant must file a request before the first hearing. The judge reporter issues a decision by decree, which is delivered to the applicant and his or her legal representative. If the request is granted, the decree does not need to contain any reasoning. The decree can be canceled before the end of the proceeding, even with a reversal effect, if it is found that the circumstances of the applicant do not justify the decision in the matter. The law does not anticipate any mechanisms for a situation in which the applicant’s circumstances change to his or her disadvantage during the proceeding.

4.4 Alternative (non-state) mechanisms

Theoretically, the individual can turn to the Bar Association to appoint an attorney for him or her. The Bar Association does not have any statistics as to whether there are applications for appointment in administrative case; therefore, no conclusion can be made on its implementation.

Similar to those in civil proceedings, there are non-governmental organizations that provide assistance and eventually representation to those in need. These, usually community, organizations provide counseling and, in some cases, direct assistance in regard to specialized procedures, e.g., social benefits or issues related to environmental protection or refuges. However, they cannot constitute an effective substitute for the lack of legal aid.

So far, there are no in-house clinics at law schools in the Czech Republic that would provide legal assistance to the poor.

4.5 Implementation

Administrative procedure

In contrast to civil proceedings before courts, where courts are obliged to inform parties only about their procedural rights and not about substantive law, administrative authorities should inform parties about both. This is rarely done in practice, however, and the administrative authorities take advantage of the slightest negligence by the parties.204 This can be particularly harmful in some proceedings where the decision can negatively influence other aspects of the individual’s life; for example, the result of a misdemeanor proceeding can influence the decision of a municipal authority to grant an apartment to an applicant or to prolong the tenancy contract; a decision of the social insurance company would deprive a person of a disability pension, etc.

Administrative justice

No data on the number of requests is yet
available as to whether administrative justice in its new form will start functioning from 1 January 2003; thus, no conclusion can be made on the effectiveness of relevant legal aid provisions as yet.

Constitutional procedure

Despite the possible application of the Civil Procedure Code provisions on the appointment of attorneys, the Constitutional Court rejected an appropriate application of the given provision in the Decision of the Constitutional Court No. III. ÚS 269/97. In this case, the applicant requested that the Court appoint an attorney for him or her for the proceeding before the Constitutional Court, based on supportive application of the Civil Procedure Code as available, or to impose such an obligation on the civil court. The Constitutional Court rejected the application, arguing that it stands outside the system of general courts and thus, in its procedure, only some provisions of the Civil Procedure Code should be applied. The Court stated that “[o]bligations of the state following from the constitutionally granted right to legal aid (Article 37, paragraph 2, of the Charter) are sufficient—even from the point of a mandatory representation before the Constitutional Court—and assured by the law (No. 85/1996 Coll., Law on Advocacy)... This means that the Constitutional Court presumes that the applicant, unable to hire an attorney, should not turn to the state but to the Bar Association, which does not have any obligation to appoint an attorney for him or her. Not only is the decision of the Bar based on criteria other than a lack of financial means, and it cannot be challenged by any corrective measure, but there are also concerns as to the nature of the Bar Association appointment (compare above).

The number of constitutional complaints filed by individuals increases every year. The following chart demonstrates the number of complaints during the last five-plus years:

<table>
<thead>
<tr>
<th>Year</th>
<th>1997</th>
<th>1998</th>
<th>1999</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of all petitions</td>
<td>2,024</td>
<td>2,221</td>
<td>2,576</td>
<td>3,140</td>
<td>3,049</td>
<td>2,307</td>
</tr>
<tr>
<td>Number of petitions decided in the plenary</td>
<td>45</td>
<td>30</td>
<td>24</td>
<td>59</td>
<td>39</td>
<td>22</td>
</tr>
<tr>
<td>Constitutional complaints</td>
<td>1,978</td>
<td>2,191</td>
<td>2,552</td>
<td>3,081</td>
<td>3,010</td>
<td>2,283</td>
</tr>
</tbody>
</table>

Despite this phenomenon, the Constitutional Court does not keep any statistics as to the number of requests, and thus rejections, for appointment of an attorney or the number of applicants for reimbursement of the costs of representation. The director of the Constitutional Court administration has estimated the number of requests to be approximately twenty-five a year, out of which approximately five—to ten are granted each year.
5. Organization of the System for Provision of Legal Aid

5.1 Special State Body Authorized to Administer the System

Currently there is no single state body authorized with the administration of the legal aid system.

5.2 Role of the Bar Association in the Administration of the Legal Aid System

The procedure for appointment is governed by respective procedural codes. An individual unable to obtain legal representation can also turn to the Bar Association to designate an attorney for him or her. The Bar Association criteria, however, do not focus on the financial situation of the applicant. Under the current arrangement, the state does not make any contribution toward the costs of attorneys designated by the Bar Association.

The Bar Association arranges general, free consultations with attorneys on the premises of the Bar Association in Prague and in eight regional seats of the Bar. These consultations are organized once a week—except during summer months—and are visited on any given day by forty applicants in Prague and twenty applicants in regions who are scheduled based on requests registered by the reception of the Bar Association. Within these consultations (of approximately ten minutes per client), only overall information is provided on whether a claim is consistent with the law and how and where the applicant should proceed. According to the information of the Bar Association, approximately 1,600 applicants in Prague and 4,800 applicants in regional seats turn to the Bar Association annually. The consultations are provided by individual attorneys.

5.3 Role of the Courts

Under the current system, the court or the proceeding authority appoints private counsel to represent an indigent individual or otherwise disadvantaged client, if the conditions for appointment of *ex officio* counsel provided by the procedural codes are met.

5.4 State Models of Organization of the Provision of Legal Aid

In the Czech Republic, the only state system of legal aid for indigent defendants, as well as poor and otherwise disadvantaged parties, in the proceedings before the courts is the *judge-assigned counsel system*. Under this system, the judge appoints private counsel to represent an indigent individual or otherwise disadvantaged client. The costs of such an attorney are covered by the state.

Appointed attorneys perform their tasks as independent attorneys for their clients.
Even if appointed by the state, they are not considered public employees but are engaged in private practice.

5.5 Evaluation and training

There is no evaluation mechanism as to the effectiveness of the current system. So far, there has been no attempt made by another non-state entity, e.g., a commission or non-governmental organization, to evaluate the system from the point of its effectiveness and other operational aspects.

6. Financial aspects of ensuring effective access to justice for the indigent

6.1 Determination of the legal aid budget

No separate budget is established for legal aid in the Czech Republic. Resources out of which the legal aid is covered form a part of the respective institutions that decide on the coverage of the fees claimed by attorneys for representation in criminal and civil cases. For criminal proceedings, those are budgets of criminal authorities who decide about the reimbursement of the fees and expenses if the termination of the procedure is caused by their decision—that is, investigators (police), state prosecutors, and first-instance courts. In civil proceedings, the decision is made by the civil courts. The budget of the police forces (investigators) falls within the budget of the Ministry of Interior, while the Ministry of Justice is allocated finances for the operation of courts and state prosecution. There are no special budgetary lines at respective institutions for legal aid. The legal aid is covered from the administration’s resources.

6.2 Budgetary information

<table>
<thead>
<tr>
<th>Year</th>
<th>State budget in CZK</th>
<th>Equivalent in euros</th>
</tr>
</thead>
<tbody>
<tr>
<td>1998</td>
<td>536,635,000,000.00</td>
<td>17,310,806,451.60</td>
</tr>
<tr>
<td>1999</td>
<td>605,127,000,000.00</td>
<td>19,520,225,806.40</td>
</tr>
<tr>
<td>2000</td>
<td>627,336,000,000.00</td>
<td>20,236,645,161.20</td>
</tr>
<tr>
<td>2001</td>
<td>685,177,300,000.00</td>
<td>22,102,493,548.30</td>
</tr>
<tr>
<td>2002</td>
<td>736,622,657,000.00</td>
<td>23,762,021,193.50</td>
</tr>
</tbody>
</table>

Total state budget

The state budget in the five-year period has been as follows:
Amount allocated to the judicial system

Only the following data is available as to the operation of the judicial system:

<table>
<thead>
<tr>
<th>Year</th>
<th>Budget of Ministry of Justice</th>
<th>Budget allocated to administration of justice (without salaries)</th>
<th>Percentage of the MoJ budget</th>
</tr>
</thead>
<tbody>
<tr>
<td>1998</td>
<td>CZK 10,096,858,000.00 325,705,096.80 euros</td>
<td>General court expenses: CZK 3,935,130,000.00 126,939,677.40 euros General expenses of state prosecution: CZK 978,995,000.00 31,579,193.60 euros</td>
<td>39% 9.7%</td>
</tr>
<tr>
<td>1999</td>
<td>CZK 11,559,212,000.00 372,877,806.50 euros</td>
<td>General court expenses: CZK 5,112,466,000.00 164,918,258.10 euros General expenses of state prosecution: CZK 1,146,450,000.00 36,982,258.10 euros</td>
<td>44.2% 9.9%</td>
</tr>
<tr>
<td>2000</td>
<td>CZK 13,083,579,000.00 422,059,935.50 euros</td>
<td>General judicial expenditures: CZK 7,510,851,000.00 242,285,516.10 euros</td>
<td>57.4%</td>
</tr>
<tr>
<td>2001</td>
<td>CZK 13,548,061,000.00 437,034,225.80 euros</td>
<td>General judicial expenditures: CZK 7,745,761,000.00 249,863,258.10 euros</td>
<td>57.2%</td>
</tr>
<tr>
<td>2002</td>
<td>CZK 15,259,520,000.00 492,242,580.60 euros</td>
<td>General judicial expenditures: CZK 9,010,673,000.00 290,666,870.97 euros</td>
<td>59.1%</td>
</tr>
</tbody>
</table>

Amount allocated to legal aid

There is no specific amount of finances from the state budget allocated to legal aid.

Amount allocated to criminal legal aid

Despite the lack of a specific budget for legal aid in criminal cases, the Ministry of Justice was unable even to identify how much of its financial resources was actually paid to appointed attorneys in criminal cases whose expenses are carried by the state. The Ministry provided only an overview as to the number of cases and the amount of funds that were spent by the state in those cases in connection with criminal proceedings and that must be reimbursed to the state by individual defendants, as well as the amount of funds that had already been reimbursed. These include not only expenses for legal representation but also costs of the criminal proceeding, costs of experts and witnesses, etc. Although the following chart thus does not represent the amount spent for free legal aid but the amount claimed by the state for reimbursement, the Ministry of Justice suggested that “some information about the amount spent on free legal aid in criminal cases can be determined” from the given amounts.214
Amount allocated, if any, to civil legal aid

Similar to the area of legal aid in criminal cases, the Ministry of Justice does not have readily available information on the number of cases in which expenses for legal representation were carried by the state. From the information of the Ministry, it was possible to determine only the amount spent on legal aid in civil cases since the year 2000, when they were recorded.

The latest information is from records dated 30 June 2002:

<table>
<thead>
<tr>
<th>Year</th>
<th>Amount</th>
<th>Percentage in the MoJ budget (judicial expenses)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>In CZK</td>
<td>In euros</td>
</tr>
<tr>
<td>2000</td>
<td>159,813,000</td>
<td>5,155,258</td>
</tr>
<tr>
<td>2001</td>
<td>445,944,000</td>
<td>14,385,290</td>
</tr>
<tr>
<td>to 30 June 2002</td>
<td>259,472,000</td>
<td>8,370,064.50</td>
</tr>
</tbody>
</table>

Amount allocated, if any, to other means of providing free legal advice

No data is available on this.

In conclusion, it can be said that the Czech Republic grants the right to legal aid on the level of constitutional guarantees but does not designate any specific funds that are necessary for covering respective costs.

6.3 Number of cases supported by the state budget for legal aid

Statistics on the number of legal aid cases supported from the state budget are not available for either civil or criminal cases. Available data shows that the number of cases within both types of proceedings is increasing every year:
### Civil procedure: First instance

<table>
<thead>
<tr>
<th>Year</th>
<th>District courts</th>
<th>Regional courts</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No. of submissions</td>
<td>No. of decided cases</td>
</tr>
<tr>
<td>1996</td>
<td>228,701</td>
<td>250,746</td>
</tr>
<tr>
<td>1997</td>
<td>213,585</td>
<td>246,076</td>
</tr>
<tr>
<td>1998</td>
<td>234,554</td>
<td>254,848</td>
</tr>
<tr>
<td>1999</td>
<td>239,032</td>
<td>274,709</td>
</tr>
<tr>
<td>2000</td>
<td>239,378</td>
<td>270,707</td>
</tr>
<tr>
<td>2001</td>
<td>227,703</td>
<td>252,541</td>
</tr>
</tbody>
</table>

### Civil procedure: Regional courts in the second instance (appeals)

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of submissions</th>
<th>No. of decided cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1996</td>
<td>52,498</td>
<td>251,887</td>
</tr>
<tr>
<td>1997</td>
<td>69,026</td>
<td>55,649</td>
</tr>
<tr>
<td>1998</td>
<td>63,419</td>
<td>68,191</td>
</tr>
<tr>
<td>1999</td>
<td>68,660</td>
<td>71,422</td>
</tr>
<tr>
<td>2000</td>
<td>68,160</td>
<td>68,099</td>
</tr>
<tr>
<td>2001</td>
<td>58,761</td>
<td>62,874</td>
</tr>
</tbody>
</table>

### Criminal procedure: First instance

<table>
<thead>
<tr>
<th>Year</th>
<th>District courts</th>
<th>Regional courts</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No. of submissions</td>
<td>No. of decided cases</td>
</tr>
<tr>
<td>1996</td>
<td>68,096</td>
<td>75,706</td>
</tr>
<tr>
<td>1997</td>
<td>68,009</td>
<td>81,434</td>
</tr>
<tr>
<td>1998</td>
<td>61,361</td>
<td>81,847</td>
</tr>
<tr>
<td>1999</td>
<td>71,048</td>
<td>85,139</td>
</tr>
<tr>
<td>2000</td>
<td>71,803</td>
<td>87,291</td>
</tr>
<tr>
<td>2001</td>
<td>71,221</td>
<td>86,953</td>
</tr>
</tbody>
</table>
Criminal procedure: Regional courts in the second instance (appeals)

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of submissions</th>
<th>No. of decided cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1996</td>
<td>26,967</td>
<td>26,688</td>
</tr>
<tr>
<td>1997</td>
<td>29,012</td>
<td>28,357</td>
</tr>
<tr>
<td>1998</td>
<td>29,918</td>
<td>30,177</td>
</tr>
<tr>
<td>1999</td>
<td>31,810</td>
<td>31,608</td>
</tr>
<tr>
<td>2000</td>
<td>30,784</td>
<td>31,227</td>
</tr>
<tr>
<td>2001</td>
<td>28,558</td>
<td>28,604</td>
</tr>
</tbody>
</table>

The author of this study asked several courts to provide information about the amount allocated to legal aid by them. The information was provided only by the District Court for Prague 4 and by the City Court Prague (Městský soud v Praze), whose records show the requested information for the court itself and for other Prague district courts. No distinction was provided as to the nature of the proceedings. The following figures represent the amount paid for all appointments by respective courts:

<table>
<thead>
<tr>
<th>Year</th>
<th>Amount paid by all Prague district courts (10 courts) in CZK</th>
<th>Amount paid by the City Court Prague in CZK</th>
</tr>
</thead>
<tbody>
<tr>
<td>1996</td>
<td>12,958,717.00</td>
<td>5,224,448.10</td>
</tr>
<tr>
<td>1997</td>
<td>23,975,253.88</td>
<td>8,103,172.98</td>
</tr>
<tr>
<td>1998</td>
<td>31,364,008.15</td>
<td>10,124,048.50</td>
</tr>
<tr>
<td>1999</td>
<td>48,494,771.72</td>
<td>12,359,304.90</td>
</tr>
<tr>
<td>2000</td>
<td>46,659,929.10</td>
<td>11,585,237.60</td>
</tr>
<tr>
<td>2001</td>
<td>49,329,205.90</td>
<td>15,615,316.00</td>
</tr>
<tr>
<td>2002</td>
<td>27,383,866.23</td>
<td>8,265,672.70</td>
</tr>
</tbody>
</table>
The District Court for Prague 4 expenses for *ex officio* appointed attorneys were as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Attorneys in civil cases</th>
<th>Attorneys in criminal cases</th>
<th>Overall expenses</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>in CZK</td>
<td>in euros</td>
<td>in CZK</td>
</tr>
<tr>
<td>1996</td>
<td>5,040.00</td>
<td>162.60</td>
<td>213,463.82</td>
</tr>
<tr>
<td>1997</td>
<td>5,643.75</td>
<td>182.10</td>
<td>1,252,909.70</td>
</tr>
<tr>
<td>1998</td>
<td>2,775.00</td>
<td>89.50</td>
<td>2,449,893.10</td>
</tr>
<tr>
<td>1999</td>
<td>15,350.00</td>
<td>495.20</td>
<td>4,833,117.80</td>
</tr>
<tr>
<td>2000</td>
<td>17,575.00</td>
<td>566.90</td>
<td>5,931,520.30</td>
</tr>
<tr>
<td>2001</td>
<td>196,006.50</td>
<td>6,322.80</td>
<td>6,630,410.10</td>
</tr>
<tr>
<td>2002</td>
<td>115,440.00</td>
<td>3,723.80</td>
<td>4,017,368.50</td>
</tr>
<tr>
<td>Total</td>
<td>357,830.25</td>
<td>11,542.90</td>
<td>25,328,683.32</td>
</tr>
</tbody>
</table>

Nevertheless, it is not clear from this data how much resources were provided in criminal cases from the state budget and how much was eventually claimed back by the state.

6.4 Lawyers’ fees

In principle, the fee of an attorney for providing legal services is regulated by a contract between the attorney and his or her client—the so-called “contractual fee.” If the attorney’s fee is not determined in this way, the fee is subject to the non-contractual fee provisions of the Advocacy Tariff.215

The contractual fee is an agreement between the attorney and the client on a pecuniary amount for which a legal service is provided, or on a method of determining this amount. The fee can be established by a fixed price or a percentage; it depends on the individual arrangements. A contractual fee can be also determined by a number of hours or other time units (“time fee”); the agreed-to time fee rate is then payable for each started time unit, unless it was agreed otherwise. Upon the client’s request, the attorney is obliged to present time specification of provided legal services when invoicing the fee.

The non-contractual fee amount is determined according to the non-contractual fee rate per one legal service operation, and according to the number of legal service operations performed by the attorney in the case. The non-contractual fee depends on the tariff value of the case. In general, the tariff value is understood as the amount of pecuniary performance or the price of an object or right and appurte-
nances at the time of starting the legal service operation, as associated with the legal service. If the legal service object is a repeated performance, the tariff value is calculated as a total sum of the individual performance values; further, if the performance period is longer than five years or is unspecified, the tariff value is calculated as quintuple the annual performance. If an object's value cannot be converted to money, or if it can be determined only with disproportionate difficulties, and if it is not explicitly specified by the decree—e.g., cases of juvenile care, adoption, foster care, legal capacity, guardianship, death proclamation, social security, pension, medical and health insurance claims of individuals, misdemeanor procedure, and others—the tariff value equals 1,000,000 CZK.

Depending on the tariff value, the non-contractual fee rate per one legal service operation amounts to:

<table>
<thead>
<tr>
<th>Tariff value</th>
<th>Non-contractual fee rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>less than CZK 500 (16 euros)</td>
<td>CZK 250 (8 euros)</td>
</tr>
<tr>
<td>more than CZK 500 and less than CZK 1,000 (32 euros)</td>
<td>CZK 500 (16 euros)</td>
</tr>
<tr>
<td>more than CZK 1,000 and less than CZK 5,000 (161 euros)</td>
<td>CZK 750 (24 euros)</td>
</tr>
<tr>
<td>more than CZK 5,000 and less than CZK 10,000 (323 euros)</td>
<td>CZK 1,000 (32 euros)</td>
</tr>
<tr>
<td>more than CZK 10,000 and less than CZK 200,000 (6,452 euros)</td>
<td>CZK 1,000 and CZK 25 per every other CZK 1,000 by which the value exceeds CZK 10,000</td>
</tr>
<tr>
<td>more than CZK 200,000</td>
<td>CZK 5,750 (185 euros) and CZK 25 per every other CZK 10,000 by which the value exceeds CZK 200,000</td>
</tr>
<tr>
<td>more than CZK 10,000,000 (322,581 euros)</td>
<td>CZK 30,250 (976 euros) and CZK 25 per every other CZK 100,000 by which the value exceeds CZK 10,000,000</td>
</tr>
</tbody>
</table>

For extremely difficult legal service operations, especially when a foreign law or foreign language must be used, or others that are time-consuming, the attorney can increase the non-contractual fee up to three times. The attorney also can reduce the non-contractual fee by up to one-half.

In criminal proceedings, when the attorney is defending the client in a case where the first-instance court makes a decision in a non-public hearing, the tariff value equals CZK 500. Otherwise, the tariff value equals the following (the eventual legal reduction of the penalty range in cases of minors is not considered):

- CZK 1,000 (32 euros) if the law sets an imprisonment penalty for the crime
concerned with the upper penal limit not exceeding one year;
- CZK 10,000 (323 euros) if the law sets an imprisonment penalty for the crime concerned with the upper penal limit exceeding one year and not exceeding five years;
- CZK 30,000 (968 euros) if the law sets an imprisonment penalty for the crime concerned with the upper penal limit exceeding five years and not exceeding ten years;
- CZK 50,000 (1,613 euros) if the law sets an imprisonment penalty for the crime concerned with the upper penal limit exceeding ten years, and/or if an exceptional punishment can be imposed for the crime concerned.

In civil proceedings, there are some special rules established for attorneys’ fees for conduct in the first-instance proceeding.\textsuperscript{218}

The attorney is further entitled to receive compensation for direct expenses used efficiently in association with legal services, especially for paying judicial and other fees, travel expenses, postage, telecommunications fees, for expertise and expert opinions, translations, retyping, and photocopies. The attorney can make an agreement with the client for an appropriate fixed amount to compensate for all or some direct expenses expected to be incurred in association with the provided legal services. If no such agreement is made, compensation for national mail, local phone calls, and transport expenses is CZK 75 (2.42 euros) per one legal service operation.\textsuperscript{219}

The attorney can also be reimbursed for time lost in association with providing legal services:

- during operations performed in a place that is not a seat or home address of the attorney, and for time spent by traveling to and from this place;
- for time lost as a result of a delay in starting a hearing before the court or another authority, if this delay is longer than thirty minutes.

The attorney can receive compensation for time lost in association with providing legal services amounting to one-half of the non-contractual fee for attending a hearing which was adjourned without discussing the case and for attending a hearing which was cancelled without the attorney having been informed early enough. If a hearing was adjourned or it did not take place for reasons caused by the attorney’s client, and if these reasons were known to the attorney at least two days before the hearing date, the attorney is entitled to compensation amounting to one-fourth of the non-contractual fee.\textsuperscript{220}

6.5 SUPPORT FOR NON-STATE INITIATIVES

Currently, there is no other entity supported by the state providing legal aid and free legal representation on a wide scale. For example, the Citizens Advice Bureaux that exist in fourteen Czech cities provide only
legal counseling and can only try to help their clients obtain legal representation elsewhere. The centers are financed mostly by support from private foundations. The only ministry supporting their activity is the Ministry of Labor and Social Affairs, which funds activities from the resources available for social services. Ministerial support has not exceeded an amount of 80,000 CZK (2,581 euros) a year for an individual center and 400,000 CZK (12,903 euros) for a whole association in the previous three years.

7. Data collection

As was previously pointed out, practically no statistics are gathered with regard to legal aid. There is no data available on the number of individuals unable to secure legal representation from their own financial means, no data on responses to that need, and no data on the distribution of legal aid.

The only court that was able to provide the number of appointed attorneys in general was the District Court for Prague 4, which provided the following numbers of appointed attorneys in criminal cases:

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>No. of ex officio attorneys</td>
<td>447</td>
<td>588</td>
<td>452</td>
<td>518</td>
<td>457</td>
<td>572</td>
<td>455</td>
</tr>
</tbody>
</table>

In light of what was said above, collection of the following statistics should be considered:

In criminal cases:

- the number of *ex officio* appointments a year, separated according to reasons for obligatory defense;
- the number of appointments in cases where there are doubts about the ability of the defendant to defend himself or herself (Article 36, paragraph 2, of the Code of Criminal Procedure);
- the number of requests for free legal representation in cases where the defendant is claiming that he or she does not have sufficient means to pay for the representation;
- the number of admissions and rejections of those requests.

In civil cases:

- the number of requests for an appointment for exemption from court fees;
- the number of requests for an appointment of a representative;
- the number of admissions and rejections of those requests;
- the number of attorneys appointed in civil proceedings.
Constitutional Court:

- the number of requests for covering the costs of an attorney from the Court budget;
- the number of positive and negative decisions based on these requests.

Bar Association:

- the number of requests for appointment of an attorney, differentiated for each type of proceeding;
- information on decisions (positive and negative) in those cases;
- the number of complaints about the conduct of *ex officio* attorneys.

Financial:

- the amount of resources allocated and distributed for legal aid, separated by criminal, civil, and other proceedings.

8. LEGISLATIVE DEVELOPMENTS

Inadequacies in the current “system” of legal aid to indigent individuals have attracted surprisingly very little attention or concern from the Czech government. The need for reform of the situation is raised solely by non-governmental organizations and by the Bar Association at different forums. The call for change was particularly urgent during the discussions on the amendment of the Civil Procedural Code. Nevertheless, the only change achieved after the amendment of the civil procedure with regard to its increased complexity was a change in the payment of attorneys’ fees—that is, increases in the advocacy tariffs.

At the level of the government, there exists a widespread skepticism against reform and expansion of legal aid services. In general, the Ministry of Justice considers current regulations and practice sufficient, and standards and requirements to assure free legal aid fully implemented.\(^{224}\) All proposals by other entities have been met with great refusal; for example, already in 1999, the Bar Association prepared a draft proposal of “the Law on Legal Aid and Its Financing by the State,” which proposed an overall regulation in one law. The draft proposal focused primarily on the form of payments to the attorneys and did not deal with the issues of clear and feasible mechanisms for counsel appointment, control of the quality of legal aid, or a means test to determine indigence of the applicant. The proposal was never considered by the government, however, and the Bar Association did not pursue its adoption directly in the Parliament.

Some efforts have been made on the level of the Commission for Human Rights, which is a consultative body to the government. In the spring of 2001, the Commission created an informal working group of NGO representatives, to which it also invited the Bar Association, Association of Notaries, representatives of the Ministry of Justice, and other individuals. In the
course of one year, only NGO members actively participated in the work of the group, and a thesis of the draft law was prepared. The thesis focuses, however, on distributing legal aid in the form of legal counseling and representation only in administrative proceedings. The thesis was not developed in the form of a legislative proposal. As a result of negative reaction from the Ministry, the Bar Association and other professional associations have not called for any further legislative action.

9. Recommendations

The Charter of Fundamental Rights and Freedoms guarantees everyone the right to legal aid in individual proceedings. Based on these provisions, the state has undertaken the task of ensuring equality between parties in respective provisions and providing the disadvantaged with information and lawyers to represent them in given proceedings. However, in the Czech Republic, only a limited possibility of being granted legal representation is established for proceedings before courts in criminal, civil, and administrative judicial proceedings. In other cases—and, in particular, in proceedings before authorities of the state and public administration—the only option is to contact the Bar Association and request designation of an attorney. The law does not establish any mechanisms for covering the costs of the attorney designated by the Bar Association from the state budget.

The above discussion can be briefly summarized: the Czech Republic lacks a sufficient legal framework and rules for legal aid for poor and otherwise disadvantaged individuals in proceedings before courts and other state authorities and authorities of public administration. The practice falls short especially with respect to specific regulations on legal aid by separate law or within individual procedures. In light of these shortcomings and the lack of unification of regulations (in particular, for administrative proceedings), it appears preferable to regulate legal aid through one specific law.

The system of free legal aid should be established by a law—not by a decree or internal regulation—because a constitutionally guaranteed right is at stake. Adoption of such a law would require the amendment of other laws, e.g., the Law on Court Fees, the Law on Advocacy, etc., as well as executive rules.

The law should provide for the representation of indigent individuals not only in proceedings before the courts but in all types of proceedings where the state authoritatively decides on rights, legitimate interests, and obligations. It has to be stressed that the majority of proceedings where an individual’s rights can be significantly harmed are decided by public administration authorities.

A necessary component of the free legal aid law would be a definition of a person eligible to receive free or reduced-cost legal aid, as well as development of a system of means testing, with possible use of the existing system of social assistance. For
example, a person would be automatically entitled to free legal aid if he or she receives certain social allowances. In addition, sanctions should be determined for abuses of the system—e.g., an attorney providing legal representation cannot examine whether the client is entitled to legal aid, because of the confidentiality of the relationship with the client.

The system of legal aid should rely primarily on the judicial authorities—in particular, courts. Each first-instance court (district and regional) could have an administration department responsible for the activity. Subjects providing legal aid should be attorneys, in the majority of cases, as they have sufficient qualifications, knowledge, and experience, are bound by the confidentiality obligation, and are insured for eventual liability for damages.

The state must create an effective control mechanism for the quality of provided free legal aid.

The whole system should be financed by the state. The state is the only institution that should secure to all individuals effective access to justice. It will be desirable to support the system with financial incentives from other organizations, foundations, associations, or individuals. Possible consideration can be given to some obligatory payments by professional associations (Bar Association, Notary Association, Association of Tax Lawyers), and to amending respective laws that would provide for deductions of eventual contributions from taxes. Another possibility is facilitating insurance of legal expenses, which involves cooperation with insurance companies.

It will be necessary to ensure sufficient awareness of the system, and to ensure that those in need will be able to gain firm knowledge of their rights with regard to legal aid. Forms of awareness campaigns are many—leaflets, brochures, radio and television programs, lectures, education at schools, etc. Similar attention should be paid to the subjects providing legal aid—attorneys and recipients—in a manner that considers their activities within the legal aid system a part of their professional obligations.

**Notes**


2 According to Law No. 85/1996 of the Coll., Law on Advocacy, as Subsequently Amended (Zákon o advokaci), the provision of legal services comprises representation of the client in the proceedings before the court or other authorities, defense in matters of criminal law, legal consulting, writing of documents, preparation of legal analysis, and other forms of legal assistance, so long as it is provided continuously and for a fee.

3 Information provided by the Bar Association, 1 November 2002.

4 It was the Law on the Legal Advocate’s Profession—Law No. 57/1963 of the Coll. and No. 118/1975 of the Coll. (Zákon o advokaci) and Advocacy Tariff (Advokátní tarif) issued by the Decree of the Minister of Justice No. 50/1965 that governed this issue.

5 During the communist period, attorneys worked in so-called advocacy centers with a regulated number of attorneys and other staff. These were established in each district. Compare: I. Shelleova and J. Stavinohová,

6 See Article 5 of the Civil Procedure Code.

7 See Article 7, paragraph 3, letter a, of Law No. 6/2002, the Law on Courts, Judges, Lay Judges, and the State Administration of Court and on the Amendment of Other Laws (Law on Courts and Judges—Zákon o souduch a soudcích), which states: “The judge is obliged to provide each participant in or party to the judicial proceeding or to their representatives full opportunity to apply their rights; however, with the exception of cases determined by the laws on judicial procedure, he cannot unilaterally accept or provide information on to deal with the substance of the respective matter or procedural questions that can have an influence on it.”

8 Article 90 of the Constitution reads: “The courts shall first and foremost provide in a manner defined by law protection of rights. A court alone shall decide about guilt and penalty for criminal offenses.”


10 Charter of Fundamental Rights and Freedoms, No. 2/1993, Decree of the Board of the Czech National Council from 16 December 1992 on declaration of the Charter on Fundamental Rights and Freedoms as a part of the constitutional order of the Czech Republic (Usnesení předsednictva ČNR o vyhlášení Listiny základních práv a svobod jako součásti ústavního pořádku ČR).

11 Article 96, paragraph 1, of the Constitution reads: “All parties to judicial proceedings shall have equal rights.”

12 Article 37, paragraph 3, of the Charter reads: “All parties are equal in the proceedings.”


14 Article 10 of Law No. 1/1993 of the Coll., from 16 December 1992, Constitution of the Czech Republic. Prior to the constitutional amendment, this article read as follows: “Ratified and promulgated international treaties on human rights and fundamental free-

doms by which the Czech Republic is bound are directly applicable and have priority before the laws.”

15 Article 37, paragraph 2, of the Charter reads: “Everybody has the right to legal assistance in proceedings held before courts, other organs of the state, or public administration organs from the beginning of such proceedings.”

16 Article 40, paragraph 3, of the Charter.

17 See Article 2, paragraph 13, and Article 33, paragraph 4, of the Code of Criminal Procedure.

18 Article 33, paragraph 1, of the Code of Criminal Procedure. Persons with deprived or reduced legal capacity can be tried in a criminal proceeding unless, because of mental illness at the time of the crime was committed, the person was unable to recognize a danger of his or her acts to society or control his or her behavior. Compare to the provisions on insanity in Article 12 of the Criminal Code.

19 Who is a legal representative of an accused person deprived of legal capacity is governed by the Civil Code (Law No. 40/1964 of the Coll, as Subsequently Amended—Občanský zákoník) and the Family Law (Law No. 94/1963 of the Coll, as Subsequently Amended—Zákon o rodičích). Article 27, paragraph 1, of the Civil Code and Articles 36 and 37, Article 63, paragraph 1, and Article 78, paragraph 1, of the Family Law.

20 Article 34, paragraph 1, of the Code of Criminal Procedure.

21 Article 34, paragraph 2, of the Code of Criminal Procedure.

22 Article 37, paragraph 3, of the Code of Criminal Procedure.

23 Law No. 265/2001 of the Coll.

24 Compare to the section in Article 158 of the Code of Criminal Procedure on proceedings before commencement of the criminal procedure.

25 II. ÚS 98/95, Volume 5, No. 42, of the Collection of Decisions and Decrees of the Constitutional Court.

26 Article 158, paragraph 4, of the Code of Criminal Procedure.


28 Article 179a–f of the Code of Criminal Procedure. Accelerated preliminary procedure is a procedure that must be terminated, at maximum, two weeks after the criminal complaint was received or the procedure oth-
erwise began. It is carried out by the police authorities in crimes that are dealt with by district courts in the first instance and for which the Criminal Code establishes an imprisonment of a maximum of three years if (a) the suspect was caught when committing the crime or immediately afterward; or (b) in the investigative phase, circumstances were discovered justifying commencement of the criminal procedure, and it can be expected that the suspect will be brought before the court within the deadline mentioned above. All provisions of the Code of Criminal Procedure apply to this proceeding accordingly.

29 Article 186, letter e, of the Code of Criminal Procedure: “[The presiding judge can order a preliminary hearing on the indictment] if the preliminary procedure was not conducted in accordance with the law, because there had been seriously violated procedural norms, especially provisions assuring the right to a defense, and if such a violation cannot be redressed in the procedure before the court.”

30 Article 258, paragraph 1, letter a, of the Code of Criminal Procedure.

31 According to Article 84, paragraph 1, of the Criminal Code, if the court sentences a minor, it can impose protective education on him or her if (a) the minor’s education is not properly ensured; (b) hitherto the education of the minor was neglected; (c) the background where the minor lives so requires.

32 Article 291 of the Code of Criminal Procedure.

33 Law No. 140/1961 of the Coll., Criminal Code as Subsequently Amended (řestní zákon).

34 Article 86 of the Criminal Code.

35 Placement is imposed by the court in a criminal proceeding if the perpetrator committed a crime in a state of diminished sanity and the court believes that protective care will secure reformation better than punishment. The criminal court will also decide on institutional care if the perpetrator of the crime is not criminally responsible and his or her liberty would be dangerous to society. Further, the court can so decide if a perpetrator committed a crime in a state caused by mental illness and his or her liberty would be dangerous for society; or if an addict perpetrator committed a crime under the influence of an addictive substance (unless, with regard to the individual perpetrator, it is clear that the purpose of institutional care would not be achieved; Article 72 of the Criminal Code. As for the procedure, see Article 351 and following of the Code of Criminal Procedure.

36 Psychiatric institutions are designed for providing institutional care to persons affected by mental deficiencies who need specialized care, eventually persons on whom had been imposed obligatory treatment. Article 15 of Decree No. 242/1991 of the Coll., from 3 May 1991, of the Ministry of Health of the Czech Republic on the System of Medical Institutions Established by District Offices and Municipalities.

37 As governed by Article 36, paragraph 2, of Law No. 20/1966 of the Coll., from 17 March 1996, Law on the Health Care of the Population (Zákon o péči o zdraví lidu), or Health Care Law.

38 According to Article 13 of Decree No. 187/1987, implementing the Law on the Protection from Alcoholism and Other Toxic Dependencies, the institutional care is provided by departments for anti-alcohol and anti-toxic care at psychiatric institutions and the working stations for anti-alcohol and anti-toxic care at psychiatric departments of hospitals.

39 See note 39.

40 According to Article 23 of the Health Care Law, patients can be treated and even taken into institutional care without their consent if they manifest symptoms of poor mental health or intoxication and are endangering themselves or their surroundings. The decision is made by a doctor or by special commissions of medical facilities. If an individual does not agree with the decision, he or she can file a complaint for review by the director of the medical institution that made the decision. In case of a negative decision, the director submits it to the appellate institution, which is either the Ministry of Health or a district office. A proposal for appellate review must be filed within fifteen days of the delivery or notification of a decision. Otherwise, all provisions of administrative proceedings apply, although it is possible to file a petition to the court against any decision in the administrative proceeding.

41 Article 9, paragraph 3, of Law No. 37/1989 of the Coll., from 28 March 1989, Law on Protection from Alcoholism and Other Toxic Dependencies (Zákon o ochraně před alkoholismem a jinými toxikomaniemi).
police officer or intentionally contaminates or destroys police equipment or property; who was caught committing a misdemeanor and there is a suspicion he or she would continue to do so or interfere with an investigation; or who is younger than fifteen and was caught committing a crime and there is a suspicion that he or she would continue the criminal activity or interfere with an investigation. The police can also apprehend a foreigner if he or she commits an offense for which it is possible to limit his or her presence in the Czech Republic or issue an administrative expulsion; if an administrative expulsion was initiated; if the foreigner should be expelled based on a valid decision; or if a police officer believes the foreigner entered the country illegally. See Articles 14–15 of Law No. 283/1991 of the Coll., from 21 June 1991, Law on Police of the Czech Republic (Zákon o policii).

44 Article 3, paragraph 1, of the Code of Administrative Procedure.
45 Article 3, paragraph 2, of the Code of Administrative Procedure.
48 Article 36 (and following) of the Code of Criminal Procedure.
49 Article 36, paragraph 1, letters a–d, of the Code of Criminal Procedure.
50 For the latter, see Article 116 (and following) of the Code of Criminal Procedure. The observation cannot exceed two months.
51 According to Article 74 of the Criminal Code, a minor is “an individual has reached the age of fifteen and does not exceed the age of eighteen.”
52 According to Article 302 of the Code of Criminal Procedure, a fugitive is “an individual who avoids criminal procedure by staying abroad or by hiding.”
53 Article 36, paragraph 2, of the Code of Criminal Procedure.
54 Article 36, paragraph 3, of the Code of Criminal Procedure.
55 For accelerated procedure, see section 2.1.2, subsection on Extent of legal aid.
56 Article 36, paragraph 4, of the Code of Criminal Procedure.
57 The purpose of the enforcement proceeding is to execute the content of the decision issued in the criminal proceeding, e.g., a decision about the beginning or postponement of the imprisonment, expulsion, protective care, etc. For details, see Head XXI, Articles 315–362, of the Code of Criminal Procedure.
58 Article 36a, paragraph 1, letters a–d, of the Code of Criminal Procedure.
59 Articles 266–276 of the Code of Criminal Procedure.
60 See Article 265a–s of the Code of Criminal Procedure.
61 Article 36a, paragraph 2, letters a–e, of the Code of Criminal Procedure.
62 Article 152 of the Code of Criminal Procedure.
63 Article 33, paragraph 2, of the Code of Criminal Procedure.
66 The law defines a victim of a crime as an individual whose health was impaired or who suffered a proprietary, moral, or other damage as a result of a crime. However, a person who feels harmed by the crime morally or in any other manner, or a person suffering harm that has not been caused by the dereliction of a defendant or harm that is not in a causal relation to the crime, is not considered a victim. See Article 43 of the Code of Criminal Procedure.
67 Article 51a, paragraph 1, of the Code of Criminal Procedure.
68 Article 51a, paragraph 2, of the Code of Criminal Procedure.
69 Article 51a, paragraph 3, of the Code of Criminal Procedure.
70 Article 51a of the Code of Criminal Procedure.
71 Article 151a of the Code of Criminal Procedure.
73 Communication with the Bar Association, Representative of the Registry Department, 27 September 2002. See also information on www.cak.cz (last accessed on 28 July 2002).
74 See Article 38 of the Code of Criminal Procedure.
Ibid.

76 Article 39, paragraph 1, of the Code of Criminal Procedure.

77 Article 40 of the Code of Criminal Procedure.

78 Article 33, paragraphs 2 and 3, of the Code of Criminal Procedure.

79 Instruction of the Ministry of Justice No. 1100/98-OOD, from 23 March 1998, issuing the Inner and Administration Rules for District, Regional and Upper Courts (hereafter, the Rules on Court Administration).

80 Article 30, paragraphs 1 and 2, of the Rules on Court Administration.

81 The list should also include telephone and fax numbers, and eventually cell phone numbers, if the attorney makes them available to the court.

82 Article 30, paragraph 3, of the Rules on Court Administration.

83 Article 30, paragraph 4, of the Rules on Court Administration.

84 The law uses this term to refer to all possible complaints, requests, and appeals. It does not include an obligation to file a constitutional complaint.

85 Article 41, paragraph 1, of the Code of Criminal Procedure.

86 Article 165, paragraph 2, of the Code of Criminal Procedure.

87 Article 41, paragraphs 1–4, of the Code of Criminal Procedure.

88 Article 41, paragraph 5, of the Code of Criminal Procedure.

89 Decree of the Ministry of Justice, No. 177/1996 of the Coll., from 4 June 1996, on Fees and Reimbursements of Attorneys for Provided Legal Services (Advocacy Tariff), as Subsequently Amended (O odměnách advokátů a náhradách advokátů za poskytování právních služeb [Advokátní tarif]).

90 Article 11 of the Advocacy Tariff.

91 See Decision (urszen) of the Upper Court in Prague from 19 February 1998, No. 1 Ts/3/98.


94 Article 151 of the Code of Criminal Procedure.

95 Full information on this case is available at the Counseling Centre for Citizenship, Civil and Human Rights, poradna@poradna-prava.cz.

96 See section 2.2.2.

97 Interview with JUDr. Tatiček, the judge of the Regional Court in Brno, November 2002.

98 Interview with Ms. Soukupová, the treasurer of the Regional Court in Prague, November 2002.

99 Interview with the Treasurer of the Criminal Department of the Regional Court in Hradec Králové, November 2002.

100 Communication with the Ministry of Justice. Interview with P. Munišová of the Statistical Department of the Ministry of Justice, 1 November 2002.

101 For example, communication with the district courts in Prague, July–September 2002.

102 Communication with the Bar Association, letter No. 04-1565/2001, letter from, signed JUDr. M. Jodas, director of the Civil Department of the Bar Association; interview with JUDr. Bajchlová, Bar Association, September 2002.

103 Communication with the Bar Association, letter No. 01-0046/02/dr.KL/ep, from 22 January 2002, signed by JUDr. J. Klouza, treasurer of the Bar Association.

104 For example, interview with JUDr. Samorodová, 23 October 2002.


107 See section 2.1.2, subsection on Extent of Legal Aid.

108 Interview with Deputy Minister of Justice JUDr. J. Baxa in Právo, 26 June 2002.

109 See reaction of the Bar Association (V. Mandák) in Právo, 1 July 2002, to the interview with Deputy Minister of Justice JUDr. J. Baxa in Právo, 26 June 2002.

110 Article 151 of the Code of Criminal Procedure.

111 Article 151, paragraph 5, of the Code of Criminal Procedure.


113 Interview with Deputy Minister of Justice JUDr. J. Baxa in Právo, 26 June 2002.

114 Law on Advocacy.
Law on Advocacy.
Communication with the Disciplinary Committee of the Bar Association, 1 November 2002.
Interview with JUDr. Klouza, treasurer of the Bar Association, 12 November 2002.
See When the Interest of Justice Requires So: On Certain Aspects of Legal Aid in the Czech Republic, prepared by M. Thiehoff on behalf of the Tolerance Foundation, November 1997, p. 9.
Article 37, paragraph 2, of the Charter.
Article 18, paragraph 1, of Law No. 99/1963 of the Coll, from 4 December 1963, Civil Procedure Code, as Subsequently Amended (Občanský soudní řád).
Judicial review of the decisions issued by other institutions is governed by Article 244–250r of the Civil Procedure Code from 1 January 2003, and by Law No. 150/2002 of the Coll, from 21 March 2002, Code of Administrative Justice Procedure. Civil courts will further review only petitions against effective decisions of administration authorities (which are public enforcement institutions, institutions of regional administration, institutions of interest or professional administration, or eventually institutions of alternative dispute resolution) on disputes or other legal matters regarding civil, labor, family, or commercial institutions. For details, see section 4.
Article 24, paragraph 1, of the Civil Procedure Code.
Article 28, paragraph 3, of the Civil Procedure Code.
Article 32, paragraph 2, of the Civil Procedure Code.
Article 25 of the Civil Procedure Code.
Article 27, paragraph 2, of the Civil Procedure Code.
Article 27, paragraph 2, of the Civil Procedure Code.
Article 28a, paragraph 2, of the Civil Procedure Code.
Article 28a, paragraph 1, of the Civil Procedure Code.
Article 28, paragraph 1, of the Civil Procedure Code.
Article 28, paragraph 4, of the Civil Procedure Code.
Article 31, paragraph 1, of the Civil Procedure Code.
Article 31, paragraph 2, of the Civil Procedure Code.
Prior to 1 January 2003 (when an amended Civil Procedure Code and a new Code of Administrative Justice Procedure became effective), it was also the procedure on a petition against a decision of an administrative authority, according to Article 250a of the Civil Procedure Code. The amended Civil Procedure Code does not presuppose mandatory representation in the remaining forms of judicial review by civil courts. Parties will have to rely on the general norms on legal aid in civil procedure, as described above.
See Articles 237–239 of the Civil Procedure Code.
Article 241a, paragraphs 2 and 3, of the Civil Procedure Code.
Article 241, paragraph 1, of the Civil Procedure Code.
Article 30, paragraph 2, of the Civil Procedure Code.
See also A. Macková, Legal Aid Provided by Lawyers and Its Accessibility, C. H. Beck, 2001, p. 177.
See Macková, p. 180.
Article 30 of the Civil Procedure Code.
Compare Macková and Burč.
Article 137, paragraph 2, of the Civil Procedure Code.
Amendment No. 519/1991 of the Coll.
Article 5 of the Civil Procedure Code.
Amendment No. 171/1993 of the Coll. Currently, the principle applies only to a limited number of situations in contradictory procedure.
Law No. 30/2000 of the Coll.
Article 153b, paragraphs 1 and 5, of the Civil Procedure Code.
Communication with the Statistical Department of the Ministry of Justice, P. Musilová, 1 November 2002.
Compare with letter No. 243/2001-Org., from the
Ministry of Justice, signed by JUDr. Eva Sumeraurova, director of the Department of Civil Control.

Compare with letter No. 916/2002, from the District Court for Prague 2, Administration of the Court, signed by JUDr. Martina Kasiková, deputy president of the Court.

Communication with the Bar Association, September 2002.

Communication with the Bar Association, No. 01-0046/02/dr.KL/ep.

Ibid.

Article 151, paragraph 3, of the Civil Procedure Code.

See www.obcanske-poradny.cz, Section Statistika (accessed on 31 August 2002).


Article 5 of the Law on Court Fees.

Ibid.

Equivalent of 3.67 euros.

Equivalent of 36,667 euros.

Equivalent of 20 euros.

Equivalent of 500 euros.

See the Appendix to the Law on Court Fees, item 1.

See the Appendix to the Law on Court Fees, item 17.

A full list of the material exemptions is contained in Article 11, paragraph 1, of the Law on Court Fees.

Article 2 of the Law on Court Fees.

Article 142 of the Civil Procedure Code.

Articles 67–69 of the Civil Procedure Code.

Article 37, paragraph 2, of the Charter.


Article 3 of the Code of Administrative Procedure.

Article 16, paragraph 1, of the Code of Administrative Procedure.

Article 17, paragraph 1, of the Code of Administrative Procedure.

Article 17, paragraph 4, of the Code of Administrative Procedure.


According to Article 3, paragraph 1, of the Code of Administrative Justice Procedure, those are the regional court and the Supreme Administrative Court.

Article 4, paragraph 1, of the Code of Administrative Justice Procedure.

See Article 103 of the Code of Administrative Justice Procedure.

Article 35 of the Code of Administrative Justice Procedure.

Article 105, paragraph 2, of the Code of Administrative Justice Procedure.

Article 36, paragraph 1, of the Code of Administrative Justice Procedure.

Articles 29 and 30 of Law No. 182/1993 of the Coll., from 16 June 1993, Law on the Constitutional Court as Subsequently Amended (hereafter, the Law on the Constitutional Court).


Article 63 of the Law on the Constitutional Court.

Article 34, paragraph 1, of the Law on the Constitutional Court.

Article 35 paragraph 7, of the Code of Administrative Justice Procedure.

Article 36, paragraph 3, of the Code of Administrative Justice Procedure.

Articles 83–84 of the Law on the Constitutional Court.

Article 35, paragraph 7, of the Code of Administrative Justice Procedure.


See also the instructions for those filing applications to the Constitutional Court at www.concourt.cz (last accessed on 2 September 2002).

Interview with Ing. V. Minašík, director of the Constitutional Court Administration, 1 November 2002.

Situation as of 31 August 2002.

Letter from the Constitutional Court, No. 169/01, from 24 October 2002, signed by Ing. Vladimir Minašík.


212 Communication with the Ministry of Justice; Information provided by the Investment and Financial Department of the Ministry of Justice via the spokesperson of the Ministry, JUDr. V.Voracek, e-mail from 14 October 2002.
213 See footnote 91.
214 Article 8 of the Advocacy Tariff.
215 Article 7 of the Advocacy Tariff.
217 Article 13 of the Advocacy Tariff.
218 Article 14 of the Advocacy Tariff.
219 Communication with the director of the Association of Citizens Advice Bureaux, September 2002.

220 Compare with the communication with the Ministry of Justice, letter No. 28/2002-St., from 30 January 2002, signed by JUDr. J.Brož, director of the Department of the Organization and Control of the Ministry of Justice.
222 See letter No. 20573/02, from 10 January 2002, signed by JUDr. V.Král, director of the Legislative Department of the Ministry of Justice.

Anne Adamson and Frank Emmert

Executive Summary

After some introductory remarks about the legal system of Estonia and the way it has developed since the country’s independence from the Soviet Union, sections 2, 3, and 4 of this report describe the central features of state-paid legal aid in criminal, civil, and administrative/constitutional cases, respectively. In particular, the report outlines the conditions for partial or full waivers of court fees and for appointment of state-paid legal counsel.

Section 5 analyzes the organization of the system of legal aid and the respective roles of the Ministry of Justice, the Bar Association, the lawyers, and the courts. In this section is also the results of a questionnaire sent by the authors to all 150 judges in Estonia. Although their general level of satisfaction with the legal aid system is quite high, the judges have pointed out a number of weaknesses and made a number of recommendations for improvements. These have been incorporated in subsequent parts of the report and are summarized below.

Section 6 provides financial and other data about the provision of legal aid in Estonia during the last five years. This includes tables with the budget allocated to the courts and the legal aid system as a proportion of the general state budget, the number of cases brought to the courts, the number of cases where legal aid has been granted, the number of hours of legal aid paid for by the state, and the level of remuneration for the attorneys per hour. At the end of this section, there is also a description of various non-governmental initiatives, which may or may not be financially supported by the Estonian government.

Section 7 briefly summarizes the lack of comprehensive data about the relationship between the need for and the provision of legal aid, as well as data breaking down legal aid cases into criminal, civil, and administrative/constitutional cases.

In Section 8 is an overview of several important draft laws currently being con-
sidered by the Estonian Parliament. The most significant changes, for the purposes of the present report, will be brought about by the new law on legal services. Consequently, the text of this draft, as far as it is already available, is discussed in some detail.

Finally, in Section 9, the authors present a number of recommendations for possible reform of the system of legal aid in Estonia. These recommendations are based in part on the feedback obtained from judges responding to the questionnaire, as well as from people interviewed in the Ministry of Justice and in other administrative and judicial bodies. In part, they are also based on the experience of the authors and their analysis of the data collected for this report.

In brief, it can be said that the Estonian system suffers from several weaknesses.

First, the procedure for granting legal aid is too complicated. The courts should not have to address themselves to the Ministry of Justice, which then approaches the Bar Association, which in turn then approaches the individual lawyers. There is no valid reason that a request for legal counsel cannot be addressed directly by the judge to the Bar Association.

Second, to the extent that the judges have noted quality problems, they say that these are due partly to the limited financial incentive for the legal aid providers and partly to the fact that legal aid is not necessarily provided by attorneys who have been admitted to the Bar. The latter problem should be corrected by limiting the right and the duty to take on legal aid cases to members of the Bar and those trainee lawyers who have at least passed the second level of the Bar exam. Others should be included in the system only upon successful completion of a special training program and an examination. All Estonian lawyers should be required to take a certain number of hours of continuing professional education every year, including training about the legal aid system.

On the former matter, by contrast, the authors feel that the hourly remuneration for the legal aid providers is quite adequate in the meantime, in particular if compared with the remuneration in various Western countries. What needs to be changed, however, is the system at present, which gives courts the power to reduce the remuneration claimed by an attorney for a given case, without also providing the courts with binding guidelines on how to apply this prerogative. In particular, ancillary costs related to the preparation of legal briefs, travel expenses, office expenses, etc., have to be more adequately taken into account.

Third, a major problem in Estonia is the lack of sufficient information given to the general public on how, where, and when to apply for legal aid. This report makes a number of specific recommendations as to how this can be changed, in particular with a view toward advising people whether a certain claim is valid prima facie and could be supported by legal aid. In addition, specific information has to be made available to the Russian-speaking minority.

Fourth, another significant problem results from the absence of clear standards of eligibility for legal aid. So far, the law provides
for legal aid only for people who are found to be “insolvent.” This term has been interpreted in very different ways by the courts, and some have gone so far as to deny legal aid to individuals purely on the basis that they had regular income, even if it was as little as the minimum state pension of less than 100 euros, Article 9 of the draft Law on Legal Services addresses this issue only partly, and it still leaves vast discretion to the courts as to the conditions in which an applicant is or is not able to cover his or her elementary subsistence. This should be clarified further. A reasonable stipulation could be that the courts have to grant legal aid to applicants who have less disposable income (after payment of taxes, rent, basic heating, electricity, etc.) per head of the household than the minimum state pension.

Despite these various weaknesses, the authors found that the system of allocation of funds from the state budget for legal aid purposes is adequate and as such is able to guarantee the proper functioning of the legal aid system. At least it seems that legal aid has not been, and will not be, denied purely for lack of state funding.

1. Introduction

Estonia, a former part of the Soviet Union, declared independence in 1991 and promulgated a new, democratic Constitution in 1992. Ever since then, the country has been rebuilding itself as a market economy and democracy that is based on the rule of law. Estonia gained early recognition for its efforts in 1997, when it was short-listed by the Commission of the European Union—together with Poland, Hungary, the Czech Republic, and Slovenia—as a prime candidate for membership in the European Union. Even after the fast-track approach to EU enlargement was replaced in 1999 with the “regatta principle,” under which each candidate country for EU membership is evaluated on its own merits, Estonia has managed to retain a leading position in its candidacy for membership. To this day, there remains a widespread perception across Europe that Estonia is well on its way in the transformation process—and ahead of many other countries in Central and Eastern Europe in the development of a market economy and democracy based on the rule of law. Indeed, many Western donor organizations have already “graduated” Estonia and have terminated their support for the country in favor of others farther East that are perceived to be more in need of help.

This report will show that Estonia has grown into a democratic country, with legislation that generally meets Western standards and expectations. Despite this, Estonia does not have the resources to provide access to justice in a satisfactory way for a significant part of its population. Given that Estonia’s average per capita taxable income in 2002 was approximately 416 euros per month, this problem affects practically the majority of the Estonian population. However, Estonia’s difficulties are not limited merely to providing its population with access to justice. The development of
Estonia’s administration and judiciary—like that of most other Central and Eastern European countries—has lagged behind the economic and social changes that the country has experienced. Indeed, Estonia’s government and judiciary tend to be characterized more by serious and persistent structural problems than by its successful implementation of Western standards of justice and rule of law, and there is widespread disillusionment in the population and a perception that one unjust system has been replaced by another. It is the strong conviction of the authors that these problems, if left unaddressed, will haunt Estonia and Central and Eastern Europe for a long time to come. It is also the hope of the authors that this report, and the entire research project, will contribute to a better awareness of the problems and ultimately to their resolution.

**Court system in Estonia**

The courts in Estonia are independent in their work and administer justice in accordance with the Constitution and the laws of the Parliament. The Estonian court system consists of the following three levels:

- county, city, and administrative courts: courts of first instance;
- district courts: courts of second instance;
- Supreme Court.

The Ministry of Justice is responsible for the organization and management of the courts of first and second instance. Only the Supreme Court is both legally and financially independent.

County and city courts deal with all civil and criminal cases, while administrative courts hear cases related to legislation; activities of the institutions of executive state power, local governments, and the election committee; and disputes concerning administrative agreements and administrative offenses. In addition to the chief judge, county and city courts employ a number of professional judges and are divided into real estate departments, registration departments, probation supervision departments, and enforcement departments. Additional departments may be established within courts.

Most cases in the courts of first instance are heard by a single judge. Two lay judges may assist the judge, if the parties so request, in civil proceedings and in criminal proceedings dealing with serious offenses, or if the accused is underage. Lay judges are elected by local government councils. In district courts, decisions are reached by joint decision of a panel of three judges. The Supreme Court takes decisions en banc or in chambers.

**Definitions**

In this report, the following conventions shall apply: *Legal aid* is used to describe the right of an indigent person to be provided with the services (including legal advice and legal representation) of a qualified lawyer, where these services are com-
pletely or partially free of charge for the recipient and paid for by the state. Mandatory legal representation is used when discussing legal representation in cases for which the defendant is required by law to be represented by an attorney. Free legal advice means legal counseling or information (excluding representation) provided free of charge for the recipients by lawyers or non-lawyers and sponsored by the state or private funds.

Methodology
The information contained in the present report was compiled on the basis of the laws of Estonia as of the fall of 2002. A very important draft Law on Legal Services, which is intended to clarify and improve the existing regime for the provision of legal aid, is still in preparation. While it is to some extent difficult to foresee the final wording and the practical impact these changes will have, the draft rules have been evaluated for the purposes of the present report and are presented in section 5.

In order to assess the state of the legal aid system in Estonia, the authors have drawn not only on their own experience within the system, but also on a questionnaire sent to all 150 judges in Estonia. Thirty-six judges, or 24 percent, returned the questionnaire, and their feedback is included in section 5.6.

2. CRIMINAL LAW: EFFECTIVE ACCESS TO THE JUDICIAL SYSTEM FOR THE INDIGENT IN CRIMINAL CASES

2.1 RIGHT TO COUNSEL

2.1.1 Constitutional guarantees of the right to counsel and the right to legal aid

Articles 8–55 of the Estonian Constitution deal with “Fundamental Rights, Freedoms, and Duties.” Article 20 focuses on the right to liberty and security of every person, and lists all lawful grounds for depriving a person of liberty. Article 22 contains the presumption of innocence. Article 23 includes the fundamental guarantees against retroactive application of criminal laws (nulla poena sine lege) and the protection against double prosecution (ne bis in idem). Procedural guarantees are spelled out in Articles 21 and 24. The closest the Constitution comes to a guarantee of the right to legal counsel and legal aid is in the second sentence of the first paragraph of Article 21, which provides: “A person suspected of a criminal offense shall also be promptly given the opportunity to choose and confer with counsel.”

The Constitution does not mention legal aid for people who cannot afford the legal counsel of their choice—or, for that matter, any legal counsel at all. A guarantee of legal aid is, however, included in the Courts Act. According to Section 9 (1) of the Courts Act, “Everyone is entitled to legal
aid in order to protect his or her rights and freedoms at all stages of judicial proceedings.”¹⁰ This provision is not limited to criminal cases; thus, it also guarantees legal aid in cases where private individuals are seeking to protect their rights in civil law and/or administrative law proceedings. However, it does not have constitutional status.

The Estonian Code of Criminal Procedure contains the typical canon of procedural guarantees that one would expect to find in a Western-style democracy. While originally adopted on 6 January 1961, i.e., during Soviet times, it has been amended to reflect the procedural guarantees that are contained in the European Convention on Human Rights, as well as the case law of the European Court of Human Rights. The core provisions for the purposes of the present report are Section 13 (which deals with the administration of justice on the basis of equality of persons before the law and the courts), Section 45 (which addresses the obligation of the courts, prosecutors, and preliminary investigators to provide adequate explanations to all individuals participating in criminal cases in order to allow them to exercise their rights), and, in particular, Section 35 (which details the rights and obligations of suspects in criminal investigations and of accused persons in criminal trials) and Section 37 (which sets out the rights and obligations of criminal defense counsel).¹¹

2.1.2 Right to counsel in criminal proceedings

According to Section 35 (1) of the Estonian Code of Criminal Procedure, a suspect has the right to have a criminal defense counsel and to confer with the counsel, without the presence of other people, “for unlimited numbers of times” and for “unlimited duration.” Section 37 (2) contains the corresponding provision for “persons being defended.” Section 36¹¹ (1) clarifies that any “suspect, accused, or accused on trial” has the right to criminal defense counsel of their own choice “during all the criminal proceedings.” If a suspect, an accused, or an accused on trial is required to have criminal defense counsel,¹² or has requested participation of criminal defense counsel “but does not have criminal defense counsel,” Section 36 (2) places an obligation on the Estonian Bar Association to ensure that a criminal defense counsel is appointed “at the expense of the state.”

Section 9 (2) of the Courts Act specifies the following persons as entitled to act as criminal defense counsel: sworn advocates of the Republic of Estonia, senior clerks and clerks of sworn advocates, and “other persons with the permission of the court.”¹³ Section 36 (1) of the Code of Criminal Procedure expands the third group to “other persons with the permission of the preliminary investigator or the court.”¹⁴ The first category, sworn advocates, is equivalent to fully qualified attorneys and full members of the Bar in other countries. The second category, however, is more problematic. It basically gives sworn advo-
icates the right to send almost any of their assistants, including those who have just finished law school and taken only the first of three levels of the Bar exam, the so-called Examination of a Sworn Advocate’s Clerk, to represent a client. This problem will be further elaborated upon in section 5 of this report.

A related problem is the question of whether the right to have unlimited numbers of meetings for an unlimited duration of time—or even just a sufficient number of meetings for a sufficient duration of time—with the counsel of choice can be effectively guaranteed with the very limited financial resources that are available from the state in legal aid cases. Again, this point will be further developed below.

2.1.3 Right to counsel and right to legal aid in non-criminal proceedings when deprivation of liberty is at stake

Misdemeanors and administrative offenses (väärteod)

The Code of Misdemeanor Procedure entered into force on 1 September 2002. According to Article 19 of this new Code, every party to a procedure under the Code has the right to contact his or her representative if he or she has been arrested, or if a misdemeanor-related procedure has been initiated against him or her. The participation of a legal representative in the misdemeanor procedure is compulsory in cases where the person who has allegedly committed a misdemeanor is between fourteen and eighteen years of age or is otherwise unable to represent himself or herself.

Under Article 20 of the new Code, the representative can be either an attorney or, with the permission of the person in charge of the procedure, an individual with knowledge of legal disciplines (õigussteamistega). An application for cassation (court of appeal) and/or for Supreme Court review must, however, be submitted through an attorney (i.e., a full member of the Bar).

A party to a procedure under the Code of Misdemeanor Procedure may also request a legal representative paid for by the state, as stipulated under Article 22 of the Code. The grounds on which a representative is to be provided and the procedure to be followed in making the application are identical to the civil court procedure. State-paid legal representation is available in cases where a defendant’s material interests are at stake and where he or she is insolvent. If the defendant is between fourteen and eighteen years of age and does not choose a representative for himself or herself, the court must appoint a representative for him or her. If the court rules that legal representation shall be provided free of charge to the party, the decision is forwarded to the Estonian Bar Association.

According to Article 23 of the Code, a defendant can apply for reimbursement of the costs of legal counsel if a punishment imposed against an individual for a misdemeanor is quashed by the court and the proceeding is terminated.
Extradition cases

Sections 400 et seq. of the Code of Criminal Procedure outlines the procedure to be followed in cases where a foreign state has requested the extradition of a person. According to Section 403 (1), a person has the right to representation during the entire proceeding regarding his or her extradition. Any sworn advocates, or their senior and other clerks, or other persons with the permission of the court, may act as legal counsel. For cases where a person is unable to pay for legal assistance, Section 403 (2) refers to the provisions of Section 361 (2) of the Code of Criminal Procedure, as detailed in section 2.1.2.

Minors with behavioral disorders

According to Section 2891 of the Code of Criminal Procedure, participation of a legal representative may be required in cases where a minor is to be placed in a special school for children with behavioral disorders or for the extension of such a placement.

2.2 Right to legal aid: Eligibility criteria for granting legal aid in criminal cases

2.2.1 Substantive criteria

As the above summary suggests, legal aid can, in principle, be granted in every criminal case, regardless of the severity of the potential sentence or whether the defendant has been placed in pretrial detention. However, in cases concerning misdemeanors or administrative offenses, and in certain other cases, legal aid will be granted only if deprivation of personal liberty has occurred or is at stake.

2.2.2 Financial criteria

The Code of Criminal Procedure does not provide financial criteria for assessing whether legal aid should be granted. For further information, see the relevant passages below.

2.2.3 Other eligibility questions

Legal aid is available on the same terms for Estonians and non-Estonians on the basis of Article 9 of the Estonian Constitution, which specifically stipulates: “The rights, freedoms and duties of each and every person, as set out in the Constitution, shall be equal for Estonian citizens and for citizens of foreign states and stateless persons in Estonia.” Article 12 of the Constitution provides that everyone is equal before the law and that no person shall be discriminated on the basis of, inter alia, nationality. According to Article 13 of the Constitution, everyone has the right to [equal] protection of the state and of the law. Finally, Article 15 of the Constitution provides that anyone whose rights or freedoms have been violated has the right to appeal to the courts.
This means that an applicant for state legal aid does not have to be an Estonian citizen. The right of recourse to legal aid must be available to everyone, including foreigners. Minorities, in particular members of the large Russian-speaking minority (close to 30 percent of the resident population), illiterate persons, immigrants, refugees, etc., must not be given preferential treatment just because of their belonging to a distinct group. All these persons have to meet the same criteria as Estonians, namely, insolvency.

On the other hand, there is little doubt that in reality it is far more difficult for members of the minority groups to obtain legal aid, in particular because they have a hard time communicating in Estonian. As will be shown below, even many Estonians are unaware of the option of free legal aid. This almost certainly means that non-Estonians know even less about their rights.

This is one of the reasons the work of the Estonian Refugee Council is very important. This non-governmental organization offers free legal aid to asylum-seekers. Previously, refugees who wished to appeal a decision by the border guards or the Citizenship and Migration Board would probably just be advised to contact an attorney—a task that was almost impossible, given most refugees’ financial and linguistic difficulties.

2.2.4 Legal aid for victims of crimes

Section 45 of the Code of Criminal Procedure provides a right for people wrongfully accused of a crime to receive compensation. Such compensation is available, in principle, if proceedings are terminated on the grounds that no crime was committed, if the court concludes that the criminal act was exceptionally justified, or if the defendant was not part of a criminal act that was unlawfully committed by other individuals. Damages to the victim are compensated for wrongful conviction, wrongful charges, and wrongful preventive custody.

On 1 January 2001, the State Compensation of Victims of Crime Act of 15 December 1998 entered into force. The purpose of the act is to regulate the procedure for the alleviation of the material consequences of serious violent crimes.

Section 3 of the act stipulates that compensation can be paid by the Estonian state to Estonian citizens, aliens with permanent or temporary residence permits and actual residence in the Republic of Estonia, and refugees staying in Estonia. It does not include tourists and other short-term visitors to Estonia.19 In case the crime victim dies as a result of the violent attack, his or her dependents can bring the claim for compensation. The term “dependent” is specifically understood to include descendants who are born after the death of their parent.
In order to come within the scope of the act, under Section 4 (1), the crime has to be committed in territory under Estonian jurisdiction. However, the act also applies to violent crimes committed abroad, if the victim is an Estonian citizen "staying abroad for reasons related to studies, employment, or service duties or for other good reason and if the victim is not entitled to a similar compensation under the law of the country where the criminal offense was committed." Under Section 4 (2) of the act, if the victim dies, compensation is paid to a dependant who was a permanent resident of the Republic of Estonia at the time when the crime was committed.

Section 5 of the act contains a list of situations in which 50 percent of the actual damages may be payable. This includes damages arising from incapacity for work; expenses for medical treatment of the victim; the victim’s funeral expenses, and other damages arising from the death of the victim. If material damage caused to appliances substituting for bodily functions (such as dentures, contact lenses, and eyeglasses) and to clothes exceeds 50 percent of the monthly income of the victim, compensation may also be claimed.

After the Estonian state has paid compensation to the victim, the state acquires the right to bring an equivalent claim against the person who committed the crime. Both wrongfully accused persons and victims of crimes can claim legal aid according to the general principles outlined in this report for their claims for compensation.

2.3 Procedure for granting legal aid

Responsibility for processing legal aid applications

According to Section 12, subsection 12, of the Statute of the Ministry of Justice, the processing of applications for legal aid falls under the judicial administration responsibilities of the Ministry of Justice. Decisions approving applications for legal aid are forwarded to the Board of the Estonian Bar Association, which is responsible for the actual provision of legal aid through its members, pursuant to Section 12 of the Bar Association Law.

In a decision of 6 June 2000, the Estonian Supreme Court confirmed that an application for legal aid for an appeal may be submitted both to the court against whose decision the appeal is directed and to the higher court that is reviewing the decision. The Supreme Court also held that the applicant bears the burden of proving insolvency, and that the courts are not required to ask for such evidence.

Informing suspects of their procedural rights, including the possibility to obtain legal aid

Section 234 of the Code of Criminal Procedure requires the judge to explain the various procedural rights and guarantees to the accused in a criminal court hearing. Section 235 extends this right to information to victims, plaintiffs, defendants, and legal representatives of accused at trial who are minors.

According to Section 17 (4) of the Code
of Ethics of the Bar Association, an attorney is obliged to inform his or her client of his or her right to obtain legal aid free of charge. Additionally, Section 17 (5) of the Code stipulates that where the attorney’s fees are being paid by the state, the attorney may not accept additional monetary contributions or compensation from the client. According to Section 17 (3) of the Code, an attorney may provide legal aid pro bono.

**Procedural stage when legal counsel is appointed**

At the beginning of the prosecution of an accused person, Section 192 of the Code of Criminal Procedure requires the judge to make decisions on the following issues:

- the appointment of a criminal defense counsel, or permission of the participation of a criminal defense counsel chosen by the accused;
- measures for securing a civil action;
- determination of persons to be summoned to a court session as participants in the proceedings, witnesses, experts, or specialists;
- declaration of persons as victims or plaintiffs;
- demands for submission of further evidence;
- order to the head of the probation supervision department to make a proposal for appointment of a probation officer;
- hearing of the criminal matter in a public court session or in camera;
- participation of interpreters or translators in a court session;
- time and place of the court sessions.

Legal representatives of minors

According to Section 193 of the Code of Criminal Procedure, “the parents or other legal representatives” of an accused shall be required to participate at all stages of a trial if the accused is a minor. They have the right to make declarations on behalf of the minor and to participate in the examination of evidence.

**Selection of the lawyer providing legal aid and other organizational points**

The procedure in practice will be described in section 5.

2.4 **Scope of legal aid**

The legal aid appointed counsels may participate in all stages of the proceedings, from the moment of first interrogation until the decision becomes final. The appointed counsels have the same procedural rights as all defense counsels in criminal proceedings.

2.5 **Quality of free legal representation**

As mentioned earlier, a questionnaire was sent to 150 judges in Estonia in order to get information on their assessment of the quality of free legal representation in Estonia. In addition, a number of interviews were conducted with judges and other legal professionals. The results are presented jointly for criminal, civil, and administrative law in section 5.
3. Civil Law: Effective Access to the Judicial System for the Indigent in Civil Cases

3.1 Normative Basis of the Right to Access to Courts in Civil Cases

The provisions of Article 15 of the Constitution and Article 9 of the Courts Act, as outlined above, are also applicable in civil cases. The rules on legal capacity to undertake procedural activities and on legal representation are included in Sections 71 and 84 of the Code of Civil Procedure, respectively. Minors, natural persons otherwise lacking legal capacity, state and local government agencies, and legal persons must have a legal representative in court. Otherwise, legal representation is required only before the Estonian Supreme Court.

According to Article 10 of the Code of Civil Court Procedure, if a participant in a proceeding is not represented by an advocate, the court shall explain to the participant the consequences of performance of, or failure to perform, a procedural act. Once these consequences have been explained, no further explanation is required under the law.

3.2 Eligibility Criteria for Granting Legal Aid in Civil Cases

The Estonian Code of Civil Procedure distinguishes between different forms of financial support for parties who are unable to cover the costs of litigation themselves. Section 57 deals with the possibility of waiving the state fees payable to the courts. First, the statute sets out the general rule that state fees are payable in cases that fall under the provisions of the State Fees Act, as described in section 3.7. Second, the statute notes that a court may waive the payment of fees fully or partially, if a person is insolvent. Where the party is a legal entity, insolvency must be demonstrated by a bankruptcy order. Waivers may apply to the filing of the claim alone or may cover the entire proceedings, including claims that are ultimately dismissed.

Section 58 provides for the possibility of extending the time for payment of legal costs payable to the state if the participant cannot pay the legal costs immediately. This decision is to be made when the final judgment is entered.

Legal aid is regulated in Section 59 of the Estonian Code of Civil Procedure. According to subsection (1), “a court has the right to fully or partially release a natural person from payment for legal assistance and to charge the advocate’s fees to the state if the court finds that the person is insolvent.” The provision grants the minister of justice the authority to fix the fee to be paid to the advocates. Each time a court decides to grant free legal aid, it must send this decision to the Ministry of Justice and to the attorney in question for implementation.

Section 60 provides that the party in whose favor a judgment is made may
request that its “necessary and justified” legal costs be imposed on the other party. If a claim was only partly successful, the legal costs of both parties are to be borne by them in proportion to their success in court; i.e., the legal costs to be borne by the plaintiff shall be calculated in proportion to the satisfied claims, and the legal costs to be borne by the defendant shall be calculated in proportion to the part of the action that was dismissed. If an action is satisfied only in part, the court may also decide that the legal costs of both parties will be borne by the parties themselves. If a party imposes unnecessary costs on another party, e.g., by failing to show up for a hearing for which he or she was summoned, the other party can demand compensation for these costs.

“Necessary and justified” costs are defined in Section 61 of the Estonian Code of Civil Procedure.26 The costs of legal assistance provided by a representative shall be compensated as follows:

- in the case of an action for a specified value, in an amount equal to up to 5 percent of the value of the satisfied part of the action in favor of the plaintiff, or in an amount equal to up to 5 percent of the value of the dismissed part of the action in favor of the defendant;
- in the case of an action for an unspecified value, as determined by the court, but not more than the amount established by the minister of justice.

The division of legal costs in cases where an action is settled or otherwise discontinued are dealt with in Section 62 of the Code.

3.2.1 Substantive criteria

According to Section 9 of the Courts Act, everyone is entitled to legal aid in order to protect his or her rights and freedoms at all stages of judicial proceedings. The act does not specify the extent of legal aid, nor the precise criteria when a court should find legal aid necessary for the protection of rights and freedoms. This question is not regulated by the internal rules of the courts either. In an interview, Civil Court Judge Eda Murak27 explained that a court may appoint an attorney for a claimant in cases where the person’s “important interests” (õhulised huvid) may be jeopardized due to his or her financial situation, i.e., inability to pay for legal counsel. As will be shown below, a new draft Law on Legal Services will provide at least some additional guidelines for the question of eligibility for legal aid.

3.2.2 Financial criteria

In order to be eligible for legal aid, a person has to be “insolvent” or otherwise unable to pay for legal expenses. The law does not provide specific thresholds or limits for income or property. According to explanations provided by Judge Murak, “an insolvent is a person who has no movable or immovable property and no monetary
resources.” However, the mere claim of the person that he or she is insolvent is not sufficient. This means, for example, that a person who is retired and has to live on the minimum pension\(^{28}\) is not automatically insolvent for the purposes of the law, since he or she might own real estate or have other relevant property.\(^{29}\)

3.2.3 Other eligibility questions

Further details will be discussed in section 8 in the context of the analysis of the new draft Law on Legal Services.

3.3 Procedure for granting legal aid

A person in need of legal aid must submit an application for the appointment of an attorney who will represent his or her interests during the court proceedings and who will submit his or her claims. The application must include a request to the court for a ruling that the state should cover the applicant's legal costs. On the basis of the application, the court will make a ruling as to whether to appoint a lawyer for the applicant at the expense of the state.

As further explained by Judge Murak, the court requires that an applicant for legal aid submit supporting evidence about his or her insolvency, which, among other things, should indicate that he or she does not own any valuable movable or immovable property\(^{30}\) and that there is no third person providing for financial liabilities of the applicant.\(^{31}\) The applicant must also specify in the application whether the attorney is required only for the submission of the claim, or also for legal representation during the trial. Lastly, the application must specify the essence of the claim for which legal aid is requested. The completed application is then forwarded through the Ministry of Justice to the Bar Association.

3.4 Scope of legal aid

Compensation for expenses related to legal assistance

According to Regulation No. 23 of the Ministry of Justice,\(^{32}\) the state shall compensate the expenses related to legal assistance in civil and administrative cases if the court has relieved the person partially or totally from payment for legal assistance or if the court, investigator, or prosecutor has done so in criminal cases with an appointed defendant.

This regulation applies only in case the person providing legal assistance is a member of the Estonian Bar Association. Expenses are to be reimbursed from the state budget. However, compensation for legal expenses is not unlimited. The time spent on the provision of legal assistance is calculated on the basis of time points. Each time point represents fifteen minutes of work, and is valued at EEK 32.50 (equivalent to about 2 euros). In exceptional circumstances (e.g., very complex cases, long-distance travel required of the representa-
tive, necessity of increasing the efficiency of adjudication, or multiple persons to be defended in a criminal case), the Board of the Bar Association may increase the compensation per time point, but not, in any event, beyond EEK 65 (about 4 euros).

As a consequence, the maximum compensation an attorney can get for the defense of an accused in a criminal trial is equivalent to 16.62 euros per hour. According to the Bar Association Yearbook of 1999, the members of the Bar have frequently asked the state to provide compensation for additional expenses, such as travel costs, time spent for drafting the claim or appeal, time spent on traveling to the location of the trial or to meet with the client, etc. However, no such approval has been given.  

Further details on financial aspects will be provided in section 6.

**Exemption from payment of state fees for court procedures**

Section 16 of the Courts Act provides a list of persons who are exempt from payment of court fees:

- plaintiffs and appellants in actions or appeals concerning wages, reinstatement in employment or service, or amendment of the written legal basis for termination of a contract of employment or for release of a person from service;
- plaintiffs in actions for allowances;
- plaintiffs in actions for compensation for damage caused by bodily injury, other health disorders, or the death of a provider;
- plaintiffs in actions for compensation for proprietary damage caused by a criminal or administrative offense;
- plaintiffs in claims for revenue derived from state forests;
- plaintiffs in actions related to assets of national stockpiles;
- environmental protection agencies that are plaintiffs in claims for compensation for damage caused by environmental pollution or unauthorized or unreasonable use of natural resources, and also in claims for collection of fines imposed for violations of nature conservation rules and claims for revenue received as a result of such violations;
- agencies that issue natural resources exploitation permits and are plaintiffs in claims for collection of debts for the right to exploit natural resources;
- the Competition Board, if it is a plaintiff in claims for revenue received without legal basis as a result of violations of pricing regulations, and also for collection of corresponding fines, and in matters concerning failure to comply with a precept or failure to comply with a precept in the manner required;
- trustees in bankruptcy who are plaintiffs in actions for recovery or reclamation of property in bankruptcy proceedings;
• the Tax Board and Customs Board, if they are plaintiffs in claims for collection of tax arrears;
• social insurance agencies and social welfare institutions, if they are plaintiffs in recourse actions for benefits and pensions paid to victims by persons who caused the damage;
• social welfare institutions, if they are plaintiffs in actions for reimbursement of unduly paid benefits and pensions;
• the Police Board, if it is a plaintiff in claims for reimbursement of the costs of a search;
• health insurance funds, if they are plaintiffs in claims for collection of amounts for health services and compulsory health insurance benefits.

State and local government agencies and legal and natural persons who, in the cases provided by law, have filed petitions with courts for protection of the rights and freedoms of other persons are also exempt from payment of state fees.

According to Section 16, subsection (3), parties are exempt from payment of state fees:

• in disputes concerning compensation for damage caused by unlawful conviction, unlawful criminal prosecution, unlawful preventive detention, other unfounded deprivation of liberty, or unlawful imposition of administrative penalties;
• in disputes concerning the restitution of property expropriated or abandoned in the course of unlawful repression and concerning compensation for the corresponding damage. Finally, other subsections provide as follows:

• Natural and legal persons are exempt from payment of state fees upon the issue of original judicial documents concerning criminal matters or actions for allowances.
• Natural persons are exempt from payment of state fees for complaints against decisions of election committees.
• Pension or benefit claimants are exempt from payment of state fees in matters concerning unduly paid benefit or pension amounts, or failure to pay such sums.
• Persons are exempt from payment of state fees in matters concerning certification of years of pensionable service.
• Tax authorities are exempt from payment of state fees upon the submission of bankruptcy petitions or other petitions related to bankruptcy proceedings, and in matters concerning determination of an amount of tax.

3.5 Quality of Free Legal Representation

The results of the interviews and the questionnaire regarding the quality of legal aid are presented in section 6.
3.6 Application of the Right to Legal Aid in Practice

There are a number of practical barriers to effective access to justice in civil cases. First of all, the option of free legal representation is not widely known, in particular among persons in low-income groups and among pensioners. Neither the state authorities nor the courts nor the Bar Association have thus far issued guidelines for citizens on where and how to inquire about legal aid.

Secondly, for an application for legal aid to be successful, a number of relatively sophisticated criteria must be met in the course of the application process. Basically, a significant number of people who are potentially eligible for legal aid would actually need aid in order to put together a successful application, which must include statements about the following:

- the need for an attorney for the submission of a proper claim;
- the need for an attorney for representation in the dispute;
- elaboration about a prima facie claim

3.7 Other Barriers to Effective Access to Courts in Civil Cases

**Court costs**

State fees, which must be paid upon initiation of proceedings unless a waiver is granted, are quite high. Section 37 of the State Fees Act provides a schedule for the fees, which depend on the value of the claim.
A supplementary state fee must also be paid if the value of an action increases during adjudication proceedings. Section 37 also provides that specific fees must be paid upon filing of non-monetary claims, such as for divorce and other family law claims, intellectual property rights, claims for declaratory judgments (such as the validity of a contract), etc.

The Code of Civil Procedure was revised recently. The new version entered into force on 1 September 2002. However, the changes in the Code relate only to the appeals/cassation procedure and do not amend any sections of the Code dealing with legal aid and legal costs.

3.8 Alternative dispute resolution (ADR) and similar schemes

Commercial arbitration

Pursuant to the Act of the Republic of Estonia on the Court of Arbitration of the Estonian Chamber of Commerce and Industry, the Court of Arbitration of the Estonian Chamber of Commerce and Industry (hereinafter, “the Court of Arbitration”) was established as a permanent court of arbitration for the settlement of disputes arising out of contractual and other civil law relationships, including foreign trade and other international economic relations. The Court of Arbitration is a non-governmental institution.

In order for an arbitration proceeding to be initiated, a registration fee of 1,200 EEK (77 euros) has to be paid to the Estonian Chamber of Commerce and Industry. The actual arbitration fee is later determined by the Board of the Court of Arbitration, and it will vary depending on the complexity of the case and the number of arbitrators involved in the settlement of the dispute. Free legal aid is not available for disputes brought to the Court of Arbitration.

Labor disputes

In disputes arising out of employment relations, the parties have a choice between dispute settlement in court and dispute settlement before special labor dispute committees. Pursuant to Section 10 of the Individual Labor Dispute Resolution Act, the labor dispute committees are extra-judicial, independent, individual labor dispute resolution bodies, which apply international agreements that are binding on Estonia, laws of the Parliament, administrative legislation and other rules regulating employment relations, and collective agreements and employment contracts. In order to encourage parties to pursue such matters before the labor dispute committees, proceedings before these committees are exempt from state fees. By contrast, labor disputes brought to the civil courts are subject to state fees, according to the above fee schedule for civil law disputes.

Simultaneous filing of claims before both the labor dispute committee and a court is not permitted. If a case is already pending before a committee, the courts must decline jurisdiction. A party who is not satisfied with a ruling by a labor dispute
committee may appeal to the courts to over-rule the committee. In practice, however, the courts tend to follow the decisions of the committees, unless there is evidence for procedural mistakes or other exceptional grounds for a rehearing of the case.


4.1 Normative Basis

Right of access to the courts

Article 15 of the Estonian Constitution provides that anyone “whose rights and freedoms are violated” has the right to seek a remedy in court. The article specifically stipulates that anyone can petition for any relevant law, administrative regulation, or individual act to be declared unconstitutional. Thus, the Estonian courts have the power to set aside the application of a legislative or administrative measure on the basis of constitutional review.

Article 4 of the Courts Act specifies that the right to judicial protection is guaranteed in all cases of violation of “life, health, personal freedoms, property, honor, and dignity, and violations of other rights and freedoms ensured by the Constitution.” This right is specifically extended to foreigners “unless otherwise provided by international agreements,” and to any party who is a legal person.

The right of recourse to the administrative courts is fleshed out in Article 7 of the Code of Administrative Court Procedure:

(1) Only a person who finds that his or her rights have been violated or his or her freedoms have been restricted by an administrative act or measure has the right to file an action with an administrative court. An action for the establishment of the existence or absence of a public law relationship or the unlawfulness of an administrative act or measure may be filed by a person who has legitimate interest in the matter.

(2) A protest against an administrative act or measure may be filed with an administrative court by an agency or official to whom the corresponding right is granted by law.

(3) An association of persons, including an association that is not a legal person, may file an action with an administrative court in the interests of the members of the association or other persons if the corresponding right is granted to the association by law.

Division of fees and costs

The general rules about how costs of litigation are to be borne, as well as the division of these costs, are set out in Articles
92 and 93 of the Code of Administrative Court Procedure. These rules generally adhere to continental European standards; i.e., the party against whom judgment is made has to bear all costs of the proceedings, including the court fees and the necessary attorney fees and other costs of both sides. If an applicant was only partially successful in the proceeding, the costs and fees are divided between the parties in proportion to their success in the proceeding (as explained in section 3.2). The court may also order that each party bear its own costs.

**Legal aid**

The granting of free legal aid is regulated in Article 94 of the Code of Administrative Court Procedure. Under this law, the administrative courts are permitted to “release an insolvent natural person fully or partially from payment for legal assistance and to charge the costs for legal assistance to the state on the bases of and pursuant to the procedure provided by law.”

It is worth mentioning in this context that legal aid is not available for any procedures before international courts and tribunals. Thus, if a person has exhausted legal remedies domestically and wants to take the case further to the European Court of Human Rights, that person will have no recourse to legal aid for the appeal. Such a situation can arise quite easily: for example, if a claim is rejected at first and second instance, and the Supreme Court does not admit the case for further review (denies *certiorari*).

**Exemption from payment of legal costs, division of costs and compensation**

Article 91 of the Code of Administrative Court Procedure allows the administrative courts, upon application, to fully or partially release a person from payment of the state fee that is due upon registration of a claim and/or from providing security, if the court finds that the person is insolvent. The provision applies both to natural and legal persons, including not-for-profit associations. A release from payment of fees applies only to the first instance. If necessary, it can be sought again on appeal. Article 91 (3) specifically provides that a party may appeal a refusal by the court to release that party from the payment of state fees or from the giving of security.

**Reduction of legal costs by the administrative courts**

According to Article 87 of the Code of Administrative Court Procedure, a court may reduce the costs of an advocate who participates in a matter as a representative, or the costs of another person who provides legal assistance, if it deems such costs to be unreasonably high.

**Other matters**

Article 5 of the Code of Administrative Court Procedure stipulates that in all matters not comprehensively regulated in this code, the administrative courts “shall take guidance from provisions of civil procedure,” and in so doing “shall take into consideration” the specific nature of the administrative court procedure.
4.2 Eligibility Criteria

As has been described, the relevant provisions in administrative law contain the same eligibility criteria as found in civil law, namely, that the person applying for legal aid must be “insolvent.” There are no specific guidelines under which the administrative courts are to interpret the term “insolvent,” so the question is left largely to the discretion of the courts. However, on the basis of Article 5 of the Code of Administrative Court Procedure, the rules described above for the procedure before the civil courts can be used for some guidance.

4.3 Procedure for Appointment

Since there are no provisions in administrative law about the selection and appointment of legal counsel in cases where legal aid is granted, the general rules described for the civil court procedure and below in section 5 have to be applied.

4.4 Alternative Mechanisms

Legal chancellor as ombudsman

The Estonian Constitution devotes an entire chapter to the institution of the legal chancellor (Articles 139 to 145). The legal chancellor is an independent official whose task is to review the legislation adopted by the Parliament, and the activities of the executive and local governments, “for conformity with the Constitution and [other] laws.” The legal chancellor is appointed by the Parliament for a term of seven years, upon a proposal by the president of the Republic, and his rank is equivalent to that of a Cabinet minister. He can address the Parliament and the Cabinet of Ministers at any time.

The primary task of the legal chancellor is to review draft legislation for compatibility with the Constitution and other laws. However, he can also review administrative measures. If he should find that a law or an act of the executive or a local government is incompatible with the Constitution or other legislation, he may make a proposal to the relevant body to amend the act within twenty days. If the act is not brought into conformity with the Constitution or the other laws, the legal chancellor can directly bring the question before the Supreme Court and propose that the act be declared invalid.

According to Section 19 of the Legal Chancellor Act, anyone may file a petition with the legal chancellor for review of the activities of state agencies, particularly in situations relating to guarantees of constitutional rights and freedoms. The legal chancellor thus also exercises the functions of an ombudsman. The act does not contain rules about fees and costs before the legal chancellor and does not provide for legal aid. Presumably, then, these procedures are free of charge, and may thus be interesting for applicants who cannot afford recourse to attorneys and courts.

In practice, however, the system has a
number of weaknesses. First, the appeal to the legal chancellor cannot be pursued simultaneously with an application to the courts. Potential applicants must therefore choose which remedy to pursue. In light of the strict time limits for appeals to the administrative courts, giving priority to an appeal to the legal chancellor will often mean that subsequent remedies in court are no longer possible if the appeal fails. Secondly, one may ask whether the legal chancellor can necessarily exercise an effective remedy in cases of violations of individual rights by the administration, and if so, for how long. For the procedure before the legal chancellor to lead to appropriate review and satisfaction of individual applicants, the office of the legal chancellor will have to build up considerable structures that parallel those of the courts. Furthermore, if the review procedures by the legal chancellor do provide appropriate review and do lead to the satisfaction of justified claims, these procedures will become more and more popular over time, forcing the structures of the Legal Chancellor’s Office to grow more and more as it attempts to handle the growing numbers of incoming cases.

Thus far, it appears that these problems have not really materialized, because the function of the legal chancellor as ombudsman is little known, and attorneys generally prefer to go to court.

5. Organization of the System for Provision of Legal Aid

5.1 Special state body authorized to administer the legal aid system

Legal aid is allocated from the state budget under the auspices of the Ministry of Justice. According to Section 12, subsection 12, of the Statute of the Ministry of Justice, the processing of applications for legal aid is part of the Ministry’s responsibilities for judicial administration. Within the Ministry of Justice, the Courts Department processes legal aid applications on the basis of relevant legislation, and it supervises the implementation of the decisions of the Ministry.

In criminal cases, the courts can appoint mandatory legal counsel for an accused person directly, without having to go through the Ministry of Justice. Such appointments are forwarded directly to a law firm or to the Bar Association for selection of a suitable legal representative.

5.2 Role of the Bar Association in the administration of the legal aid system

While the courts and the Ministry of Justice are responsible for making decisions to grant free legal aid, the implementation of these decisions is the responsibility of the
Estonian Bar Association, pursuant to Article 3 of the Bar Association Act. Within the Bar Association, Section 12 of the act requires the Board of the Bar Association to organize the provision of state legal aid by advocates, remunerate these advocates, and establish any other procedures that may be required.

The General Assembly of the Bar Association, pursuant to Section 60 of the Bar Association Act, may make proposals regarding the fees payable to attorneys and their calculation. However, the final decision on any such proposals rests with the minister of justice. As this report demonstrates (see section 6), the compensation for attorneys is relatively low, particularly when compared to the fees charged by these attorneys in other cases. Consequently, legal aid cases are not very popular with most attorneys. The problem is exacerbated by the fact that there are approximately 1,500 cases every month where legal aid is granted, or where legal counsel is appointed.

In order to meet its obligations under Section 361 (2) of the Code of Criminal Procedure for the cases where mandatory counsel is appointed by the courts, the Estonian Bar Association has created an internal rule that law clerks must take on at least twenty-five legal aid cases before they can take the Advocate’s Examination, the third and final level of the Bar exam. In this way, the burden to provide legal aid to persons who cannot afford criminal defense counsel or who are otherwise granted legal aid has been shifted to the group of legal professionals that is least able to reject this duty. As it happens, this group is also the one with the least relevant experience in legal representation. The implications for the quality of the legal aid that is provided are discussed below.

5.3 ROLE OF THE COURTS

The role of the courts in the decision to grant or not to grant free legal aid has been described above. The decisions are largely left to the discretion of the judge.

5.4 ROLE OF THE PROSECUTION AND THE POLICE

Article 12 of the Police Act requires police to ensure that the rights and legal interests of individuals are safeguarded. To this end, police officers must inform a person about his or her rights when first taking that person into custody.

Section 45 of the Code of Criminal Procedure requires the courts, the prosecutors, and the preliminary investigators (emphasis added) to explain to all persons participating in criminal investigations what their constitutional rights are, and “to ensure that the persons have the possibility to exercise the rights.” Neither the Code nor the Prosecution Office Act elaborates on how that particular duty is to be fulfilled. Thus, there is no guidance provided in the law for a clear understanding of the role of the prosecutor in the provision of legal aid.
5.5 State Models of Organization of the Provision of Legal Aid

Some Estonian laws contain specific instructions for civil servants to inform citizens of their rights, including the right of recourse to the courts. However, these laws are usually vaguely phrased, requiring that information be given about “opportunities for the protection of legal interests,”51 or that different possibilities are explained in a way that ensures “that errors and doubts are precluded and the rights of inexperienced or incompetent parties are not damaged.”52 Neither of these provisions specifically obliges legal professionals to inform indigent citizens who are attempting to protect their rights and freedoms about the possibility of obtaining legal aid.

Another aspect worth mentioning is the right of the trade unions, pursuant to Article 17 of the Trade Unions Act,53 “to represent, exercise, and protect the rights and interests of employees.” This provision also allows trade unions to represent their members before labor dispute resolution bodies.

5.6 Evaluation and Training

Unfortunately, there has never been a systematic evaluation of the needs in the area of legal aid. The Ministry of Justice is concerned about the quality of legal work and pursues a strategy of pushing for higher standards in legal education, as well as gradually reserving more and more activities to the attorneys who are full members of the Bar. However, before the new Law on Legal Services was drafted, neither the Ministry nor the Bar Association nor any other governmental or non-governmental body undertook any serious study into the question of how many people might need legal aid, how much legal aid they may need, and how the present system is meeting or failing to meet these needs.

The third sector is generally underdeveloped in the area of access to justice and legal aid. Some limited initiatives for the benefit of very clearly defined and limited groups, such as asylum-seekers, will be described below.

Opinions of Estonia’s judges

In the course of the research for this report, 150 questionnaires were sent to Estonian judges and prosecutors. Thirty-six questionnaires, or 24 percent, were returned.54 The questions and answers are reproduced here, rather than in the context of sections 2, 3, and 4, because they generally apply across the board, i.e., to criminal, civil, and administrative cases.

Question 1: Figure 1 shows the distribution of judicial experience among the responding judges:

Figure 1: Years of professional experience of the respondents

<table>
<thead>
<tr>
<th>10 or more</th>
<th>5 to 10</th>
<th>2 to 5</th>
<th>less than 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>41.6%</td>
<td>47.2%</td>
<td>5.5%</td>
<td>5.5%</td>
</tr>
</tbody>
</table>

Question 2: Figure 2 details the number
of applications for free legal aid or for waiver of state fees that the responding judges had received in the course of their careers:

**Figure 2: Total number of applications for legal aid dealt with**

<table>
<thead>
<tr>
<th></th>
<th>more than 100</th>
<th>up to 50</th>
<th>up to 20</th>
<th>up to 10</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.5%</td>
<td>8.3%</td>
<td>36.1%</td>
<td>44.4%</td>
<td></td>
</tr>
</tbody>
</table>

**Question 3:** Figure 3 shows the relative frequencies with which the responding judges had approved these applications approved:

**Figure 3: Average approval given to applications for legal aid**

<table>
<thead>
<tr>
<th>every time</th>
<th>most of the time</th>
<th>5 in 10 times</th>
<th>1 in 10 times</th>
</tr>
</thead>
<tbody>
<tr>
<td>19.4%</td>
<td>58.3%</td>
<td>13.8%</td>
<td>0.0%</td>
</tr>
</tbody>
</table>

The judges had a number of additional comments with regard to question 3:

According to several commentators, most people are unaware of their right to request a fee waiver or free legal aid. Applications for state-appointed legal representative are quite rare; most of the time, people apply only for waivers of the state fees. In any event, it is very rare for applications for free legal aid to be made in cases of criminal conduct or misdemeanors, because the defendant would have to reimburse the state for these costs if he or she was convicted.

Perceptions of what constitutes “insolvency” also differed among the responding judges—some judges seemed to believe that anyone who was living on the minimum state pension for retirees (about 95 euros per month) and did not own real estate should qualify as insolvent. Other judges, however, were of the opinion that the regular pension should count as income and should enable these individuals to pay for legal assistance.

On the whole, the responding judges believed that most applications for free legal aid were justified. However, the responding judges would grant only a fee waiver of 50 percent in some of these cases, or stipulate that the applicant should cover 50 percent of his or her own legal costs for an attorney. Indeed, the responding judges noted that they often found it difficult not to approve free legal aid, because they felt sorry for the applicant, even if the application was not strictly justified. Six out of seven of the judges who responded had granted legal aid at least once in 2001.

An appellate court judge who had to review first-instance rejections of the state fees waiver estimated that only one out of eight such rulings was overturned on appeal.

**Question 4:** Figure 4 details the opinions of the responding judges with regard to the quality of the legal assistance and representation provided by state-appointed legal representatives:

**Figure 4: Average quality of legal aid provided**

<table>
<thead>
<tr>
<th>above a reasonable standard</th>
<th>of a reasonable standard</th>
<th>below a reasonable standard</th>
</tr>
</thead>
<tbody>
<tr>
<td>45.8%</td>
<td>31.9%</td>
<td>5.5%</td>
</tr>
</tbody>
</table>
The judges commented further on question 4:

Many of them noted that the existing system of free legal representation could be further improved. Several judges commented, however, that it was difficult to make general statements about the quality of mandatory counsel, because the quality and standards of the legal representation varied significantly from case to case.

Some judges noted that they could directly approach certain lawyers whom they knew to be competent for certain kinds of cases. Outside of Tallinn in particular, judicial appointments of attorneys do not always go through the Bar Association. By contrast, some of the responding judges who had had to go through the Bar Association noted that the Bar should be careful not to appoint lawyers who lacked experience, or who did not have a current grasp of the rapidly evolving Estonian criminal laws. Some of the responding judges suggested that lawyers should themselves participate more in quality management, by turning down cases for which they are not qualified.55

In general, the responding judges noted that most of the legal representatives in free legal aid cases are attorneys. This has led, in the opinion of some of the responding judges, to a generally high standard of legal representation. Other responding judges felt, however, that the quality of the attorneys who took on the mandatory defense cases tended to be below average, and that at least some of those attorneys were taking on these mandatory represen-
tations, despite the low rate of remuneration, because they were unable to attract enough paying clients. It is worth noting that the best-known and most successful attorneys in Estonia never take on cases involving free legal representation.

In cases where the quality of the legal representation is below a reasonable standard, judges may discipline the representative and/or rule that the representative’s fees should be partly or fully withheld by the state.

One-third of the responding judges felt certain that there was a difference of attitude and discipline between attorneys who were being paid under contractual arrangements with clients and those who had been appointed by the state. The responding judges also noted certain other factors that might affect the quality of the representation. For instance, some of the responding judges felt that younger attorneys tended to prepare more carefully for their cases, and took their work more seriously than older ones. Younger attorneys seemed to feel more responsible and know more about liability issues, possibly because they feel peer pressure to do well. Other factors noted as important for the quality of the legal services provided in a given case were the individual personality of the lawyer, and the attitude of the lawyer’s firm as a whole.

One administrative court judge said that she refused to appoint legal representatives at all, because the quality of legal representation in free legal aid cases tended to be extremely poor. She noted that since the
administrative courts worked on the basis of an investigation or inquisition principle (urimistrintsiip), she would be doing most of the work even if a representative had been appointed.

Many responding judges also felt that the extremely low remuneration rates for state-appointed legal counsel was the reason many attorneys were not interested in taking on these cases.

**Question 5:** The responding judges were asked to evaluate the length of the proceedings when a legal representative had been appointed by the state, relative to situations where the representative had been chosen by the party. Figure 5 details these responses:

**Figure 5: Length of proceedings in legal aid cases compared to other cases**

<table>
<thead>
<tr>
<th></th>
<th>shorter</th>
<th>same length</th>
<th>longer</th>
<th>very long</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>18.6%</td>
<td>58.3%</td>
<td>19.4%</td>
<td>0.0%</td>
</tr>
</tbody>
</table>

**Question 6:** The responding judges were also asked to provide information about whether parties who were represented by state-appointed counsel had expressed dissatisfaction with their representatives. Figure 6 sets out these findings:

**Figure 6: Complaints received from parties represented by state-appointed counsel**

<table>
<thead>
<tr>
<th></th>
<th>never</th>
<th>hardly ever</th>
<th>quite often</th>
<th>always</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>18.1%</td>
<td>51.4%</td>
<td>13.9%</td>
<td>0.0%</td>
</tr>
</tbody>
</table>

The judges had additional comments with regard to question 6:

While most parties who had used the services of state-appointed representatives seemed satisfied with their counsel, some who had lost their cases were dissatisfied, which was not necessarily the fault of the lawyers concerned. Some people were also generally dissatisfied with the quality of their representation. Some of the responding judges pointed out that parties are often unaware of all the legal aspects of their cases, and may therefore be unable to properly evaluate the work of the state-appointed representatives or the fairness of the proceedings. Many judges also felt that the satisfaction or dissatisfaction of the parties, if manifested at all, was generally not affected by whether the parties concerned had had state-appointed counsel or had entered into contractual fee arrangements with their own representatives.

**Question 7:** The responding judges were asked whether they were generally satisfied with the legal aid system as a whole. Their responses are detailed in Figure 7:

**Figure 7: Satisfaction with the legal aid system as a whole**

<table>
<thead>
<tr>
<th></th>
<th>quite satisfied</th>
<th>very satisfied</th>
<th>not at all satisfied</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>44.4%</td>
<td>22.2%</td>
<td>13.8%</td>
</tr>
</tbody>
</table>

They made further comments on question 7:

Several of the responding judges said they would appreciate clearer decision-making...
ing criteria in exercising their discretion as to whether to grant legal aid. Many judges also noted that public awareness of the existence of free legal aid remained very low. However, many of the responding judges also felt that if demand for free legal aid were to increase significantly, there would not be enough attorneys available to handle the caseload.

Some judges felt that the decision-making process regarding legal aid was too cumbersome and too long. Several of the responding judges suggested that the courts should help needy people with their applications for legal aid.

Some of the responding judges also noted that free legal assistance should be available to individuals before their cases even got to court, i.e., that individuals should be able to obtain advice about whether to bring their cases to court at all.

Several judges explicitly noted and welcomed the efforts made by students in the legal clinics in Tallinn and Tartu. None of the responding judges expressed any dissatisfaction with the work of these students.

Some judges felt that insolvency should not be the only basis for granting legal aid or waiving state fees. They noted that individuals whose salaries were below or even at the national average might have significant difficulties paying for legal fees and court costs, even though they would not qualify for legal aid under the current regime. They pointed out that many of these individuals received only about 5,500 EEK (about 350 euros) per month after taxes, while just one hour of an attorney already costs about 1,500 EEK (exclusive of VAT).

The latest draft of the Code of Civil Procedure regulates the insolvency aspect in more detail.

**Question 8:** Figure 8 details the distribution of the responding judges’ satisfaction with the quality and standard of the legal services provided through the appointments of the Bar Association (through the legal aid scheme):

**Figure 8: Satisfaction with legal aid provided by the Bar Association**

<table>
<thead>
<tr>
<th>quite satisfied</th>
<th>very satisfied</th>
<th>not at all satisfied</th>
</tr>
</thead>
<tbody>
<tr>
<td>38.8%</td>
<td>38.8%</td>
<td>13.8%</td>
</tr>
</tbody>
</table>

There were additional comments by the judges regarding question 8:

In southern Estonia, where the courts tend to appoint representatives on their own, the quality of legal representation provided under the legal aid scheme does not seem to differ significantly from the quality of legal representation in the North, where Bar Association appointments are more the norm.

Some judges were concerned, however, about the sole proprietor attorneys/lawyers, the so-called nurkadvoikadid, who are not specialized in any field of law and often seem to provide cheap but low-quality legal assistance. The responding judges agreed that the state-paid fees for the service were too low to motivate top attorneys to provide free legal aid, so that even those who
participated in the state legal aid scheme tended to execute their duties only up to a certain point. However, the judges also pointed out that each court has the power to replace a representative who demonstrates insufficient commitment to the case or who executes his or her duties poorly. Some of the responding judges noted concerns about attorneys who had focused their businesses on providing legal assistance under the state legal aid scheme. According to the responding judges, some of these attorneys were de facto unable to formulate a claim and/or to compose a proper legal brief or an appeal.

Lawyers who are not attorneys and members of the Bar Association, in particular trainee attorneys and lawyers working in so-called “law offices” (ōgushiro),\(^\text{57}\) are often perceived as “not competent enough.”

**Question 9:** The judges were also asked whether they thought that the right of recourse to the courts was sufficiently accessible to everyone in Estonia, and whether people were generally able to exercise those rights. The responses are detailed in Figure 9:

**Figure 9: Are Estonian courts sufficiently accessible?**

<table>
<thead>
<tr>
<th>sufficiently accessible</th>
<th>mostly yes</th>
<th>mostly no</th>
<th>50/50</th>
</tr>
</thead>
<tbody>
<tr>
<td>16.6%</td>
<td>69.4%</td>
<td>8.3%</td>
<td>2.7%</td>
</tr>
</tbody>
</table>

On question 9, the judge made additional comments:

Many people are unaware of their rights and duties. They should have access to legal aid before they decide to submit a claim to a court. Nobody should be precluded from submitting a justified claim on the basis of financial or health reasons. These rights are currently not always guaranteed.

**Question 10:** The judges were asked to suggest ways to make the legal aid scheme more accessible and to improve the quality of legal aid provided through the Bar Association. Some of their suggestions included the following:

- Specific activities should exist to build public awareness.
- More money should be allocated to legal aid, so as to ensure that participating attorneys will be adequately compensated for their services. The German model of legal aid insurance, for example, could be studied and applied in Estonia. Legal aid insurance could be subsidized by the state for certain population groups, e.g., pensioners. Another possibility might be to introduce a system of installment payments for legal costs.
- The requirements for proving insolvency should be clarified. There should be more generous limits for low-income persons to be eligible for free legal services.
- There should be pretrial advisory mechanisms to assist parties who are contemplating a lawsuit, before they bring their cases to court.
• The existing system of selecting legal representatives should be reorganized, to require every attorney to provide a certain amount of free legal assistance. This would improve the quality of free legal services. One way in which to implement this might be to require every lawyer to provide free legal assistance for at least one hour per week. Attorneys should also be required to take specific training for legal aid cases and follow-up training (järvelõkkud).

• Activities should aim at increasing public awareness of the work of the law students in providing free legal representation in the legal clinics in Tallinn and Tartu.

Promoting pro bono practices

According to Section 17 (3) of the Code of Ethics of the Bar Association, attorneys are expressly allowed to provide pro bono legal advice. However, attorneys are not openly encouraged, supported, or trained to provide pro bono legal advice or to participate in any free legal aid initiatives, as this is widely seen as providing competition to attorneys in their market.

It is not common for a law firm to state expressly that it takes pro bono cases; however, some admit that they occasionally do such kind of cases, and at least one law firm mentions pro bono work on its Web site. Nevertheless, some law firms and some “law offices” literally “live” on state-funded legal aid cases, in particular in some parts of the country where the population is largely poor and unable to pay normal market prices for legal services.

The Estonian Lawyers Union (ELU) has a chapter called Young Members Union, i.e., lawyers who are still studying or who graduated recently. The Young Members occasionally do pro bono or low-fee cases.

The Estonian Lawyers Union also is one of the initiators of the Legal Aid Project, supervised by Anne Adamson. ELU offers free training activities to participants in the Legal Aid Project, and these training sessions are very popular among the lawyers.

The work done by students in the Tartu University legal clinic seems widely supported by the judges (at least in Tartu). The Estonian Law Centre Foundation, a research and training unit of the Estonian Supreme Court, has shown an interest in participating in the legal clinic initiation projects and standardizing efforts.

The state does not support these initiatives openly, but it does give some financial support to some NGOs in order for them to provide legal aid to indigent people. Examples are the Legal Information Centre for Human Rights (LICH), the Estonian Refugee Council (ERC), and the Estonian Institute for Human Rights (EIHR).

6. Financial aspects of ensuring effective access to justice for the indigent

6.1 Determination of the legal aid budget

The responsibility for the provision of legal aid in Estonia is divided between the Ministry of Justice and the Bar Association.
Each year, the Bar Association has to draft a budget for legal aid for the following year. It has to make reasonable predictions of a possible increase or decrease in the need for resources for state-funded legal aid. This budget is then submitted to the Ministry of Justice and discussed with the Cabinet of Ministers and the Parliament in the context of the general budgetary debates.

The Ministry applies for a specific sum for state-funded legal aid, which may or may not correspond to the requests by the Bar Association. The Cabinet and the Parliament take the final decision when they fix the annual budget of the government and provide for various items, including the budget for state-funded legal aid. After the budget has been fixed in this way, the Ministry is not entitled to make changes, such as allocating additional funds for legal aid or shifting resources away from legal aid to other activities. If more money was reserved than is actually used in a given year, the surplus can be carried over to the subsequent year; however, it has to be taken into account when making the prediction for the needs in that subsequent year. If, however, insufficient funds have been requested or approved for a given year, the Bar Association can save money by reducing the compensation for the attorneys, or it can advance money for legal aid from its own resources to bridge a gap until funds under the subsequent state budget become available, or it can ask the Ministry to approach the Cabinet and the Parliament with a request for a supplementary budget. In any case, the courts are not informed about a possible shortfall in the budget reserved for legal aid; as a consequence, a reasonable application for state-funded legal aid should never be denied merely because of lack of funds. The Ministry has stressed that in this respect, the courts are totally independent to make the decisions they see fit under the law.

Over the years, the Bar Association has typically requested considerably more money for legal aid than was later requested by the Ministry, and even the lower request by the Ministry was usually lowered again in the parliamentary debates or by the government. In particular, the Bar Association has sought to obtain more money in order to increase the compensation for the attorneys for every hour spent on a legal aid case. Discussions and negotiations about an agreement between the Bar Association and the Ministry of Justice on a clearer distribution of the responsibilities concerning legal aid started as early as 1996, but have yet to produce tangible results.

According to the Ministry of Justice, so far it has never been necessary to adopt a supplementary budget because of lack of funds. However, as is shown below, there was a crisis in the year 2000. By 31 December 2000, the Bar Association and its members had provided free legal aid for some EEK 3 million (about 192,000 euros) beyond the resources allocated in the state budget for 2000. Consequently, the state owed this sum to the Bar Association and its members. The debt was ultimately covered from the 2001 budget. In practice, this meant that the attorneys were asked to represent clients in legal aid cases but were
told that they could not be paid until about six months later. This led to a strike in Tartu, the largest town in southern Estonia, where attorneys refused to represent clients in mandatory defense criminal cases as long as they were not paid for their previous representations. The strike was not supported by the Bar Association itself, however. As a consequence of the 2000 crisis, the legal aid budget has seen considerable increase since then, and at the end of 2001 there was a surplus carried over to 2002.

For the purposes of the present study, the Ministry of Justice was also asked whether social factors and developments, legal reforms, and other trends in the legal system were systematically evaluated and taken into consideration whenever an annual budget was adopted. The Ministry agreed that this would probably be useful in the long run, but that for the year 2003 a prediction of 0 percent increase had again been made, purely on the basis of previous experience. The private law reforms that entered into force in 2002, and the recently adopted, radically new Punishment Act, were too new to create an increased need for legal aid, according to the opinion at the Ministry. The Ministry believes that cases based on these new legal acts will not translate into increased demand for state-funded legal aid for at least another year.

### 6.2 Budgetary Information

The following tables trace the development of the legal aid budget from 1997 to 2002.

<table>
<thead>
<tr>
<th>1997</th>
<th>EER</th>
<th>Euros</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total state budget</td>
<td>12,512,034,000</td>
<td>800,000,000</td>
</tr>
<tr>
<td>Total budget for the Ministry of Justice</td>
<td>531,840,600</td>
<td>34,000,000</td>
</tr>
<tr>
<td>Budget for the administration of court system (1st and 2nd instance)</td>
<td>122,786,500</td>
<td>7,800,000</td>
</tr>
<tr>
<td>Budget for the administration of the Supreme Court</td>
<td>12,359,500</td>
<td>790,000</td>
</tr>
<tr>
<td>Legal aid budget covered by the state</td>
<td>13,922,400</td>
<td>890,000</td>
</tr>
<tr>
<td>Percent of overall state budget</td>
<td>1.113%</td>
<td></td>
</tr>
</tbody>
</table>

In the year 1997, the members of the Bar provided 143,230 hours of legal representation and/or consultation covered by the state. This means that on average, 11,936 hours per month were spent in providing legal services covered by the state.
The members of the Bar worked 148,268.9 hours for state-funded legal representation in 1998, on average about 12,355.7 hours per month. The hours spent on mandatory defense cases increased by 103.5 percent compared to 1997 (an additional 5,038.9 hrs). This was justified by an increase in criminal activity.

<table>
<thead>
<tr>
<th>1998</th>
<th>EEK</th>
<th>Euros</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total state budget</td>
<td>14,967,518,500</td>
<td>956,600,000</td>
</tr>
<tr>
<td>Total budget for the Ministry of Justice</td>
<td>598,438,900</td>
<td>38,247,220</td>
</tr>
<tr>
<td>Budget for the administration of court system (1st and 2nd instance)</td>
<td>171,283,000</td>
<td>10,947,000</td>
</tr>
<tr>
<td>Budget for the administration of the Supreme Court</td>
<td>15,377,500</td>
<td>982,800</td>
</tr>
<tr>
<td>Legal aid budget covered by the state</td>
<td>15,922,400</td>
<td>1,018,000</td>
</tr>
<tr>
<td>Percent of overall state budget</td>
<td>1.064%</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>1999</th>
<th>EEK</th>
<th>Euros</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total state budget</td>
<td>18,464,506,700</td>
<td>1,180,000,000</td>
</tr>
<tr>
<td>Total budget for the Ministry of Justice</td>
<td>683,552,400</td>
<td>43,686,960</td>
</tr>
<tr>
<td>Budget for the administration of court system (1st and 2nd instance)</td>
<td>215,804,300</td>
<td>13,800,000</td>
</tr>
<tr>
<td>Budget for the administration of the Supreme Court</td>
<td>18,162,000</td>
<td>1,160,800</td>
</tr>
<tr>
<td>Legal aid budget covered by the state</td>
<td>16,312,400</td>
<td>1,042,500</td>
</tr>
<tr>
<td>Percent of overall state budget</td>
<td>0.834%</td>
<td></td>
</tr>
</tbody>
</table>

The 1999 Yearbook of the Board of the Bar Association emphasizes how the Bar had repeatedly petitioned for an increase of the hourly fees paid to the members of the Bar for state-funded legal services. In addition, the Board also petitioned—unsuccessfully—for compensation of other expenses to the law firm related to the provision of state-funded legal services, such as travel expenses, time for preparatory work (not merely the time spent at the courthouse), additional costs in case the hearing is in another county, etc.

In 1999, members of the Bar worked 155,912 hours to provide legal aid. The hourly fee for state-funded legal services
was EEK 90 from January to April (excluding VAT of 18 percent), and 105 EEK from 1 May 1999 onward (excluding VAT of 18 percent).

In October 1999, the Revision Committee of the Ministry of Justice conducted a review of the Board of the Bar Association and another in the law firms of Ida-Virumaa (Eastern County). No misstatements were discovered.

<table>
<thead>
<tr>
<th>2000</th>
<th>EK</th>
<th>Euros</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total state budget</td>
<td>28,530,988,300</td>
<td>1,823,462,500</td>
</tr>
<tr>
<td>Total budget for the Ministry of Justice</td>
<td>627,882,600</td>
<td>40,129,000</td>
</tr>
<tr>
<td>Budget for the administration of court system (1st and 2nd instance)</td>
<td>199,999,100</td>
<td>12,782,000</td>
</tr>
<tr>
<td>Budget for the administration of the Supreme Court</td>
<td>16,149,000</td>
<td>1,032,100</td>
</tr>
<tr>
<td>Legal aid budget covered by the state</td>
<td>13,267,500</td>
<td>848,000</td>
</tr>
<tr>
<td>Percent of overall state budget</td>
<td>0.465%</td>
<td></td>
</tr>
</tbody>
</table>

During the year 2000, a major shortfall occurred in relation to the financial resources allocated for legal aid. The entire sum for legal aid was used up by midyear, which led to a crisis situation in the access to justice. The state lacked financial resources to cover the legal services provided within the legal aid scheme.

In 2000, legal services were provided for 155,798.4 hours. The hourly fee during the entire year was EK 105 (excluding VAT of 18 percent, i.e., about 6.71 euros plus VAT).

The Board petitioned for the allocation of EK 29,420,000 for the provision of legal aid in 2001, with an hourly rate of EK 150 (excluding VAT of 18 percent).

<table>
<thead>
<tr>
<th>2001</th>
<th>KEK</th>
<th>Euros</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total state budget</td>
<td>29,786,050,000</td>
<td>1,903,675,000</td>
</tr>
<tr>
<td>Total budget for the Ministry of Justice</td>
<td>681,166,000</td>
<td>43,534,442</td>
</tr>
<tr>
<td>Budget for the administration of court system (1st and 2nd instance)</td>
<td>187,358,100</td>
<td>11,974,365</td>
</tr>
<tr>
<td>Budget for the administration of the Supreme Court</td>
<td>18,660,000</td>
<td>1,192,600</td>
</tr>
<tr>
<td>Legal aid budget covered by the state</td>
<td>25,267,500</td>
<td>1,614,890</td>
</tr>
<tr>
<td>Percent of overall state budget</td>
<td>0.848%</td>
<td></td>
</tr>
</tbody>
</table>
The total hours spent on state-funded legal services in 2001 was 163,174, which led to expenditures of EEK 19,768,850. The hourly fee was still 105 EEK (excluding VAT of 18 percent). A higher hourly fee was applied in 1.15 percent of all cases, which caused additional expenditure in the amount of EEK 227,988.

Since the allocated funds for legal aid had been almost doubled after the crisis in 2000, there was a surplus of EEK 2,651,650 in the legal aid budget at the end of 2001.

<table>
<thead>
<tr>
<th>2001</th>
<th>EEK</th>
<th>Euros</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total state budget</td>
<td>33,130,693,000</td>
<td>12,117,437,210</td>
</tr>
<tr>
<td>Total budget for the Ministry of Justice</td>
<td>774,442,200</td>
<td>49,496,000</td>
</tr>
<tr>
<td>Budget for the administration of court system (1st and 2nd instance)</td>
<td>210,848,400</td>
<td>13,475,670</td>
</tr>
<tr>
<td>Budget for the administration of the Supreme Court</td>
<td>28,070,400</td>
<td>1,800,000</td>
</tr>
<tr>
<td>Legal aid budget covered by the state</td>
<td>24,000,000</td>
<td>1,533,900</td>
</tr>
<tr>
<td>Percent of overall state budget</td>
<td>0.724%</td>
<td></td>
</tr>
</tbody>
</table>

There has so far been no breakdown provided in the state budget for the allocation of specific sums for criminal legal aid, civil legal aid, or other means of providing immediate access to free legal advice.

On the basis of Sections 25 and 29 of the State Budget Act, the minister of justice is not allowed to change the allocation of funds between different budgetary items without seeking a change in the state budget to be adopted by the Parliament.

6.3 Number of cases supported by the state budget for legal aid

Since the beginning of the court reforms in 1993, the following numbers of criminal cases have been filed:

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases</td>
<td>6,192</td>
<td>6,199</td>
<td>5,835</td>
<td>6,301</td>
<td>6,413</td>
<td>6,290</td>
<td>7,279</td>
<td>9,224</td>
<td>9,024</td>
</tr>
</tbody>
</table>

According to information provided by the Ministry of Justice, the only data available is the total amount of hours spent per year on legal aid covered by the state. No data is available about the division of the legal aid budget between criminal, civil, administrative or administrative offenses cases.
The number of hours per year are as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Hours</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997</td>
<td>143,230</td>
</tr>
<tr>
<td>1998</td>
<td>148,269</td>
</tr>
<tr>
<td>1999</td>
<td>155,912</td>
</tr>
<tr>
<td>2000</td>
<td>155,798</td>
</tr>
<tr>
<td>2001</td>
<td>163,346</td>
</tr>
</tbody>
</table>

In most cases, a court ruling granting state-funded legal aid to a petitioner in a civil or administrative case is forwarded first to the Ministry of Justice and then by the Ministry to the Bar Association. However, some courts, in particular in South Estonia, have been approaching certain attorneys directly. In addition, the cases where mandatory counsel is provided for a person charged with a criminal offense do not go via the Ministry of Justice. As a consequence, the Ministry does not have complete control over the state-funded legal aid provided in any given year, and it depends in part on the information provided to it by the Bar Association.

The Bar Association, which gets all of the state funds allocated for legal aid, receives an invoice from the law firm whose attorney has provided legal assistance in a case, together with copies of the court rulings deciding on the provision of legal aid. The invoices indicate only the hours spent on the provision of legal assistance. On the basis of a new Regulation of the Minister of Justice, adopted on 4 April 2002, the law firms are now also obliged to provide a monthly report to the Ministry of Justice indicating the hours and money spent on civil, administrative, administrative offenses, and criminal cases. Therefore, the Bar Association has required the law firms to inform them also of the content of each case they have been dealing with. According to a preliminary review of this data, the Ministry of Justice has indicated that the majority of the financial resources for state-funded legal aid is used for criminal cases (mandatory representation).

The reports issued to the Ministry by the Bar Association are simple and very brief. They specify the period, the total hours spent as indicated on the invoices received during that period, the total amount paid out during the period, the sum that has been transferred to the Bar by the Ministry (one-twelfth of the annual amount each month), other sums that have been transferred to the specific bank account (returned sums from law firms, in case they have received more due to mistake). The report does not show when the legal assistance was provided in reality; it only shows the movement of money. The Ministry of Justice has the right to check and confirm the data provided in the reports, but according to the Ministry of Justice, neither the Bar nor any report has ever been under investigation, as the reports are submitted in time and have not raised any doubts regarding their credibility. According to the Ministry of Justice, the State Audit Office has pointed out that the system lacks an effi-
cient checkup system, but the Ministry has not reacted to this so far.

The Bar Association is also obliged to forward to the Ministry the decisions of the Board of the Bar to apply a higher hourly rate for legal assistance provided in certain cases. The Ministry reviews the decisions to check whether there is a pattern that relatively more cases by some attorneys have been remunerated at the higher rate for the services provided. The Ministry has indicated that it is quite satisfied with the internal control system of the Bar Association, as the Bar has its own supervisory body, the Revision Committee, which oversees the economic activities and the management of the Bar.

During the past two years, the Bar has received more money than was needed for cases where legal aid has been provided. Therefore, there has been a surplus at the end of the fiscal year. The Bar is not allowed to use the money for other purposes, however. The money is carried over to the next annual budget, and lower appropriations may be made to take account of the previous surplus.

There is, as such, no limitation on the number of hours that can be spent on a given case. According to the Ministry, the hours billed by the attorneys range from 10 time points (150 minutes) to 400 time points (100 hours). As the hourly compensation is rather low, and as attorneys are generally not compensated for other expenses, such as travel costs, there may be a trend to “overcharge” the system by billing slightly more hours. However, the Ministry has the right to check the books and accounts of the law firms, and it does so regularly. In addition, the courts can reduce the compensation in legal aid cases if they consider the claims by the attorney unreasonably high. This happens quite regularly. Overall, the system should ensure that by and large the attorneys get paid only for work actually done.

Civil cases filed in the courts of first instance since 1994:

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases</td>
<td>17,612</td>
<td>18,604</td>
<td>19,529</td>
<td>20,128</td>
<td>21,663</td>
<td>24,509</td>
<td>22,413</td>
<td>21,087</td>
</tr>
</tbody>
</table>

6.4 Lawyers’ Fees

As has been explained above, the compensation for lawyers who provide state-funded legal aid is paid per case and per hour of work on the case. In principle, this covers time spent on the preparation, as well as time spent in court.

As has further been elaborated, the hourly compensation is decided by the Bar Association together with the Ministry of Justice, and it has to take into account the expected need for legal aid and the finan-
cial resources made available under the state budget.

At a rate of about 7 euros per hour, it is generally considered inadequate, in particular given the fact that many law firms in Tallinn are already charging in excess of 100 euros per hour to clients who pay for their legal representation themselves.

Regulations of the Ministry of Justice\textsuperscript{62} stipulate that the fee in criminal cases for legal representation requested by the prosecutor or the court, or in other cases where the court has relieved a person partly or completely from the payment for legal services, is EEK 90 per hour (excluding VAT of 18 percent), equivalent to 5.75 euros plus tax.

On 18 April 2002, Regulation No. 23 of the Ministry of Justice entered into force, according to which the state shall compensate the cost of legal aid in civil, administrative, and administrative offenses cases if a court has relieved a person partly or completely from payment for legal assistance, or if the court, investigator, or prosecutor has appointed a mandatory representative (määratud kaitsja) in a criminal case. For some reason, Regulation No. 23 does not mention the possibility of compensating the cost of legal aid in criminal cases if the court has relieved the defendant partly or completely from payment for legal assistance.

The calculation system has been amended in comparison to Regulation No. 44 as follows:

- Time spent on the provision of legal assistance is now calculated on the basis of time points.
- Every time point amounts to fifteen minutes and costs EEK 32.50 (excluding VAT of 18 percent), equivalent to 8.31 euros per hour plus tax.\textsuperscript{63}
- In exceptional circumstances (very complicated cases, long-distance travel by the attorney, several persons to defend in a criminal case), the Board of the Bar Association may give higher monetary value to the time points, but not exceeding EEK 65 (excluding VAT of 18 percent), which is equivalent to 16.62 euros per hour plus tax.

The investigating judge or court deciding on the amount of hours spent on the case and the monetary value of the work is no longer required to hear the explanations of the attorney. Only where necessary, the explanations of the attorney and the person represented/advised by the attorney are to be heard. A copy of the decision is forwarded to the law firm, which then submits it to the Board of the Bar Association to receive the compensation.

In a change from previous procedure, the decisions of the Board of the Bar Association to approve the higher hourly rate for legal aid providers are no longer sent directly to the Ministry of Justice. They now have to be collected and sent only twice a year, by 15 July and by 15 January. Furthermore, the monthly reports by the Bar Association to the Ministry of Justice on the utilization of the legal aid budget now have to include a breakdown of the amounts spent on legal aid in criminal, civil, administrative, and administrative offenses cases.

Over the years, the normal compensation for attorneys in legal aid cases has developed as follows:
<table>
<thead>
<tr>
<th>From</th>
<th>Until</th>
<th>Hourly fee in EEK (excluding VAT)</th>
<th>Hourly fee in euros (excluding VAT)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 February 1994</td>
<td>30 April 1994</td>
<td>30</td>
<td>1.92</td>
</tr>
<tr>
<td>1 May 1994</td>
<td>31 December 1994</td>
<td>40</td>
<td>2.56</td>
</tr>
<tr>
<td>1 January 1995</td>
<td>28 February 1997</td>
<td>55</td>
<td>3.52</td>
</tr>
<tr>
<td>1 March 1997</td>
<td>31 January 1998</td>
<td>70</td>
<td>4.47</td>
</tr>
<tr>
<td>1 February 1998</td>
<td>30 April 1999</td>
<td>90</td>
<td>5.75</td>
</tr>
<tr>
<td>1 May 1999</td>
<td>17 April 2002</td>
<td>105</td>
<td>6.71</td>
</tr>
<tr>
<td>18 April 2002</td>
<td>Present</td>
<td>130</td>
<td>8.31</td>
</tr>
</tbody>
</table>

The Code of Criminal Procedure provides a number of rules on the costs of proceedings. Section 88 of the Code of Criminal Procedure contains the following provisions for the payment of costs of participants in criminal proceedings:

(1) Witnesses, victims, experts, specialists, interpreters, translators, and impartial observers of investigative activities shall be compensated for the full time of their absence from work or from their everyday activities on the basis of their average daily remuneration, for the costs in connection with their appearance in court, for their travel expenses, and for the costs of renting residential space; a daily allowance shall be paid to witnesses, victims, experts, specialists, interpreters, translators, and impartial observers of investigative activities.

(2) Experts, specialists, interpreters, and translators have the right to receive a fee for the performance of their duties, except in the cases where they performed their duties as occupational duties.

(3) Costs and fees in connection with summons shall be paid out of the funds of preliminary investigation authorities or of courts pursuant to the procedure determined by the government of the Republic.

(31) Costs related to the conduct of expert assessments borne by agencies and legal persons shall be compensated for in the amount and pursuant to the procedure determined by the government of the Republic.64

(4) If criminal defense counsel participated in a criminal matter pursuant to the procedure prescribed in subsections 361 (2) and (5) of this Code, the court shall make a ruling on the amount payable simultaneously with the referral of the criminal matter for further pretrial investigation or with the making of a court judgment.

Section 89 specifies how the collection of legal costs shall be done:

(1) Upon making a judgment of con-
viction, a court shall collect the legal costs from the convicted offender, except for the amounts paid or payable to the interpreters or translators.

(2) If several persons are convicted in a criminal matter, the court shall decide which part of the legal costs is due from each convicted offender, taking into account the extent of the liability and financial situation of each convicted offender.

(3) In the criminal matters of minors, the court may require the legal costs from the parents of the minor or from other persons who are responsible for raising the minor.

(4) Upon termination of a criminal matter on the bases prescribed in clause 5 (1) 3) and 4) and subsection 5 (4) of this Code, a preliminary investigator or a court shall collect the legal costs from the suspect, accused, or accused at trial. Upon termination of a criminal matter on other bases, the legal costs shall be borne by the state.

(5) Upon acquittal of an accused at trial, the legal costs shall be borne by the state. Upon the acquittal of an accused at trial in a matter where criminal proceedings may be commenced only on the basis of a complaint by the victim, the court has the right to order that the legal costs be fully or partially paid by the complainant.

(6) Upon the termination of a criminal matter on the basis prescribed in clause 5 (1) 6) of this Code, the legal costs may be ordered from the accused, accused at trial, and victim, or one of them.

6.5 SUPPORT FOR NON-STATE INITIATIVES

NGO providing free-of-charge legal aid

The Legal Information Centre for Human Rights (LICHR) provides free legal advice mostly to members of the Russian minority and primarily in relation to residence permits, expulsion, citizenship law, language barriers, discrimination issues, social benefits, etc. Some legal representation is also provided. The center mainly operates on foreign grants.

The Estonian Institute for Human Rights (EIHR) provides free legal advice to individuals on a restricted scope, mostly concentrating on the rights of the child, social benefits, ex-deportees, Gulag victims, and freedom of speech. Legal representation before courts and other authorities is not provided. The EIHR receives direct funding from the state budget, but mostly operates on foreign grants.

The Estonian Refugee Council (ERC) provides free legal aid to refugees and asylum-seekers.66 It is also involved in legal representation of asylum-seekers before the Citizenship and Migration Department and the administrative courts. Legal assistance is available without checking the financial background of the applicant or the refugee. If the asylum applicant cannot
make a *prima facie* justified claim to receive asylum in Estonia, the person is not eligible for free legal assistance. The ERC receives very limited funds from grants of specific ministries on the basis of open call proposals. The ERC’s activities are mostly financed by the UN High Commission for Refugees.

The Estonian Nature Fund provides legal advice free of charge to residents of Estonia in matters relating to the Estonian environment.

The Estonian Pensioners’ Union provides free-of-charge legal advice to retired members of the population and to other people with low income. Free-of-charge legal advice is provided in the towns of Tallinn, Rakvere, Pärnu, Keila, and Põlva.

Several other NGOs provide legal aid to their own members. For example, the Estonian Taxpayers Union provides tax advice over the phone free of charge.

Section 17, subsection 3, of the Estonian Bar Association’s Code of Ethics specifically allows *pro bono* legal advice by an attorney-at-law. However, there are no statistics available that could provide an overview of the number of cases represented by attorneys on a *pro bono* basis. The fact that *pro bono* advice is available is promoted on the website of only one law firm in Estonia (A. Jakobson & A. Jaroslavski law firm).

The Legal Services Bureau Direct Fund (Õigusteenuste büroo SA) provides legal services free of charge to everyone who is unemployed or retired, to people whose income is below the minimum income level, to large families, and to persons whose only income is social aid. Applicants for legal aid must fill in a form and indicate why they consider themselves eligible for free legal aid. This information is not checked officially; instead, the statements are given the benefit of the doubt. This NGO is financed by grants, funds, and local government units.

NGOs may ask the government for tax-exempt status. Providing free legal aid can be one reason for obtaining this status.

**Legal clinics**

At present, there are two legal clinics operating in Estonia.

The Tartu University Student Law Office is operating in its third year. The legal clinic is part of the curriculum and involves regularly about ten to twenty students. Starting from the fall semester of 2002, the clinic is supervised by a former clinic student; the responsibility for the course requirements and grading falls on the dean of the law school.

Students provide free-of-charge legal advice and representation. They do not have insolvency as a case selection criteria, but they limit their cases according to substance: students do not provide representation in civil cases that have more than EEK 10,000 at stake, and they do not provide representation in cases dealing with first-degree crimes.

Another legal clinic, operating in Tallinn, was established in June 2002 and brings together students of three Tallinn law schools: Nord Academy, Concordia International University Estonia, and Tartu Uni-
The university’s Law School in Tallinn. These students are providing legal assistance in the city government building. They are supervised by members of the Estonian Lawyers Union, professors of their law schools, attorneys, and the public notary chamber. The law schools have introduced a clinical legal education course as a legal internship course, and the responsibility for the course requirements and grading falls on an associated professor of Concordia International University of Estonia. The students do not provide representation in criminal cases, or in civil cases with more than EEK 10,000 at stake. So far, most cases dealt with have not included representation in court.

**Temporary projects of legal aid**

Tallinn’s city government has decided to provide free-of-charge legal advice to the inhabitants of certain community houses of Mustamäe (a city area in the south of Tallinn); as a result of the privatization of these houses, numerous inhabitants have been evicted from their homes and essentially left in the streets.

### 7. Data collection

Public awareness about the possibility to get legal aid is low. This can be illustrated by the fact that 37 percent of individuals submitting a petition to the legal chancellor actually requested legal consultation or assistance with the interpretation of legal norms.  

Some of the judges who participated in the survey outlined in section 5.6 thought it was the responsibility of the Ministry of Justice to increase public awareness about the different sources of legal aid available. However, there is no data being collected by the state organs about the number of persons in need of legal aid, or how the number of persons in need of legal aid corresponds to the number of persons who actually get legal aid. Neither the courts nor the Ministry of Justice is in possession of data on the questions of how many applications for free-of-charge legal representation were submitted per year and how many of these applications were approved. The Ministry of Justice did not conduct any research into these issues before or during the drafting of the new Law on Legal Services.

The only data available to the authors of this study about the ratio of applications for legal aid submitted to the courts to those approved by the courts is based on individual judges who responded to the legal aid questionnaires sent to them by the authors.

In the opinion of the authors, the Estonian system for the provision of legal aid is highly non-transparent, and responsibilities are placed into too many hands. The lack of comprehensive information makes it difficult to develop suggestions on how to provide substantially better access to justice in Estonia. This issue shall be addressed in a more comprehensive manner in section 9.
8. Legislative Developments

Draft Law on Answering a Letter of Notification and Inquiry (657 SE II I)

This stipulates the right of an individual to send an inquiry to a state agency, local government entity, or any other public law legal entity or organ, employee, official, or representative with a request to obtain an opinion or explanation (including legal advice). According to Article 4 of the draft law, a government body, local government body, or its department must provide free-of-charge legal advice. Legal advice shall be provided to individuals during at least four hours per week. Legal advice shall be provided both orally and in written form.

Draft Law on Legal Services (928 SE I)

This regulates the provision of legal aid and lays down the general requirements on the provision of legal services, including by the legal advisers (öigusnõustajad). The proposal to draft such a law was made by the Parliament (the Riigikogu) in a decision ordering the government of the Republic to initiate a draft law that would regulate all types, conditions, and scope of state legal aid, would set the standards for the provision of quality legal assistance and for the improvement of the quality of state-covered legal assistance, and would also regulate the accessibility of qualified, reliable state-covered legal assistance and legal services.

The draft is based on the premise that in the legal services market in Estonia, only attorneys are properly qualified to provide legal services. This is supposedly ensured by the exams required for access to the Bar Association, constant self-advancement (ene-setäändamine), and the attorney supervision system. The second premise of the law, according to the explanatory letter included with the draft, is the fact that qualified and reliable legal assistance is so far not accessible to the majority of the poorer population. These premises do not rest on any specific research or scientific evidence, but essentially reflect the position of the Ministry of Justice.

The explanatory letter also makes reference to Section 2 of Article 28 of the Constitution, which refers to the obligation of the state to ensure to its citizens, foreign residents, and stateless people assistance in case they need it. It is the position of the Ministry of Justice that this draft law will fulfill that obligation in the area of legal aid.

According to Article 8 of the draft, legal aid is the provision of legal services at the expense of the state under the terms and conditions set in the current law. Legal aid is provided in the context of a procedure in an Estonian court or before an administrative organ, or for another purpose that relates to the protection of individual rights. The types of legal aid are provided in Article 8, section 3 as follows:

- appointed defense counsel in criminal procedures;
- representation of individuals in criminal pretrial procedures and in the courts;
- representation of individuals in misdemeanor cases either in court or in out-of-court procedures;
- representation of individuals in the civil court or in out-of-court procedures;
- representation in administrative court procedures;
- representation of individuals in the administrative procedures;
- representation of individuals in execution procedures;
- help with drafting of legal documents;
- other legal counseling or representation for other purposes.

Article 9 of the draft law stipulates who is eligible for legal aid: state legal aid may be provided to a natural person who, due to his or her economic situation, is unable at the time of the need for legal aid to pay for qualified legal services, or is able to pay for it only partly, or in installments, or whose economic situation does not guarantee elementary subsistence after payment for legal services. In criminal cases, it does not depend on the economic situation of the natural person. Whoever has not chosen a representative but applies for one, or who, according to the law, is required to have one, is provided a representative.

Article 10 stipulates that legal aid in criminal cases is provided only by an attorney. In other cases, legal aid can be provided by an attorney or a legal adviser. State legal aid providers are chosen for two years by the Ministry of Justice via a public tender. The tender shall be prepared by the Ministry of Justice in cooperation with the Bar Association and a body supervising the legal advisers.

According to Article 11, state legal aid shall not be provided if:

- the applicant himself or herself is able to protect his or her rights;
- the applicant cannot have the right for the protection of which he or she is applying for legal aid;
- the application is submitted in a case that is obviously of minor importance to the applicant;
- the applicant is able to cover the costs for legal services by relying on his or her property, which must be property he or she is able to sell without any great difficulty, except property that is in everyday use by the applicant and/or his or her family and proportional to need;
- the costs of legal services potentially do not exceed the sum of two monthly salaries of the level the applicant has received for the previous four months, minus taxes and obligatory insurance and sums for the livelihood of those he or she is responsible for by law;
- under the circumstances, the applicant’s opportunity to obtain relief is slim;
- the applicant applies for the compensation of moral or immaterial (moralne) damage;
- the complaint is related to an undertaking of the applicant and does not influence his or her rights outside this commercial activity;
- legal aid is sought for the protection of intellectual property;
• legal aid is sought for a case where the applicant has an obvious common interest with an individual who has no basis to receive state legal aid;
• legal aid is sought for a case that deals with a right transferred to the individual, and there is reason to believe the right was transferred in order to obtain state legal aid;
• the provision of legal services is ensured to the applicant under an insurance agreement or via obligatory insurance;
• the provision of legal aid is guaranteed by the membership of the applicant in an NGO.

According to Article 12 (1), state legal aid is provided in the following three manners:

• provision of state legal aid without an obligation on the recipient to repay the costs of the legal aid to the state;
• provision of legal aid with an obligation to repay the costs of the legal aid either fully or partially with a single payment;
• provision of legal aid with an obligation to repay the costs of the legal aid either fully or partially in several installments.

In case partial payment of legal expenses is required from the individual, the concrete sum has to be determined, in order to give the individual clear information as to what the cost of the litigation will be for him or her. The sum is to be predicted on the basis of the available information.

In all possible procedures for which legal aid is available, an application has to be made through the court system. In criminal cases, the applicant may also submit the application to the prosecutor or the investigating judge, who may make the necessary decision in the simplified criminal procedure.

Articles 15 and 16 specify the information that has to be included in the application for legal aid, as well as the supporting documents that should demonstrate the economic situation of the applicant. Article 17 provides guidance on how to evaluate the applicant’s economic situation. Article 18 stipulates that the procedure to decide for the granting or denial of state legal aid is a written procedure, if the court does not decide otherwise. The explanatory letter attached to the draft law states that Article 18 can also be applied to out-of-court cases and gives the right to the county head (maavaram) to delegate the right to decide on the granting or denial of legal aid to an official. However, in the current version of the draft law, there is no such stipulation.

Under the draft law, the person who receives legal aid by the state may personally choose from which law firm or individual attorney or legal adviser he or she wants to be represented. Article 20 of the draft provides reasons for a legal service provider to refuse to provide services in a case—in particular, due to work overload, close kinship with the parties, health reasons, etc. Article 21 provides reasons for a change or replacement of the legal service provider.

According to Article 26, the court has to oblige the applicant to repay the cost of
legal services to the state if he or she was originally released fully or partly from covering the legal costs, but his or her economic situation has substantially improved within five years after the termination of the provision of legal aid.

In case an individual provided false information while applying for legal aid, Article 27 of the draft stipulates that the court shall oblige him or her to pay the total amount of legal fees covered by the state.

According to Articles 28–32, the Ministry of Justice administers the finances allocated for state-funded legal aid. The financial resources have to be sought from the state budget and from contributions by individuals who have received only partial legal aid.

According to the explanatory letter, the drafters of the law are foreseeing that the cost of implementing the act would amount to 14.5 million EEK (equivalent to just under 930,000 euros), of which more than 12 million EEK would be strictly for the provision of legal aid. The drafters are predicting an increase of 20 percent in the use of the legal aid system within the three following years. The basis for the calculation was the data on legal aid provided in 2001:

- civil and administrative cases: 6,583,500 EEK, equivalent to 420,800 euros;
- representation before administrative authorities: 2,907,000 EEK, equivalent to 185,800 euros;
- drafting of legal documents: 1,392,000 EEK, equivalent to 89,000 euros;
- providing oral legal advice: 1,260,000 EEK, equivalent to 80,600 euros.

The source for these specific expenses in 2001 is not indicated.

In addition to the aforementioned draft legislation, a new Criminal Code entered into force on 1 September 2002, bringing along a lot of amendments, which will not remain without impact on the legal aid system.

9. Recommendations

The present system of legal aid in Estonia is suffering from a number of weaknesses, and in effect it does not guarantee access to justice for a significant part of the Estonian population. On the basis of the findings of this report, the authors believe that the following changes should be implemented, part of which are already reflected in the draft Law on Legal Services:

First and foremost, the system has to be simplified. At the moment, there is a distribution of responsibilities among the Ministry of Justice, the Bar Association, and the courts, which leads to confusion and unclear procedures. The authors suggest that legal aid should be divided into three distinct categories: 1) legal aid provided for procedures before the judicial authorities, in particular the private, criminal, and administrative courts; 2) legal advice provided by administrative authorities with regard to procedures before these authorities and the
drafting of legal documents; and 3) legal advice provided by NGOs in their respective fields of activity. The following elaborations shall deal only with the first and second elements, unless specifically stated otherwise.

The government, respectively the legislation, should deal with legal aid in the first category and legal advice in the second. The two elements should be linked in a sensible manner so that individuals can obtain legal advice with regard to legal aid and court procedures from administrative authorities.

In order to ensure a sufficiently high standard of quality in the provision of legal aid and legal advice, the providers have to be carefully selected and specifically prepared for their task. Legal aid—that is, the representation of parties before the courts—should be reserved to attorneys and their clerks, and in the latter case, they must have at least two years of experience in the profession and/or have passed the first two levels of the Bar exam. Lawyers who are not attorneys but have at least two years of professional experience could be admitted as providers of legal aid if they pass a special examination. The authors believe that junior clerks and other legal professionals who do not meet the standards outlined here should not be admitted as providers of legal aid in any function other than a purely supportive role. Within the administrative units, legal advice should also be provided only by staff with several years of work experience in different units of the administration that are typically the object of questions by citizens.

As basically foreseen in the draft Law on Legal Services, the procedures for legal aid have to be harmonized regardless of the specific subject matter (private, criminal, or administrative). The distribution of roles should be as follows:

The Ministry of Justice has overall responsibility for the provision of legal aid. It has to monitor the needs for legal aid and make budgetary allocations accordingly. In the context of need analysis and need prediction, much more systematic data collection will be necessary. The Ministry also has to supervise the qualification of the legal aid providers and establish a procedure for complaints about inadequate provision of legal aid or legal advice. Such complaints should be received from judges, prosecutors, and administrative officials as well as legal aid recipients, and they should enable the Ministry to temporarily suspend or permanently exclude certain lawyers from providing legal aid. Suspended lawyers should be required to take courses on the duties of legal aid providers and pass an examination before being readmitted to providing legal aid. Furthermore, the Ministry has to control the use of financial resources by the different providers of legal aid.

The Bar Association at present has a problematic role. On the one hand, it has to make the payments to the legal aid providers from budgetary allocations by the Ministry of Justice. It is not entirely clear whether this function should not be more efficiently located with the Ministry. On the other hand, the Bar Association selects the members who have to provide
legal aid. Given the fact that this work is rather unpopular with many of the more successful attorneys, it is very possible that the distribution of work is uneven, and that cases are shifted either to attorneys who are less successful otherwise and need this kind of work or who are not represented on the Board and cannot avoid being called upon. Under the new draft law, the indigents supposedly should have a free choice of legal counsel. However, the draft provides too many loopholes, in particular if attorneys can turn down a potential client because they are too busy. Various solutions for the problem are conceivable. One approach could be to require that every attorney has to provide as a minimum a certain number of hours per year representing legal aid clients in court free of charge. The number could be in the range of fifty. Instead of requiring that every attorney has to provide legal aid services, the obligation could be on the law firms, enabling them to select more junior staff for this kind of work. In such a case, every law firm should be obliged to appoint a specific person to receive requests for state-funded legal services. Quality should then be ensured via internal supervisory mechanisms within the law firms.

Alternatively, the Bar or the Ministry could compile a list of attorneys who are willing to take legal aid cases, and the clients could choose attorneys only from this list. Those attorneys who do not want to be on the list, however, should then be obliged to make a financial contribution to the system.

The role of the courts also has to be strengthened. It is not clear why the courts should address their decisions first to the Ministry of Justice, which then forwards them to the Bar Association, which then approaches a member for practical implementation. In cases where an attorney is appointed by the courts, rather than selected prior to the initiation of court proceedings by a client, the courts should have the right to approach suitable attorneys directly. Furthermore, there should be a procedure whereby judges can notify the Ministry about attorneys who failed to provide legal aid at sufficiently high standards of quality. Repeated notifications against certain attorneys should lead to consequences, such as mandatory retraining schemes or, in extreme cases, exclusion from the Bar.

Another area where change is necessary is the provision of information on legal aid to the general public. Once the procedures are simplified, information about the procedures and possibilities should be made available in several formats: First, every administrative authority, including all municipal and local authorities, and every court, should designate an office for legal advice, including advice on obtaining legal aid. Such an office should be clearly indicated at the entrance to the buildings and should have user-friendly opening hours. The offices should also provide legal advice over the telephone.

Second, there should be a central office for information on legal aid, established by the Ministry of Justice or the Bar Association. This office should be accessible via telephone, fax, e-mail, and direct access. It should develop a Web site with information
on how to obtain legal aid and how to obtain help for applications for legal aid. The Web site should be bilingual, in Estonian and in Russian. The central office should also develop printed guidelines, which can then be displayed at and distributed via the decentralized offices in the various courts, administrative units, and local administrations in the country.

The harmonized procedures and the rules on access to legal aid, provision of legal aid, and payment for legal aid should become part of the regular continuing education programs for attorneys, judges, court clerks, administrative officials, and other counselors.

With regard to the thresholds for obtaining legal aid, the present system is again unclear. Some courts have held that a minimum pension or income alone does not preclude a person from obtaining legal aid; others have dissented. This situation is arbitrary and unjust. Even if a person has regular income at this level, he or she cannot possibly access the judicial system and protect individual rights if legal aid is not granted. Where lawyers are charging a minimum of 50 euros per hour, and where better-known and more experienced lawyers are easily charging 150 euros per hour and more, a monthly income in a magnitude of 100 euros must not preclude a person from obtaining legal aid. Even a monthly income of 500 euros should not preclude a person if he or she has to support several family members with such limited funds. In addition, access to justice is effectively denied if a person living on a minimum income or pension but owning some land and a modest house on the land, which serves as the family home, is required to sell this house and land in order to pay for a lawsuit. The only sensible way of handling the problem would seem a scale whereby eligibility to legal aid would be preserved as long as the disposable income (after taxes, rent, basic heating, electricity, etc.) per head of a family does not exceed a sum in the range of 100 euros or 1,500 EEK per month, and where there is no personal mobile or immobile property that can easily be liquidated without affecting a reasonable standard of living for the persons concerned.

On the other hand, compensation for the attorneys has already grown considerably in recent years. If an Estonian lawyer gets about 8.30 euros nowadays per hour of work spent on a legal aid case, this does not necessarily compare poorly to the equivalent of some 35 euros paid in the United States, given the general differences in the level of income and living expenses in these two countries. The authors feel that the sum should still increase to about 10–12 euros per hour, equivalent to about 150–180 EEK, and should then be tied to the inflation index. What would seem more important than a general increase in the hourly fee is some supervision over the practice of the courts to reject claims by attorneys if they feel that these claims are disproportionate, and to generally deny compensation for other costs related to the provision of legal aid, such as travel expenses, office expenses, telecommunication expenses, etc. The authors feel that a more transparent
and more equitable system is required to ensure that justified expenses of the attorneys will actually be compensated.

With respect to non-governmental organizations, a distinction has to be made as to whether they provide legal advice or provide legal aid in court. The area of legal advice cannot be effectively monitored, and therefore should not be regulated. However, as far as legal aid is concerned, the NGOs should be subject to the same quality standards that are applicable for the attorneys, and—if they meet these standards—they should also receive state funding for their services, in the form of either general grants or specific compensation for legal aid provided to needy persons.

Notes

5 International agreements relevant to the present topic and entered into by Estonia are listed in Appendix A. Pursuant to Section 398 of the Code of Criminal Procedure, the courts, the public prosecutor’s office, the Ministry of Justice, and the Ministry of Internal Affairs are the legal authorities that can submit applications to foreign states for legal assistance and can decide, according to their specific competences, on applications by foreign states for legal assistance. The public prosecutor’s office responds to applications for legal assistance received from the International Criminal Court (RT I 2001, 100, 645, entered into force on 6 January 2001). International conventions signed or ratified by Estonia are also available on the Web site of the Ministry of Foreign Affairs at http://spunk.mfa.ee/est/oiguusloome/Konventsioonid/konv.html, respectively at http://spunk.mfa.ee/est/oiguusloome/Konventsioonid/spets.all.html.
6 See the annual progress reports by the European Commission on Estonia and other CEECs, most recently European Commission, Making a Success of Enlargement: Strategy Paper and Report on the Progress toward Accession by Each of the Candidate Countries, Brussels, 13 November 2001; and Communication from the Commission on the Action Plan for Administrative and Judicial Capacity, and the Mon-

7 In general, Estonian laws are translated into English by the Estonian Legal Translation Centre (Eesti Õiguskõik Keskus) and published on their Web site at www.legalextr.ee. However, the Estonian language is the sole official and binding language of all Estonian laws. Thus, all English translations come with the following disclaimer: “The Estonian Legal Translation Centre’s Web site, and the databases of unofficial translations of legislation and terminology, and lexicons contained therein, are subject to protection under copyright, and the rights provided by the Estonian Copyright Act for authors and holders of copyright must be observed in the use thereof” (emphasis added).

8 The questionnaire was prepared in the Estonian language. A translation of the questions is included below with the results.

9 Semi-official translation provided by the Estonian government on the Web site mentioned in note 1.

10 This provision was adopted by the Estonian Parliament on 16 December 1992 and entered into force on 1 January 1993.

11 An English translation of the Code of Criminal Procedure can be found on the Web site of the Estonian Legal Translation Centre; see note 7.

12 The cases where criminal defense counsel is mandatory are listed in Section 38 of the Code of Criminal Procedure. They include cases against minors and persons who are not able to defend themselves due to physical or mental disabilities. Criminal defense counsel is also required in cases where life imprisonment can be imposed as punishment, and in cases before the Supreme Court. Last but not least, such counsel is mandatory in certain simplified proceedings where negotiations take place that can be compared to plea bargaining in the United States.

13 This provision was adopted on 23 November 1994 and entered into force on 1 January 1995; see RT I 1994, 86/87, 1487.

14 Emphasis added.

15 See RT I 2002, 50, 313.

16 The law does not provide a definition of “material interests.”

17 See also Section 413 with regard to cases where the execution of a judgment is to take place in a foreign state. This provision was adopted on 22 March 2000 and entered into force on 17 April 2000; see RT I 2000, 29, 173.

18 This provision was adopted on 30 May 2001 and entered into force on 1 July 2001; see RT I 2001, 53, 306.

19 This may have to be changed for tourists and business travelers who are citizens of European Union member states. As the European Court of Justice confirmed in its judgment of 2 February 1989 in Case 186/87, Ian William Cowan v. Treasury (1989 ECR 195), tourists and similar travelers are recipients of services. When traveling in another member state, they make use of the fundamental freedom to provide (and receive) services regardless of the internal borders within the EU. As a consequence, these travelers benefit from prohibitions of discrimination on grounds of nationality contained in Articles 54 and 12 of The Treaty Establishing the European Community. This prohibition will certainly apply when Estonia accedes to the EU, a development that is expected to occur on 1 May 2004. However, it may already apply to tourists and business travelers on the basis of the Europe Agreement, which established a special associated states for Estonia’s relations to the EU. This agreement also contains prohibitions of discrimination on grounds of nationality.

20 Again, this rule may have to be changed to include citizens of (other) EU member states who have made use of their freedom to work and live in Estonia and have become residents of this country. Denying them compensation, in a case where an Estonian citizen would be compensated, would amount to discrimination on grounds of nationality. There can be no doubt about the illegality of such discrimination after Estonia’s accession to the EU. However, as outlined in note 19,
the prohibition of discrimination on grounds of nationality may already be enforceable today on the basis of the Europe Agreement.

21 See the Regulation of the Government No. 319, which was adopted on 23 December 1996 and entered into force on 9 January 1997.

22 Decision of 6 June 2000 by the Administrative Chamber of the Estonian Supreme Court, Case No. 3-3-1-26-00.

23 Emphasis added.

24 RT I 1998, 43/45, 666.

25 RT I 1997, 80, 1344; RT I 2001, 55, 331; 56, 332; 64, 367; 65, 377; 85, 512; 88, 531; 91, 543; 93, 565; 2002, 1, 1; 18, 97; 23, 131; 24, 135; 27, 151 and 153; 30, 178; 35, 214.

26 This section was adopted on 25 February 1999 and entered into force on 1 January 2000; see RT I 1999, 31, 425.

27 Interview with Civil Court Judge Eda Murak on 24 August 2002.

28 The minimum pension in the Republic of Estonia is still less than 100 Euro.

29 An example is provided by the decision of Tallinn City Court Judge Piret Rõuk of 14 March 2001 in case No. 2/5/30-8137/00. The judge ruled that free legal aid will not be granted to the applicant in a vindication claim for 192,178.39 EEK (approximately 12,300 euros). The applicant had argued that he was a third-degree invalid and received only a pension in the amount of 1,500 Estonian Kroon (EEK) per month (about 95 euros). Judge Rõuk was of the opinion that the applicant had regular income and that his status did not qualify him as an insolvent.

30 In practice, this is done by submission of certificates from the Building Register and Vehicles Register Centre.

31 For this purpose, the courts require a signed statement from the applicant.

32 This regulation entered into force on 18 April 2002.

33 See the Bar Association Yearbook of 1999, p. 21.

34 This section was adopted on 6 June 2000 and entered into force on 1 July 2000; see RT I 2000, 49, 300.

35 The following are subject to a state fee:

1) judicial acts; 2) commercial register acts; 3) not-for-profit associations and foundations register acts; 4) commercial pledge register acts; 5) land register and ship register acts; 6) martial property register acts; 7) succession register acts; 8) motor vehicle register acts; 81) punishment register acts; 82) building register acts; 9) vital statistics office acts; 10) acts performed in connection with professional securities market participants, management companies, and investment funds; 11) acts performed on the basis of the Gambling Act and the Lotteries Act; 12) acts performed on the basis of the Food Act, the Veterinary Activities Organization Act, the Infectious Animal Disease Control Act, and the Animal Protection Act; 121) register of feeding stuffs acts; 13) acts performed on the basis of the Medicinal Products Act; 14) acts performed on the basis of the Plant Variety Rights Act; 15) acts performed on the basis of the Customs Act; 16) acts performed on the basis of the Weapons Act; 161) acts performed on the basis of the Explosive Substances Act; 17) acts performed on the basis of the Land Cadastre Act and the Earth's Crust Act; 18) acts performed by the Civil Aviation Administration; 19) acts performed by the Maritime Board; 20) acts performed by the Patent Office; 201) acts performed by the Competition Board; 21) notarial acts and other acts performed at representations; 22) acts performed on the basis of the Identity Documents Act and the Citizenship Act; 23) acts performed on the basis of the Aliens Act and legislation of general application issued on the basis thereof; 24) issue of state activity licenses; 25) certification by rural municipality and city secretaries of transcripts and extracts of documents, authenticity of signatures, and authorization documents; 251) acts performed on the basis of the Archives Act; 26) acts performed on the basis of the Energy Act; 261) acts performed on the basis of the Railways Act; 262) Communications Board acts; 263) acts performed on the basis of the Digital Signatures Act; 27) acts performed on the basis of the Organic Agriculture Act; 271) fertilizer register acts; 272) acts performed on the basis of the Plant Protection Act; 28) other acts prescribed by this act.

36 This act was adopted on 22 October 1997 and entered into force on 1 January 1998; see RT I 1997, 80, 1344; consolidated text RT I 2001, 55, 331.

37 All amounts are listed in Estonian krooni (EEK). The exchange rate of the EEK is fixed to the euro at 15.6466 EEK to 1 euro.

38 This act was adopted on 14 August 1991 and entered into force on 31 August 1991; see RT 1991, 25, 308.

39 This act was adopted on 20 December 1995 and entered into force on 1 September 1996; see RT I 1996, 3, 57.

40 See Section 221 (5) of the Code of Civil Procedure.
41 This code was adopted on 25 February 1999 and entered into force on 1 January 2000.
42 In the particular case of the European Court of Human Rights, legal aid may be obtained directly from the Court in Strasbourg, but not for the drafting of the initial complaint; see “Notes for the Guidance of Persons Wishing to Apply to the European Court of Human Rights,” available on the Web site of the Court – www.echr.coe.int.
43 This information was confirmed by Judge Kaire Pikamäe of the Tallinn Administrative Court in an interview.
44 This act was adopted on 25 February 1999 and entered into force on 1 June 1999; see RTI 1 1999, 29, 406.
45 See note 21.
46 See Regulation No. 35 of the Ministry of Justice of 12 June 2002, which provides the Statute for the Courts Department of the Ministry of Justice, in particular Article 3.
47 The requirements for a person to become a sworn advocate in Estonia are set out in Articles 23–26 of the Bar Association Act. First of all, the person has to complete an accredited program of legal studies, i.e., hold a bachelor of law degree. The minimum duration of such programs at present is four years. In future, the requirement may be increased to the possession of a master of law degree, with a minimum total duration of five years of academic studies.
After graduation, young lawyers intending to become attorneys can choose between taking the examination of sworn advocate’s clerks and then working under the supervision of an attorney for at least one year, before taking the examination of sworn advocate’s senior clerks; or working in a law-related profession (e.g., in public administration) for at least two years and then taking the examination of sworn advocate’s senior clerks right away.
The examination for sworn advocates, i.e., the third and final level of the Bar exam, can be taken by persons who have worked as sworn advocate’s clerks for at least two years, or have worked as sworn advocate’s senior clerks for at least one year.
48 Approximately 98 percent of the cases handled by the clerks are criminal law representations. Only some 2 percent are legal aid cases in civil or administrative law.
49 The original Police Act entered into force on 1 March 1991; see RTI 1 1990, 10, 113. It was last amended on 1 September 2002.
50 The role of the criminal investigators is further elaborated in Section 107 of the Code of Criminal Procedure.
51 See Section 11 of the Social Welfare Act, which was adopted on 8 February 1995 and entered into force on 1 April 1995; see RTI 1 1995, 21, 323, as amended; for a consolidated text, see RTI 1 2001, 98, 617.
52 See Article 18 of the Notarization Act, which was adopted on 14 November 2001 and entered into force on 1 February 2002; see RTI 1 2001, 93, 564.
There is an interesting clause in Article 18 (4) that provides that the notary has to warn the parties if he or she believes that a particular transaction may (also) be subject to the laws of a foreign state. The provision specifically stipulates that the notary need not explain the law of that foreign state. It remains to be seen whether this provision will be interpreted so as to exclude information pertaining to the law of the European Union, once Estonia has become a member state.
There can be no doubt that EU law must not be seen as foreign law, and that failure to inform a client about applicable EU law can trigger professional liability issues.
53 This act was adopted on 14 June 2000 and entered into force on 23 July 2000; see RTI 1 2000, 57, 372.
54 Although there is no reason to believe that the sample is not representative, it cannot be denied that the judges who did return the form are probably also more interested in the problems faced by people who are financially unable to pay for legal representation.
55 It is unlikely, however, that this advice will be heeded more in future. The Estonian market for legal services is rapidly filling up with more and more law graduates who are competing for business.
56 The inquisition principle means that it is the responsibility of the judge to discover the facts and find out about the truth. By contrast, in civil proceedings, the court operates on the principle of party disposition and adjudicates only those facts brought to it by the parties.
57 This system is one of the legacies of Soviet times. Thus, Estonia distinguishes between attorneys—who have to have a law degree from an accredited program of higher education, have to have taken the Bar exams, and who have to be members of the Bar—and other “lawyers” for whom none of these criteria apply. Thus, anybody could open a “law office” and begin to provide legal advice to clients. Since representation by an
attorney is required only in the Supreme Court so far, the “lawyers” can even represent their clients before the lower courts. Some of the “law offices” are doing very good work, with staff that is just as well trained and has just as much experience as some of the attorneys; however, there are also “law offices” that do not measure up to even rather basic standards of quality and professionalism. The system is supported, on the one hand, by the fact that the Bar exams are organized by the Bar Association, and so the very members of the profession have a means of controlling access to the profession, and they have used this to keep, in particular, many graduates of private law schools away from access to the Bar. On the other hand, there are also many clients who are afraid that the attorneys will charge them a multiple of the fees charged by a “law office” without necessarily doing better work for them, since the attorneys have a reputation of not being interested in small cases and low-income clients.

58 The subsequent information on the position of the Ministry of Justice was obtained from Kaidi Alvela, counsel for the Bar and the Notary Public Offices at the Ministry of Justice, unless otherwise stated.

59 See the Bar Association Yearbook of 1999, p. 22.

60 E-mail communication with Kaidi Alvela on 12 September 2002.

61 For the current version of the act, see RT I 1999, 55, 584; 2002, 67, 405.

62 See, for example, Regulation No. 3 of the Minister of Justice of 16 January 1998 and Regulation No. 44 of the Minister of Justice of 30 May 2001.

63 The law firms chosen by the state to represent the state in its disputes, including several so-called ägāt büroos, where the lawyers are not members of the Bar, indicate as their hourly fees for legal services amounts between 590 and 2,761 EEK (including 18 percent VAT), equivalent to fees between 38 and 176 euros. This information is available at the Web site of the Ministry of Justice at http://www.just.ek/e/print.php?cat=3109, last accessed on 29 August 2002.

64 This provision was adopted on 30 May 2001 and entered into force on 1 January 2002; see RT I 2001, 53, 313.

65 This provision was adopted on 19 April 2000 and entered into force on 1 July 2000; see RT I 2000, 35, 222.

66 This NGO grew out of a legal clinic for refugee law at Concordia International University Estonia.

67 Information provided by Indrek-Ivar Määrits, counselor at the Legal Chancellor’s Office. See also the Review of the Activities of the Legal Chancellor in 2000, published by the Legal Chancellor’s Office, Tallinn, 2001.

68 Decision No. 438-IX of 16 May 2001; see RT I 2001, 49, 270.

69 The draft is also in the interest of the Estonian Bar Association and its members. As mentioned above, the Bar controls the Bar examinations, and thus access to the Bar for graduates of the four accredited law schools in the country. If the Bar tightens the conditions of access—for example, by failing more candidates in the Bar exam or by requiring a master’s degree before the Bar exam can be taken—more and more law graduates might find it attractive to provide legal services outside the Bar. This would obviously be unwelcome competition for the members of the Bar, in particular in a market where more and more lawyers are offering their services to a clientele that is not really growing. The congruence of interests of the Ministry and the Bar Association may not be accidental, since the minister of justice was formerly a partner in a law firm and still is a co-owner of that firm.
EXECUTIVE SUMMARY

Until recently, access to justice has been a neglected issue in Hungary. The institutional and legal framework is incomplete, and there are many problems regarding practical implementation of the laws. In addition, there is a lack of political will to invest adequate financial resources to support the system. As a result, the right to access to justice and legal aid is often only formally guaranteed. Below, we will summarize the most urgent problems emerging in the criminal and civil legal aid system.

Access to justice in criminal cases

In Hungary, the defendant’s right to defense is enshrined in the Constitution in accordance with democratic principles and Hungary’s obligations under international human rights instruments, such as the International Covenant on Civil and Political Rights and the European Convention on Human Rights. This constitutionally guaranteed right is expounded by the specific provisions of criminal procedure. According to the laws of criminal procedure, in cases involving certain types of defendants (e.g., juveniles, mentally handicapped persons, defendants charged with a criminal offense punishable by more than five years of imprisonment, pretrial detainees, etc.), the participation of a defense counsel is mandatory. If such a defendant is indigent and is unable to hire an attorney, an ex officio counsel is appointed.

In practice, however, the Hungarian system of ex officio defense is often dysfunctional due to the shortcomings of the legislative framework, failure to provide adequate payments, and negligence on the part of the authorities and sometimes the attorneys themselves. This statement on the system’s failures is supported by the conclusions of the ombudsman’s comprehensive investigation conducted in 1996, which bitterly states that “within our justice system the activity of ex officio defense counsels fails to provide protection against the violations and errors of the authorities.”
We note with satisfaction that recent legislative developments suggest that with the new Code of Criminal Procedure of July 2003, significant improvements might take place in a number of fields. However, some problems will certainly not be solved by the amendments. The question of primary importance is how the state can fulfill its obligation to guarantee high-quality legal aid without interfering with the autonomy of the Bar Associations, which are primarily responsible for the management and quality assurance of the legal aid system. Another concern is the complete lack of systematically collected data in the field, which makes it impossible to assess the efficiency and needs of the system, or to develop ways to improve it.

**Access to justice in civil cases**

The Hungarian civil law framework strives to ensure access to justice in civil procedures through a complex system of financial assistance afforded to indigent parties or to other, non-indigent parties in certain types of civil lawsuits. Indigent parties make wide use of this assistance, which allows them to take part in civil procedures without having to bear the costs incurred with litigation. Indigent parties who are eligible for these financial benefits do not have an automatic right to a protector attorney, as courts appoint a legal aid attorney only if the complex legal nature of the case so requires. In practice, protector attorneys are appointed in only a fraction of the cases in which litigants are afforded financial benefits. The lack of governmental or academic evaluation of the role and performance of protector attorneys, along with the lack of any registration system for cases where legal aid attorneys are appointed, illustrates that this area of access to justice has remained a peripheral issue in Hungary to date.

**Objectives of the report**

We hope that the analysis presented below will raise awareness among the legal profession and the wider public about the severe deficiencies of the present state of access to justice. As a result of the failures regarding access to justice, the right to defense and the right to a fair trial are only formally guaranteed to those who cannot afford to hire a lawyer. We also hope that this document will assist key stakeholders in developing viable alternatives to, or improvements within, the existing *ex officio* model.

**1. Introduction**

In the introduction, we will outline the judicial system and the structure of the Bar Associations.

Under Section 16 of Act LXVI of 1997 on the Organization and Administration of Courts (1997. Évi LXVI. Törvény a bíróságok szervezetéről és igazgatásáról), the following courts function in the Republic of Hungary: local courts, labor courts, military tribunals, county courts (including the Budapest Metropolitan Court), regional appellate courts, and the Supreme Court.
The local courts function as first-instance courts. County courts function both as first-instance courts (in cases of greater severity) and as appellate courts for cases in which the first-instance decision is delivered by the local courts. The regional appellate courts have not been established yet. The establishment of these courts was decided upon in 1997. However, after the change of government in 1998, their creation suffered delay due to a lack of political will. According to Act XXII of 2002 on the seat and sphere of competence of regional appellate courts and appellate prosecutorial organs, three regional appellate courts (in Budapest, Szeged, and Pécs) were planned to be established on 1 January 2003 (2002. Évi XXII. Törvény az ítéltáblák és a fellebbviteli ügyészi szervek székhelyének és illetékességi területének megállapításáról). These courts will start to operate on 1 July 2003. Two additional regional appellate courts will be in operation from 1 July 2004. The regional appellate courts will have no first-instance jurisdiction. They will adjudicate appeals regarding decisions of the county courts.

The Supreme Court reviews decisions delivered by the county courts and the regional appellate courts. It also reviews final decisions that are challenged through extraordinary remedy. The Supreme Court adopts “legal consistency resolutions” and publishes decisions on issues of principle to orient the judicial practice. The Supreme Court is the highest judicial body, but it performs no central administrative functions. However, its president is also the head of the National Council of Justice (Országos igazságszolgáltatási tanács), which is responsible for the management of the judicial system.

The labor courts function as first-instance courts in legal disputes arising from employment-related issues. Labor courts and military tribunals (functioning within the organizational structure of county courts) operate in Budapest and on the county level.

In Hungary, there are approximately 110 local courts. There are 20 county courts (including the Budapest Metropolitan Court) and 20 labor courts, and there will be 5 regional appellate courts.

The approximate number of attorneys in Hungary is 7,000. About 4,000 of them work in Budapest. The total population of Hungary is 10 million, with approximately 2.5 million people living in the capital.

According to Act XI of 1998 on Attorneys (1998. Évi XI. Törvény az ügyvédek-ről; hereinafter, Attorneys Act), the attorneys form regional Bar Associations. There is one Bar Association in Budapest and one in each county. The regional Bar Associations form the Hungarian Bar Association (Magyar ügyvédi kamara). More details about the Bar Associations will be discussed in the relevant sections.
2. CRIMINAL LAW: EFFECTIVE ACCESS TO THE JUDICIAL SYSTEM FOR THE INDIGENT IN CRIMINAL CASES

2.1 RIGHT TO COUNSEL

2.1.1 Constitutional guarantees of the right to counsel and the right to legal aid

Under Section 57 (1) of Act XX of 1949 on the Constitution of the Republic of Hungary (A Magyar köztársaság alkotmánya; hereinafter, the Constitution), “everyone is equal before the law and has the right to have the accusations brought against him or her, as well as his or rights and duties in legal proceedings, judged in a just, public trial by an independent and impartial court established by law.”

Under Paragraph (3) of the same article, “Individuals subject to criminal proceedings are entitled to legal defense at all stages of the proceedings.”

The Constitutional Court (Alkotmánybíróság) plays an important role in interpreting constitutional provisions. In its Decision 25/1991 (V. 18.), the court explained that:

[The right to defense is realized in those rights of the accused/defendant and obligations of the authorities that guarantee that the accused/defendant be informed about the criminal charges brought against him or her; he or she may explain his or her standpoint concerning such charges; he or she may put forth his or her arguments against such charges; he or she may file motions and formulate observations concerning the activity of the authorities; and he or she may resort to the assistance of a defense counsel. The right to defense also comprises those rights of the defense counsel and those obligations of the authority that enable the counsel to conduct the defendant’s defense.

The Hungarian Constitution also speaks to the status of international law within the domestic framework. The Hungarian legal system follows the dualist approach. The relationship between domestic and international law is defined by Section 7 (1) of the Constitution: “The legal system of Hungary accepts the generally acknowledged rules of international law and guarantees that domestic law be harmonized with international legal obligations.”

According to the most widespread interpretation, this means that the Hungarian legal system acknowledges the supremacy of international law but does not allow its rules to be applied directly: international laws have to be integrated into domestic law through acts of either the government or the Parliament. The most important instruments of international law appear in domestic law in the form of acts adopted by the Parliament.

The Constitutional Court plays a very important role in incorporating the rules of international law. On the motion of the Parliament, the president, or the government, the Court examines whether an inter-
national treaty or convention to be ratified is in harmony with the Constitution. If the Court considers a treaty to be unconstitutional, the treaty may not be ratified or promulgated until it has been amended to comply with the Constitution. Once an international treaty has been ratified and promulgated, it is the task of the Constitutional Court to decide whether domestic law is in harmony with the provisions of the treaty. If the domestic law is in contrast to the international treaty, and it is lower than or at the same level as the act promulgating the treaty in the hierarchy of statutes, the Constitutional Court may declare the domestic law void. If the domestic statute ranks higher than the promulgating act of the international treaty, the Court calls the legislature to make the amendments necessary to resolve the contradiction. This process can be initiated by the Parliament, MPs, the president, the government or its members, the president of the National Audit Office, the chief prosecutor, and the president of the Supreme Court. Therefore, if a judge realizes that the domestic law is not consistent with the international law, he or she must ask the president of the Supreme Court to initiate the procedure of the Constitutional Court. This procedure is especially relevant because some elements of the Hungarian access to justice system violate the provisions of international treaties adopted and promulgated by Hungary. For example, in the present system the state only advances but does not pay the fees of appointed defense counsels. Although this situation will change from 1 July 2003, the present policy is clearly in violation of Article 14 of the International Covenant on Civil and Political Rights, according to which legal assistance shall be provided free of charge to all those who do not have “sufficient means to pay for it.”

In theory, if there is no domestic regulation on point, the judges may rule on the basis of the international document promulgated in Hungary. However, there are usually no procedural provisions guiding the judge on how to apply the international provisions. When such a legal gap exists, Hungarian judges prefer not to resort to international laws.

2.1.2 Right to counsel in criminal proceedings

Section 6 of Act I of 1973 on the Criminal Procedure (1973. Évi I. Törvény a bűntetőeljárásról; hereinafter, the Code of Criminal Procedure) provides the following:

- The accused/defendant shall have the right to defense.
- The authorities are obliged to guarantee that the person against whom a criminal procedure is conducted be able to defend himself or herself in the way defined by this act.
- A defense counsel may act on behalf of the accused/defendant at any stage of the procedure. The accused/defendant may choose his or her defense counsel from the beginning of the procedure.
The right to counsel is enshrined in the Code of Criminal Procedure. Other statutes, such as the decrees on the implementation of pretrial detention discussed below, regulate only certain aspects of the issue, e.g., correspondence and consultation between the defendant and the counsel. Section 6 of the Code of Criminal Procedure guarantees the right to counsel in a general manner, asserting that the accused/defendant may resort to the assistance of a defense counsel at any stage of the procedure. This formulation is clear-cut and includes the investigative stage, trial stage, appeal stage, the stage of special remedies, and special procedures related to the criminal procedure, such as judicial revision of compulsory treatment of the mentally disabled, the procedure concerning the ordering of pretrial detention preceding the submission of the bill of indictment, etc.

The difference among these stages of procedure lies in the scope of the rights that the defense counsel is entitled to exercise in the interest of the accused/defendant. Under Section 52 of the Code of Criminal Procedure, the defense counsel may in all phases of the procedure file motions, make comments, and request information from the authorities. However, the rules regarding the counsel’s right to inspect the case files and to be present at different procedural activities differ in the various stages of the procedure. Under Section 52 (2), the defense counsel may be present at investigative activities only if the Code of Criminal Procedure explicitly authorizes such a presence. By contrast, the defense counsel may be present at any procedural activity before the court. Similar regulations exist with regard to the inspection of case files. During the investigative stage, the defense counsel may inspect only experts’ opinions and those files that record the procedural activities at which his or her presence is permitted by law. After the investigation, the defense counsel may inspect all case files. The defense counsel may inspect other files only if this does not threaten the interests of the investigation; it is up to the investigative authority to decide whether to permit such inspection.

The limitations of the defense counsel’s rights during the investigative phase present some of the greatest obstacles to the right to defense counsel, in light of the outstanding importance of this phase in the Hungarian criminal procedure. Below we summarize some of the problems emerging before and throughout the investigative stage.

**Short-term arrest**

This restriction of freedom is not formally a phase of the criminal procedure, but it often precedes the criminal process. It can be applied if a person is caught in the act of committing a crime or is “suspected of having committed a crime,” although a strongly founded suspicion is not required. A short-term arrest may not last longer than “necessary,” and not longer than eight or (in exceptional cases) twelve hours. Information must be provided to the person under short-time arrest about the reasons for the arrest.
In terms of Section 18 of the Police Act, detained individuals (including those held under short-time arrest) shall be provided with the opportunity to notify a relative or any other person, unless such a notification poses a threat to the purpose of the detention, e.g., if the police believe that the relatives to be notified are also involved in the criminal offense serving as the basis of arrest. If the detained person is not in a position to exercise this right, the police shall be obliged to perform the notification. In theory, this provision could be interpreted as authorizing the detained person to notify a lawyer (“any other person”). However, according to another interpretation (supported by police practice), since a criminal procedure has not yet formally started at this stage, the arrested person is not entitled to contact a lawyer. During the short-term arrest, the arrested person may not meet with visitors, so even if the person under short-time arrest could notify a lawyer, the lawyer would not be allowed to visit him or her. However, the police can informally question him or her without the detained person being accused of a crime. Although not permitted by either the Police Act or the Code of Criminal Procedure, this practice indeed exists. It is mentioned quite often in police reports or studies on criminology and is termed “calling somebody to account” in police jargon. As this type of informal questioning takes place before the beginning of a criminal procedure, police officers are not obliged to inform the arrested person about his or her rights as accused. This information, however, may not be used as evidence in any subsequent trial. But if someone makes a statement while being “called to account,” he or she will be easily pressed to repeat it at his or her first formal interrogation, especially since the defense counsel is rarely present at the defendant’s first interrogation, as will be explained below.

This practice of short-time arrests is clearly contrary to the recommendation of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter, CPT) that “steps be taken to ensure that persons in police custody benefit from an effective right of access to a lawyer, as from the very outset of their deprivation of liberty.”

**Investigative phase**

The formal criminal procedure starts with the communication of the suspicion. This is limited to a brief description of the facts constituting the allegation and information on the relevant sections of the criminal code (evidence supporting the allegation does not need to be communicated). If the person who is to become the accused is not detained, he or she is summoned to appear before the investigating authority, which will then communicate the suspicion. In such cases and if the notification informs the addressee that he or she is summoned as a suspect, which is not always the case, the accused has the opportunity to arrange his or her defense, provided that he or she can afford a lawyer. However, if the accused is deprived of his or her liberty first, as is
the case with short-term arrests, the suspicion is communicated to him or her during the short-term arrest. The accused can then be taken into seventy-two-hour detention. This is the longest deprivation of liberty possible without a judicial decision, and it can be ordered by either the police or the prosecutor. Under Section 91 of the Code on Criminal Procedure, the accused may be taken into seventy-two-hour detention if caught in the act and his or her identity may not be established, or if the conditions for pretrial detention exist. If the court does not order a pretrial detention within seventy-two hours, the person taken into seventy-two-hour detention shall be released.

Immediately after the communication of the suspicion, the accused has to be informed of his or her right to choose a defense counsel or to ask for the appointment of a counsel by the investigating authority. If defense is mandatory, the investigating authority has to inform the accused person that if he or she fails to appoint a lawyer within three days, appointment will be made ex officio. However, when the accused is detained, the first interrogation has to be performed within twenty-four hours, so the authority must interrogate the accused before its time to see to the appointment of an ex officio counsel becomes effective.

Consequently, as no breach of the law is committed, the records from the first interrogation may be used as evidence in a subsequent trial even if no defense counsel was present. Although, under Section 87 (2) of the Code of Criminal Procedure, the accused person shall be warned that he or she is not obliged to testify, most defendants are not “experienced” enough to refuse to testify until they are able to consult a defense counsel. If no such warning is made, the confession of the accused person may not be used as evidence.

From this point of view, we regard it as a very positive development that the bill amending Act XIX of 1998 on the Code of
Criminal Procedure (1998. Évi XIX. Törvény a büntetőeljárásról)\textsuperscript{9} will make the appointment of defense counsel mandatory “by the first interrogation at latest.” However, since Section 179 of the new Code of Criminal Procedure also prescribes that the detained accused shall be interrogated within twenty-four hours from the beginning of the detention, it is far from sure that this amendment will guarantee the presence of a defense counsel at the first interrogation. If, for instance, the authority appoints a counsel two hours before the interrogation takes place, the provision will be formally complied with but the appointed counsel most probably will not be able to attend. In our view, the amendment ought to oblige the authority to appoint a counsel in due time so that it would be realistic for the counsel to appear at the first interrogation.

**Pretrial detention**

If, on the basis of the information gathered during the investigation (most often during seventy-two-hour detention), the investigative authority finds that the conditions set forth under Section 92 (1) of the Code of Criminal Procedure are present, it will notify the prosecutor. As at the investigatory stage, the prosecutor is entitled to make a motion to the court to order the pretrial detention.\textsuperscript{10} The prosecutor is in charge of supervising the investigation, but prosecutors do not always follow the investigation closely. The procedural framework is aimed at guaranteeing that the prosecutor look into the case if the issue of pretrial detention comes up. However, according to defense counsel, the general practice is that prosecutors almost automatically forward the investigative authority’s suggestion to the competent court. This observation is supported by a study,\textsuperscript{11} based on statistical data, that explains the frequency of pretrial detentions, *inter alia*, by the fact that neither the prosecutors nor the courts thoroughly scrutinize the grounds for ordering pretrial detention or the possible counterarguments. On the basis of the investigative authority’s motion, they tend to initiate and order pretrial detention, sometimes even in doubtful cases.\textsuperscript{12} The prosecutor files the motion with the local court in the judicial district where the accused is taken into custody.\textsuperscript{13} The court then holds a hearing. At the hearing the prosecutor submits, in writing or verbally, the proof substantiating the need for pretrial detention.\textsuperscript{14} The accused and his or her defense counsel may comment on the prosecutor’s submission.\textsuperscript{15} If the defense counsel was notified of the hearing but fails to appear, the hearing may be held in his or her absence,\textsuperscript{16} with the exception of juvenile defendants, who may be heard in connection with the ordering of pretrial detention only if defense counsel is present.\textsuperscript{17}

Under Section 47 of the Code of Criminal Procedure, if the accused/defendant is detained, defense is mandatory (this most often refers to pretrial detention). If the detainee does not have a retained defense counsel, the authorities shall appoint one. However, the Code of Criminal Procedure excludes seventy-two-hour detention from
the scope of those cases of detention in which defense is mandatory. During the seventy-two-hour detention, the investigative authority usually decides about the necessity of the detention. The accused is then released unless his or her pretrial detention is ordered. Besides raising serious constitutional concerns,18 this solution creates a paradoxical situation: as the authority’s obligation to appoint a defense counsel emerges only after the court has ordered pretrial detention, those detainees who do not retain a lawyer during their seventy-two-hour detention will certainly not have a defense counsel present at the court hearing. For a person in seventy-two-hour detention, it is not impossible but certainly somewhat difficult to retain a lawyer. However, the procedural structure supporting this right to counsel is the very mechanism by which indigent defendants are denied the opportunity to resort to the assistance of a defense counsel. As a practicing defense counsel points out, “[d]efense is compulsory only after the pretrial detention [has been ordered], so in most cases the counsel is missing from the very procedural activity that brings a shift in the significance of the case and in the procedural position of the accused person.”19

According to judicial experts,20 absence of the defense counsel is extremely problematic because, in accordance with the law,21 the judge who decides on pretrial detention receives from the prosecutor only the proof that substantiates the necessity of the detention, not all the evidence gathered in the case. Under this arrangement, the presence of a legal expert summarizing the counter-arguments is even more important.

The paradoxical nature of the regulation does not end here. Under Section 379/B (2) of the Code of Criminal Procedure, if the defense counsel did not participate in the hearing ordering pretrial detention, he or she may appeal the court’s decision within three days from the hearing. As noted above, if defense is mandatory in a given criminal procedure, the investigative authority must inform the accused that if he or she fails to appoint a lawyer within three days, appointment will be made ex officio. Defense becomes mandatory from the time when pretrial detention is ordered, at which time the investigating authority’s obligation to warn the accused becomes effective. If the accused does not claim immediately upon this warning that he or she will not retain a counsel himself or herself, the authority’s obligation to appoint a defense counsel will come into force only after the three days have passed—exactly when the term expires for the counsel’s appeal against the court decision ordering pretrial detention. Even if the accused immediately requests the appointment of counsel, there is no legally prescribed time within which the investigating authority is obliged to arrange the appointment. This means that indigent defendants, as well as defendants who are severely restricted in their opportunity to contact a lawyer because they are in seventy-two-hour detention, are practically deprived of their opportunity to resort to the assistance of a legal expert in submitting an appeal against the decision ordering their pretrial detention.
This problem could partly be solved if defense were mandatory in cases involving seventy-two-hour detention. Such a solution would significantly increase the almost nonexistent opportunity for indigent defendants to have a defense counsel present at the hearing on pretrial detention. We regard it as a positive development that an upcoming amendment of the rules of criminal procedure is expected to expand the scope of mandatory defense to seventy-two-hour detention from 1 July 2003.

**Scope of right to counsel**

According to the Code of Criminal Procedure, a defense counsel may act on behalf of the accused/defendant at any stage of the procedure. Therefore, the main differences in the scope of the right to counsel at the different stages relate to the scope of the counsel’s procedural rights. In this respect, there is no difference between appointed and retained counsels.

We have noted that while the defense counsel’s right to file motions, make comments, and request information from the authorities is guaranteed in all phases of the procedure, the defense counsel’s right to inspect the case files and to be present at different procedural activities is restricted in the investigative phase. The defense counsel may be present at investigative activities only if the Code of Criminal Procedure explicitly authorizes such a presence. Under Section 134 of the Code of Criminal Procedure, the defense counsel may be present at the interrogation of the accused and—with certain exceptions, such as for protected witnesses—at the hearing of witnesses and may pose questions to the person heard. The Code of Criminal Procedure states, however, that the exercise of this right may not delay the hearing. The accused and the defense counsel may also be present at other investigative activities, such as the hearing of the experts, the inspection, the on-the-spot survey, the evidentiary experiment, and the presentation for recognition. With regard to the procedures mentioned above, even notification of the above enumerated parties may be waived if the delay would pose some danger to the process.

The rules relating to the counsel’s presence also influence his or her right to inspect the case files. During the investigative stage, the counsel may inspect only experts’ opinions and those files that record the procedural activities at which his or her presence is permitted by the law. As outlined above, the defense counsel may inspect other files only if this does not threaten the interests of the investigation; it is up to the investigative authority to decide whether to permit such inspection.

**Application of the right to counsel in practice**

There are a number of problems that are common in the case of retained and *ex officio* lawyers, and some specific ones exist in connection with the latter group. First we will discuss the common problems, and then we will describe the special issues emerging with regard to *ex officio* counsels.
Presence at investigative activities: According to experts of the criminal procedure, “the reason for the absence of defense counsels from investigative activities is that the authorities fail to notify them or they send the notification so late that the defense counsels are not able to attend the given act. The law prescribes no obligation for the authorities concerning when the notification ought to be sent.” As a result, the actual participation of defense counsels in the investigative phase is far from satisfactory. This is supported by empirical data provided by a 1998–99 study on the issue, which was based on the analysis of 1,273 case files and interviews with judges, prosecutors, defense counsels, police officers, pretrial detainees, and convicted inmates.

Table 1: Presence of defense counsel at investigative activities

<table>
<thead>
<tr>
<th>Investigative activity</th>
<th>Was the defense counsel present? If yes, on how many occasions? (with percentages)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Town courts (327 cases)</td>
</tr>
<tr>
<td>Inspection</td>
<td>No</td>
</tr>
<tr>
<td>Evidentiary experiment</td>
<td>No</td>
</tr>
<tr>
<td>Presentation for recognition</td>
<td>No</td>
</tr>
<tr>
<td>On-the-spot survey</td>
<td>No</td>
</tr>
<tr>
<td>Hearing of witness</td>
<td>Yes (40 occasions = 12.2%)</td>
</tr>
<tr>
<td>Interrogation of defendant</td>
<td>Yes (94 occasions = 28.7%)</td>
</tr>
<tr>
<td>Confrontation</td>
<td>Yes (44 occasions = 13.4%)</td>
</tr>
<tr>
<td>Presentation of expert’s opinion</td>
<td>Yes (11 occasions = 3.36%)</td>
</tr>
<tr>
<td>Presentation of the files</td>
<td>Yes (88 occasions = 26.9%)</td>
</tr>
</tbody>
</table>

Contact between the detained person and the counsel is far from perfect in practice. Two main forms of contact may be distinguished: personal contact and contact via telephone. Both the accused/defendants and lawyers are reluctant to resort to written correspondence, as it is hard to know whether the authorities abide by their obligation not to exert any kind of control over such correspondence. Practitioners raise concerns with regard to both forms.

Before discussing these, we have to draw attention to a fundamental problem, namely, that pretrial detention enforced in police jails differs from pretrial detention implemented in penitentiary institutions. Under the current law, pretrial detention should take place in penitentiary institutions. However, until the end of the investigation, it may also be imposed in a police jail in exceptional cases. However, available data show that the implementation of pretrial
detention in police premises has become the rule rather than the exception: in 1999, of 6,823 pretrial detainees, only 3,096 awaiting the first-instance decision were incarcerated in penitentiary institutions. For the year 2000, of 6,348 pretrial detainees, 3,079 were incarcerated in penitentiary institutions. At least half of all pretrial detainees were therefore detained in police jails. As the Hungarian Helsinki Committee pointed out in 1998, this gives rise to concerns, as “in almost every European country the situation of those held under pretrial detention [in police jails] is worse than that of those serving prison sentences. . . . The reasons for this have to do partly with physical conditions, partly with treatment, and in a number of cases with the police practice of using coercion during interrogation.” Experts agree that contact with defense counsel is generally worse when pretrial detentions occur in police jails rather than in penitentiary institutions.

**Personal contact:** The first encounter between the defense counsel and the detainee is also often problematic. Under Section 55 of Decree 6/1996 of the Minister of Justice on the Rules of the Implementation of Imprisonment and Pretrial Detention (6/1996. (VII. 12.) IM Rendelet a szabadságvesztés és az előzetes letartóztatás végrehajtásának szabályairól; hereinafter, Penitentiary Rules), if a defense counsel wishes to enter the penitentiary institution, he or she must present his or her retainer or the decision about his or her ex officio appointment. Entry may also be permitted if the defense counsel visits the penitentiary institution for the purpose of having the retainer signed by the detainee. However, until this happens, he or she may communicate with the detainee only under supervision. Both retained and appointed counsels may do so under security control but without supervision as to the contents of the conversation. By contrast, Decree 19/1995 of the Minister of the Interior on the Regulation of Police Jails (19/1995. (XII. 13.) BM Rendelet a rendőrségi fogdák rendjéről; hereinafter, Police Jail Regulation) contains no provision allowing the defense counsel to enter the premises for the purpose of obtaining a retainer. This creates an obvious problem: “[t]he officers want to see the authorization given by the detainee to the lawyer, but obtaining such an authorization is hardly possible without a personal meeting first.”

An additional problem exists with regard to the arrangement of the counsels’ rooms in police jails. Several practitioners note that, unlike penitentiary institutions, in police jails the defendant is separated from the counsel by a fiberglass wall. This arrangement “makes it impossible for the defendant and the counsel to conduct ‘intimate’ conversations touching upon confidential aspects of the case because they have to resort to shouting or loud speech. Because of this ‘protective wall’ they cannot look into the case files together, nor can they hand over documents to each other without posing a threat of interference by the police.” Although, under Section 3 (4) of the Police Jail Regulation, the accused
may communicate with his or her lawyer under security control but without supervision as to the contents of the conversation, if they cannot exchange documents because of the fiberglass wall separating them, they may have to ask the police officers to hand over the papers to the other party. The reality of this situation is aptly proven by the experiences of the Hungarian Helsinki Committee’s Police Cell Monitoring Program. Accused persons detained in penitentiary institutions are in a more favorable situation with regard to personal contact with their counsel, because they are not separated by walls.

Contact via telephone: Here again, we see that there is a difference between the situation of pretrial detainees in police jails and in penitentiaries. According to a recent study, 97 percent of interviewed detainees incarcerated in police jails were hindered in some way by the authorities when trying to contact their defense counsel by phone. Of the interviewed detainees in penitentiary institutions, only 60 percent made this same claim. A recent amendment to the Police Jail Regulation has further increased the difficulties facing the accused incarcerated in police jails. Under Section 3 (10) of the Police Jail Regulation, the accused may contact his or her counsel only in such a way that a police officer initiates the call to the counsel’s office number, kept on record among the documents related to incarceration. This means that the detainee is not permitted to try to reach the counsel via his or her mobile phone—often the only way to reach most lawyers. Some experts suggest that this provision be amended as soon as possible.

Copies of files: Easy access to copies of case files, especially in cases where there is a great volume of files, is an essential element of an effective defense. Therefore, it is highly problematic that under the current regulations, during the investigative phase the defense counsel is obliged to pay a relatively high fee to obtain copies of case files: 100 forints (HUF) (0.4 euros) per page. This is a clear violation of the principle of equality of arms (as the prosecution receives the copies free of charge), and it is also in contradiction with the right to defense as interpreted by the Hungarian Constitutional Court. In its Decision 6/1998, the Court declared that this right shall be effectively enforced and shall be interpreted as including the right of the accused/defendant and the counsel to prepare for exercising their procedural rights.

In the trial phase of the procedure, the situation is also troublesome: if the counsel or the defendant requests a copy of the trial records right at the end of the hearing, it shall be provided free of charge. However, if the request is submitted anytime later, the copies must be paid for. According to the view of some members of the judiciary, the courts should be granted budgetary resources so that they can provide the defense with free copies regardless of when the copy is requested.
Special problems concerning ex officio appointed counsels

It is not compulsory for appointed counsels to appear at any pretrial stage of the procedure, except in the case of minors. Since appointed defense counsels’ fees are extremely low, there is little incentive to appear unless required. Thus, in the case of ex officio appointed counsels, participation in the investigative phase is even less frequent. At present, appointed counsels are not eligible for fees for meeting with clients (this is to be changed starting in January 2003 in cases where accused persons are detained—see section 6.4). In 1996, the parliamentary commissioner for civil rights (ombudsman) conducted an extensive survey concerning the implementation of the right to defense of detained persons having appointed counsels. The survey established that in Zala County, appointed counsels appeared at only 18.7 percent of all witness hearings held in the surveyed cases. In Borsod-Abaúj-Zemplén County, in only three out of the eighteen examined cases did appointed counsels participate in any procedural activity. In Pest County, five out of twelve detained defendant had no information whatsoever about their appointed counsels.

Similar experiences were noted in the course of the Hungarian Helsinki Committee’s Police Cell Monitoring Program in 1997. Out of the 340 detainees interviewed in the program, 198 (58.1 percent) had an appointed counsel. Only 15 percent of the detainees with appointed counsels were able to contact their lawyer before the first interrogation, as opposed to 45 percent of detainees with retained lawyers. Of detainees with appointed counsels, 43.7 percent claimed that they had never met their lawyer. In addition to the low fees, the lack of appropriate sanctions against negligent appointed counsels contributes to the problem (see section 2.7).

According to practicing attorneys, the practice of appointment also hinders participation in the different investigative activities. In the notification on appointment, for instance, the appointing authorities do not indicate the location of detention. It may take days for the appointed counsel to find out where his or her client is detained. This, of course, also prevents the appointed counsel from being able to attend the first interrogation.

Another problem is that in relation to the fees paid to ex officio defense counsels, the amount charged for copies of files is extremely high. For an hourly wage, the counsel can copy just five pages. The ombudsman pointed out that “the counsel may not be expected to advance such amounts” and suggested that appointed defense counsels be exempt from such copying fees. It seems that the new Code of Criminal Procedure’s entry into force will solve this problem, as Section 74 in it provides that if the defense counsel is appointed because of the indigence of the accused/defendant, the accused/defendant and his or her counsel shall on one occasion be exempted from the costs of copying the case files.

It is unclear how the amendment of the laws related to the fees and expenses of
appointed counsels (see section 6.4) will affect the issue of copying fees. Under the present laws, the defense counsel may request reimbursement only for their travel and accommodation expenses emerging in connection with their activities performed in relation to the defense of the given accused/defendant. Under the pending regulations, other related expenses may be reimbursed at the end of the criminal procedure. If this is to be interpreted as including the amounts paid for copies, the situation would be rather paradoxical: the court first would have to charge the counsel for the copies, and then the same amount would have to be paid back as reimbursement when the trial or procedure is over. As of yet, it is impossible to predict how this practice will develop.

According to the observations of the Police Cell Monitoring Program in operation since 1996, in spite of the legal provisions, it is often impossible for pretrial detainees to obtain information from the authorities as to who their appointed defense counsel is and what his or her availability is. Thus, if the appointed counsel fails to provide assistance to the detainee during the investigation phase (which often happens due to the above-outlined reasons), the incarcerated person is often unable to contact the attorney.

In this respect, the Police Cell Monitoring Program revealed a police practice that seriously hinders the detainee’s ability to find out who his or her appointed lawyer is. Under Section 36 (1) (d) of the Police Jail Regulation, the name, business address, and telephone number of the detainee’s counsel shall be kept on record among the documents recorded in relation to the detention. If the counsel is appointed by the authorities, the detainee does not automatically receive the above information. Section 8/4 of the Code of Conduct prescribes that following the receipt of the appointing decision, the counsel shall immediately report to the appointing authority, request information about the case, and personally contact the client in pretrial detention. But, as noted above, appointed counsels often fail to abide by this obligation. When this occurs, the detainee must turn to the authority implementing the incarceration for information.

Under order 23/1998 of the deputy commander of the National Police Headquarters, the name, business address, and telephone number of the detainee’s counsel shall be attached in a sealed envelope to the detainee’s files. The sealed envelope shall be certified with a stamp and signature so that it may be seen if the envelope has been opened. A report shall be prepared every time the envelope is opened, and such reports shall be maintained in a separate file. The commander of the police jail is required to repeat the aforementioned procedure when rescaling the envelope.

In our view, this measure lacks a rational basis. Its introduction is certainly to the detriment of the unobstructed exercise of detainees’ rights to defense counsel. Detainees will most likely face difficulties in convincing the commander of the jail to carry out this extremely complicated pro-
procedure. The Hungarian Helsinki Committee suggested to the deputy commander that the registration of legal counsels be carried out without such administrative obstacles. However, citing the protection of the counsel's personal data, the deputy commander refused to initiate an amendment to the order. It is unclear from whom the appointed counsel's data should be protected, especially because Section 116 (4) of the Attorneys Act requires that the attorney's name, office address, and telephone number are public data that shall be made accessible to everyone.

Our observations concerning the difficulties that detainees experience in contacting their appointed counsels are supported by the CPT's observations “that in many cases, lawyers appointed *ex officio* had no contacts with the detainee until the first court hearing.” We agree with the CPT’s recommendation “that the system of legal aid to detainees be reviewed, in order to ensure its effectiveness throughout the procedure, including at the initial stage of police custody.”

**Lack of obligation to provide interpreters for consultation with counsel**

Although defense is mandatory if the accused/defendant does not speak Hungarian, *language interpreters are provided only at procedural activities*, which also severely hinders the practical implementation of the principle of the right to the use of the mother tongue in the criminal procedure—parallel to posing problems for defense counsels. If the appointed defense counsel wishes to consult with the client, which is obviously a precondition of effective defense, he or she must bear the expenses of hiring an interpreter. Taking into consideration the low fees that appointed counsels receive, this policy regarding language interpretation presents a significant obstacle. However, according to the amendment to the provisions regulating the fees and expenses of appointed defense counsels (see section 6.4), from 1 January 2003, appointed defense counsels may request the reimbursement of all their expenses arising in the course of the criminal procedure. The court settles this issue simultaneously with its final decision. In light of the average length of criminal cases in Hungary, this may mean that the appointed counsel will not be reimbursed for the advanced costs of language interpretation for years.

**Right to defense in other phases of the criminal procedure**

The most problematic phase is investigation, which, according to practicing counsels, determines the rest of the procedure. In the already cited empirical study, twenty out of thirty-four interviewed defense counsels claimed that it is the investigative phase that is decisive in establishing criminal responsibility. “Many . . . judges decide practically on the basis of the material put together during the investigation.”

During the trial phase, if representation by defense counsel is mandatory, attendance of the defense counsel is also obligatory. The subsequent stages of the crimi-
nal procedure are therefore less problematic. It is widely noted, however, that the actual performance of *ex officio* appointed lawyers is often severely substandard. (For more details, see section 2.7.)

Article 52 of the Code of Criminal Procedure dictates that if defense is mandatory, the defense counsel shall be obliged to be present at the court hearing and at other procedural activities prescribed by the Code of Criminal Procedure (e.g., the court hearing preceding the order of pretrial detention of juveniles, certain procedural activities related to special remedies such as the Supreme Court’s decision on a motion for review, etc.). Under Section 250 II (d) of the Code of Criminal Procedure, the court of second instance shall throw out the first-instance decision and order the court of first instance to conduct a new procedure if the court hearing was erroneously held in the absence of defense counsel. This might occur if the court of second instance finds that the first-instance court made a mistake in qualifying the criminal offense as punishable by less than five years of imprisonment, for which defense is not mandatory, although the actual offense was one punishable by more than five years in prison, for which defense is in fact mandatory.

If the investigation is conducted without the appointment of a counsel, in cases where defense would be mandatory, e.g., because the defendant is a juvenile, the correction of this severe violation depends on the procedural stage at which it is noticed. If the prosecutor detects the violation before the submission of the bill of indictment, he or she has the possibility to order a supplementary investigation. The prosecutor may resort to Section 156 (2) (b) if a procedural violation took place that severely influenced the management of the case. The law itself mentions as an example the case in which the accused or the defense counsel is not able to exercise his or her rights.

In theory, when realizing that defense would have been mandatory but no defense counsel was appointed in the investigative phase, the court may also send back the files to the prosecutor and order a supplementary investigation, according to an indirect interpretation of Section 171 of the Code of Criminal Procedure.56 However, according to judicial experts, this never happens.57 Usually, the court performs the process of hearing all evidence. If there is a contradiction between the evidence acquired during the investigative and the court stage—e.g., the defendant changes his or her testimony—the court may not take into consideration the evidence obtained during the investigation.

2.1.3 Right to counsel and right to legal aid in non-criminal proceedings when deprivation of liberty is at stake

**Deprivation of liberty in petty offense procedures**

 petty offenses are quasi-criminal offenses, the gravity of which does not reach the level of crimes, i.e., offenses deemed pun-
ishable by the Criminal Code. A form of behavior may be qualified as a petty offense by a law, a government decree, or a decree issued by a local council. The gravest petty offenses are punishable with incarceration, which may be proscribed only by laws, i.e., an act of Parliament. Under Section 14 of Act LXIX of 1999 on Petty Offenses (1999. Évi LXIX. Törvény a szabályértésekéről; hereinafter, Petty Offenses Act), the shortest duration of a petty offense incarceration is one day and the longest is ninety days. In terms of the same article, no incarceration is possible if the person charged with a petty offense is juvenile, disabled, pregnant, or someone taking care of a child or disabled relative on his or her own. If a petty offense is punishable with incarceration, only the court may adjudicate it. Other, less severe petty offenses may be decided upon by the notary, the police, and other so-called “petty offense authorities.”

In the petty offense procedure, two types of coercive measures involving the restriction of personal liberty are possible: short-term arrest and petty offense detention. Under Section 76 of the Petty Offenses Act, the police may arrest and escort to the petty offense authority, the court, or the health care institution those persons who fail to stop committing a petty offense upon warning, those against whom the petty offense procedure may be conducted immediately, and those who must be subjected to a urine or blood test in order to prove that a petty offense has been committed. Similar to the short-term arrest regulated in the Police Act, a petty offense short-term arrest may not last longer than “necessary,” and not longer than eight or (in exceptional cases) twelve hours. Information must be provided to the person under short-term arrest about the reasons for the arrest.

The other coercive measure involving the restriction of personal liberty is petty offense detention. Under Section 77 of the Petty Offenses Act, the police may take a person into a petty offense detention if he or she is caught in the act of committing a petty offense that may be punished with incarceration with view to an accelerated court procedure. The detention may last until the court delivers its decision on the offense but not longer than seventy-two hours. The detained person shall immediately be released if the seventy-two hours pass without the court accomplishing the accelerated procedure or imposing incarceration on the person charged with a petty offense. If the court imposes a punishment of incarceration, but the person charged with a petty offense appeals against the decision and it is justifiably supposed that the perpetrator, if released, would commit another petty offense punishable with incarceration, the court may prolong the detention until the final decision of the second-instance court. The maximum duration of the prolonged detention is ten days. The person charged with a petty offense, or his or her defense counsel, may appeal the decision prolonging the detention.

Article 48 of the Petty Offenses Act enumerates who may act as defense counsel in a petty offense procedure: a retained or an ex officio appointed attorney, an adult
relative of the person charged with a petty offense, or his or her legal representative. The person charged with a petty offense and the defense counsel may pose questions to the participants of the procedure. They may make comments, file motions, and request information from the petty offense authority, the prosecutor, and the court. They may inspect and copy the case files at any stage of the procedure.

There is one case in which defense is mandatory in the petty offense procedure: the accelerated court procedure, which takes place if someone is caught in the act of committing a petty offense that is punishable with incarceration. In such cases, the police takes the perpetrator into petty offense detention and escorts him or her to the court, which conducts the procedure. Under Section 126 of the Petty Offenses Procedure, in an accelerated court procedure, if the person charged with a petty offense does not have a retained defense counsel, the police shall be obliged to appoint one and make sure that the counsel could get acquainted with the case and consult the person charged with a petty offense before the court hearing.

In a 2000 case, the ombudsman pointed out a severe anomaly in connection with the implementation of the right to defense in the petty offense procedure. Article 66 of the Petty Offenses Act contains the provisions regulating the testimony of the person charged with a petty offense. According to paragraph 3, the person charged with a petty offense shall be warned that he or she is not obliged to give testimony, that he or she may refuse to continue testimony at any time, and that anything he or she says may be used as evidence against him or her. The warning and the answer of the person charged with a petty offense shall be recorded. In the event that no warning is given, the testimony may not be taken into consideration as evidence. As the ombudsman points out, the law contains no obligation for the authorities to warn the person charged with a petty offense that he or she may retain a lawyer or request the appointment of a lawyer.

Another problem is that while the fee of the interpreter is borne by the state (if the person charged with a petty offense does not speak Hungarian), the fee of the appointed counsel is part of the procedural expenses. Therefore, if the person charged with a petty offense is convicted, he or she shall bear the fee regardless of his or her financial means.

**Convicted persons**

The basis of the Hungarian penitentiary system's regulation is Law Decree 11 of 1979 on the Implementation of Punishments and Measures (1979. Évi 11. Törvényerejű rendelet a büntetések és az intézkedések végrehajtásáról). This statute hardly mentions defense counsels and makes no reference to free legal aid. There are, however, a number of procedures that may be initiated by or against convicts, which raise the necessity of such assistance. For example, it is the task of the penitentiary judge to decide on the change of the regime in which the convict is serving the
sentence, to permit the application of the so-called lenient executive rules, to decide on the convict's appeal against disciplinary confinement, to permit probation, etc. The only mention of a defense counsel in the Law Decree is found in Section 6 (3) (b), which states that the defense counsel may be present at the hearing of the convicted person. The counsel's procedural rights (filing motions, submitting appeals, etc.) are not mentioned, nor does the statute deal with whether indigent convicts have the right to request the *ex officio* appointment of a counsel in such procedures.

In our view, this right ought to be explicitly provided in the Law Decree. The implementation of the sentence is a phase of the criminal procedure, and, according to the Constitution, individuals subject to criminal proceedings are entitled to legal defense *at all stages of the proceedings*. This legal gap could be solved by applying the general rules of the Code of Criminal Procedure to the penitentiary phase. However, the acceptance of such an interpretation is not likely within the Hungarian legal community. If there are no procedural rules regulating how and when an *ex officio* counsel shall be appointed for a convicted person, the appointment will simply not take place. The role of counsels in the penitentiary phase of the criminal procedure ought to be explicitly regulated in the statutes regarding the implementation of sentences.

**Foreigners detained in connection with violations of immigration laws**

Act XXXIX of 2001 on the Entry and Stay of Foreigners (2001. Évi XXXIX. Törvény a külföldiek bevételének és tartózkodásának jogainak megrendezésével; hereinafter, the Alien Policing Act) distinguishes between a number of forms of custody: alien policing detention, detention for refusal of entry, and detention in preparation of expulsion. The decision to detain foreigners is made either by the competent regional organ of the Office for Immigration and Naturalization or by the alien policing organ of the Border Guards. Under Section 49 of the Alien Policing Act, there shall be no appeal against the decision ordering alien policing detention, detention for refusal, and detention in preparation for expulsion (hereinafter referred to as “detention”); however, the foreigner may request judicial review of the decision. If the foreigner requests judicial review of his or her detention order, and the ordering authority proposes an extension of the period of the detention, the foreigner shall be heard by the court within five days from the start of the detention. Under Section 50, at the hearing, the foreigner shall submit his or her application and evidence orally. The authority ordering expulsion shall put forward the evidence laying the foundations for its motion in writing or orally. The court shall then decide on the maintenance of the detention, the extension of its period, or its termination by ruling at the hearing. If the court establishes that the detention of the foreigner or continued detention violates the law, it shall take immediate action to have the detention of the foreigner terminated. Under Section 51 (3) of the Alien Policing Act, the
rules of the Code of Criminal Procedure governing “special procedures” shall be applied to the court procedure as appropriate.

The Alien Policing Act makes no reference to legal aid or the presence of a counsel. However, the “special procedure” invoked by Section 51 (3) is the procedure for ordering pretrial detention. According to legal experts,⁶³ the general procedural guarantees of the Code of Criminal Procedure shall also apply to the special procedures included in the regulation. As the participation of a defense counsel is mandatory if the defendant is in pretrial detention (although the hearing concerning the ordering of pretrial detention may be held in the absence of the counsel) or if the defendant does not speak Hungarian, it might be argued that ex officio appointment of a counsel should be mandatory in the judicial review procedure concerning the detention of foreigners. As the Alien Policing Act entered into force in January 2002, no consistent case law has developed concerning this issue. However, the official judicial standpoint is that no counsel shall be appointed for foreigners in detention, as the Code of Criminal Procedure talks about “defendants,” while the detained foreigners may not be regarded as such.⁶⁴ The validity of interpretation is somewhat questionable.

Language interpretation is provided by the state throughout the procedure. However, the foreigners are not provided with translations of the written decisions and other materials, e.g., the minutes of the hearings.

**Alcoholics and drug addicts**

Under Section 38 of the Police Act, the police may take the arrested person into “public order detention” for twenty-four hours if it is necessary for the establishment of the person’s identity or it is deemed to be in the person’s interest because he or she is a menace to himself or herself or to the public due to drunkenness or any other reason. In such cases, no legal assistance is available.

**Placement of people in psychiatric institutions**

Under Section 192 of Act CLIV of 1997 on Health Care (1997. Évi CLIV. Törvény az egészségügyről; hereinafter, the Health Care Act), only patients with either menacing or directly menacing behavior may be restricted in their personal freedom.⁶⁵ If a patient displays directly menacing behavior and the danger may be averted only through treatment in a psychiatric institution, the physician detecting the danger shall immediately see to it that the patient be transported to such an institution. The police shall provide help if requested. The head of the psychiatric institution shall, within twenty-four hours, notify the court and initiate judicial review of the measure. Prior to delivering the decision, the court shall hear the patient, the head of the psychiatric institution, and the opinion of an independent forensic psychiatric expert. If the court orders the treatment of the patient, this decision shall be reviewed by the court every thirty days.⁶⁶

Under Section 200 of the Health Care Act, if a psychiatrist establishes that a
patient displays behavior which is not directly menacing, he or she shall notify the court in order to initiate the compulsory treatment of the patient. The court will make a decision about the motion within fifteen days from receipt of notice. Prior to delivering the decision, the court shall hear the patient, the head of the psychiatric institute, and the opinion of an independent forensic psychiatric expert. If the patient fails to appear before the court, the court may order that he or she be escorted to the court by the police, but no other coercive measures may be used. If the court orders the compulsory treatment but the patient fails to appear in the designated psychiatric institution within three days from receiving the decision, the psychiatrist initiating the procedure shall see to it that the patient be transported to the institution. For this purpose, the psychiatrist may seek help from the police.

Article 201 (4) of the Health Care Act dictates that in both procedures, sufficient representation of the patient shall be guaranteed before the court. Based on an authorization from the patient or his or her statutory representative, the patient may be represented in the procedure by the “patients’ rights officer.” If the patient does not have a statutory representative or a proxy, the court and/or the curator ad litem representing the patient in the procedure will contact the patient prior to the hearing, obtain information about the circumstances of his or her placement in the institution, and inform the patient about his or her procedural rights. According to information from the non-governmental organization Civil Liberties Union, this kind of legal assistance and representation is of a formal nature in most cases; i.e., this form of assistance is not really effective in practice.

2.2 Right to legal aid: Eligibility criteria for granting legal aid in criminal cases

On the basis of indigence, no right to free legal aid exists. However, in certain cases the participation of a defense counsel is mandatory. In these cases, if the accused/defendant does not retain a lawyer because he or she cannot afford one, the authority appoints one ex officio. Therefore, there is a kind of overlap between legal aid and cases of mandatory defense. However, a very severe problem exists in the fact that the fee of the appointed defense counsel is only advanced, but not borne, by the state. If the defendant is convicted, the state collects the fee and the expenses for travel, accommodations, etc., of the appointed counsel as “criminal expenses.” Although in practice the state is rarely able to collect the totality of criminal expenses, this practice is clearly contrary to the relevant provisions of international instruments, such as the International Covenant on Civil and Political Rights (Article 14) and the European Convention on Human Rights (Article 6). This problem will be solved by the entry into force of the new Code of Criminal Procedure, of which Section 74 prescribes that if the accused/defendant is not
able to pay the criminal expenses as a result of his or her income and property conditions, and this fact is verified in a manner prescribed by a separate statute, the court or the prosecutor may grant a personal exemption of costs upon the request of the defendant or his or her counsel. If a personal exemption of costs has been granted, the court, the prosecutor, or the investigative authority appoints a defense counsel upon the request of the accused/defendant, and the fee and the expenses of the *ex officio* counsel are borne by the state.

Another troublesome aspect of the present system is that, by law, if the defendant is convicted, the appointed counsel may request that the court require the defendant to pay a sum equivalent to a private commission.\(^6\) In practice, however, this is rarely applied, as it is considered a compromise of professional ethics.

### 2.2.1 Substantive criteria

Under Section 47 of the Code of Criminal Procedure, the participation of a defense counsel is mandatory in the following situations:

- if the accused/defendant is detained, with the exception of seventy-two-hour detention (see section 2.1.2);
- if he or she is blind, mute, deaf, or mentally handicapped;
- if the accused/defendant does not understand Hungarian;
- if he or she is suspected of having committed a criminal offense for which a prison sentence exceeding five years may be imposed.

Under Section 298 of the Code of Criminal Procedure, defense is also mandatory if the accused/defendant is a juvenile.

There are some further procedural reasons making mandatory defense necessary:

- Under Section 355/C of the Code of Criminal Procedure, if the court conducts the procedure against an absent defendant (which is possible if the measures aimed at finding the defendant prove to be futile), the appointment of a defense counsel is mandatory.
- In terms of Section 355/J of the Code of Criminal Procedure, the defendant may waive the trial in certain cases. This means that no trial is held and the defendant pleads guilty in return for a milder punishment. In such cases, defense is also mandatory, and if the defendant does not have a counsel, the prosecutor shall appoint one *ex officio*.
- An accelerated procedure is possible if (a) the possible punishment for the given offense does not exceed eight years, (b) the case is simple, (c) there is sufficient evidence, (d) the perpetrator either was caught in the act or pleaded guilty, and (e) less than fifteen days pass from the time when the offense is committed. Under Section 347 of the Code of Criminal Proce-
dure, defense is mandatory in this accelerated procedure.

In all the aforementioned cases, if the accused/defendant does not authorize a defense counsel, the authority shall appoint one. Under Section 49 (2) of the Code of Criminal Procedure, the authority may appoint a defense counsel, *ex officio* or upon the request of the accused/defendant, if it finds it necessary in the interest of the defendant. “According to court practice, the authorities should appoint a lawyer in cases outside the scope of the mandatory defense if the case is complicated, evidentiary problems arise, or if the accused/defendant has difficulties in defending himself effectively in person, such as when accused/defendant serves his military term.”

Limited information is available on the judicial practice related to the issue of substantive criteria for aid when defense is not mandatory. The commentary of the Code of Criminal Procedure contains the following somewhat obscure description:

Among all *ex officio* appointments, the cases of mandatory defense are the most frequently applied. At the same time, the consequent implementation of the accused/defendant’s right to defense requires that the authority be entitled to appoint a counsel if it would not be obliged to do so, but it finds such a measure necessary in the interest of the accused/defendant. The court may easily find itself in an awkward situation if the defendant requests the appointment of a defense counsel simply because he or she feels that in a case where the prospective punishment does not exceed five years of imprisonment [and therefore defense is not mandatory] he or she would be in a disadvantageous situation vis-à-vis the court and the participating prosecutor. The practice that regards the objectively verifiable aspects given by the accused/defendant as definitive from the point of view of the qualification of necessity is therefore correct. Similarly correct... is the judicial practice that if the case is difficult a defense counsel is appointed for the accused/defendant serving his military term.”

The appointment of a defense counsel for conscripts is practically the only recurring example in the literature. The commentary’s view that the prosecutor’s participation at the trial does not necessarily provide a ground for the optional appointment of a defense counsel is not shared by practicing attorneys. Csaba Fenyvesi writes that “in my view the scope of cases [where defense is mandatory] should be widened. ...I would suggest—based on foreign examples—the consideration of those cases where the prosecutor participates in the trial phase... [This suggestion is] supported by the ‘equality of arms’... and the public interest in establishing the material truth.”

Judges also acknowledge that having the prosecutor, a well-trained expert of criminal law, on one side and a defendant uneducated in law on the other may not be in line
with the principle of the equality of arms.\textsuperscript{73}

It is worth mentioning here a Supreme Court ruling that gives rise to constitutional concerns. To unify contradictory judicial practice concerning mandatory defense for the mentally handicapped, the Supreme Court delivered Legal Consistency Resolution 3/1998.\textsuperscript{74} In the resolution, the Supreme Court stated that defense is mandatory only if the mental disability of the accused/defendant eliminated or limited the defendant's discretionary ability at the time the crime was committed. If not, defense is only optional, according to Section 49 (2) of the Code of Criminal Procedure (i.e., if the authority finds it necessary in the interest of the accused/defendant). Although from a formal point of view the resolution is correct (the Code of Criminal Procedure repeats the terminology of the Criminal Code, which, by its nature, considers the perpetrator's mental disability only if this condition influenced him or her in committing the offense), it is clear that the original intention of the legislators was different. The mental disability of the accused/defendant is mentioned as a criterion of mandatory defense under the same heading as blindness, deafness, or muteness, which clearly have nothing to do with the perpetrator's discretionary ability at the time the crime was committed. It is therefore obvious that mental handicap is listed among the bases for mandatory defense because a mentally handicapped person (just like someone who is deaf or mute or blind) is severely hindered in his or her capacity to defend himself or herself. Fortunately, the new Code of Criminal Procedure will eliminate this problem by making it clear that the term “mentally handicapped” has a completely independent procedural meaning and shall in no way be bound to the terminology of the Criminal Code.

2.2.2 Financial criteria

As stated above, \textit{ex officio} appointment is not related to the financial situation of the accused/defendant. The above outlined possibility for the accused/defendant to request the appointment of a counsel might be used as a means to provide the indigent with free legal assistance. However, three problems arise in this respect:

- No means test (and no procedure) is devised for deciding whose request is to be accepted by the proceeding authority. However, if the accused/defendant puts forth such a request, the authorities usually do appoint a counsel.\textsuperscript{75}

- Practice shows, however, that “defendants rarely make use of this opportunity.”\textsuperscript{76} There are no statistical data concerning this issue, but both the literature and the interviews we have conducted support this statement.\textsuperscript{77} Although, under Section 132 of the Code of Criminal Procedure, the communication of suspicion shall be followed by notice that the accused may choose a counsel or request the
appointment of a counsel, this notice is merely formal and is not accompanied by proper explanation from the authority. By law, the notification shall be recorded. The police usually have a printed form signed by the accused, without further information provided. As the work of the police is less “problematic” if no defense counsel is around, it is unrealistic to expect police officers to adequately educate the accused about why it would be more favorable for him or her to request the appointment of a counsel. Therefore, it should come as no surprise that accused persons rarely make use of this right.

• The proceeding authority is not bound in any way by the request of the accused/defendant. It is true, though, that the accused/defendant may issue a complaint or file an appeal against the denial, depending on which phase of the procedure is in progress. There are no data on how often this happens. Furthermore, “if the police, the prosecutor, or the first-instance court should make an erroneous evaluation and fail to appoint a lawyer when the interests of the defendant so require, the second instance court will annul the decision and remand the case to the first instance court.”

With regard to the ex officio appointment of a defense counsel in the interest of the defendant in cases when defense is not mandatory, practicing judges call attention to the problem that if they appoint a counsel ex officio but finally convict the defendant, the defendant must pay for the defense that he or she did not ask for, as in the present system the state only advances the fee and expenses of the counsel (see section 2.2). Although, under Section 217 (3) of the Code of Criminal Procedure, the judge may reduce the criminal expense to be paid by the defendant if it is disproportionately high compared to the gravity of the offense, this possibility is exceptional, so judges are often reluctant to appoint a counsel in this way even if they believe that it would be in the defendant’s interest.79

It is a positive development that under Section 48 of the new Code of Criminal Procedure, effective as of 1 July 2003, the court, the prosecutor, or the investigative authority will appoint a defense counsel if defense is not mandatory but the accused/defendant requests the appointment because of the financial burden. Article 604 of the new Code of Criminal Procedure declares that the minister of justice shall regulate the financial criteria in a decree issued in cooperation with the ministers of interior and finance.

2.2.3 Other eligibility questions

Legal aid for non-citizens

As a rule, the same principles and provisions of criminal law (including both the penal code and the Code of Criminal Procedure) apply to non-citizens as to Hungarian citizens. There are, however, a num-
ber of special rules regarding foreigners. The most important one is the aforementioned provision according to which the participation of a defense counsel is mandatory if the accused/defendant does not understand Hungarian. However, as discussed above, it is a point of great concern that language interpretation is provided only at procedural activities. If the counsel wishes to consult his or her client but does not speak the given language, the counsel has to pay for interpretation.

There are further benefits that foreign defendants and aggrieved parties may enjoy. For example, under Section 131 (6) of the Code of Criminal Procedure, on the basis of an international agreement promulgated by a law, in procedures initiated against foreign citizens (or against perpetrators of offenses committed against foreign citizens), the authorities shall allow the presence of the given foreign state’s authorities at the investigative actions.

The Penitentiary Rules contain special provisions (Sections 221–232) on foreign convicts. The provisions of this section prescribe, among other things, that the embassy or consulate of the convict’s country of citizenship shall be notified immediately after the convict’s admission into the penitentiary institution. If the foreign convict does not have money, he or she may send a letter to a relative once a month at the expense of the penitentiary institution. The translation and interpretation costs related to the exercise of the foreign convict’s rights and the fulfillment of his or her obligations shall be covered by the penitentiary institution.

The Police Jail Regulation also contains special provisions on non-citizens. Under Section 3 (5) (a), for example, the non-citizen whose pretrial detention is implemented in a police jail may maintain uncontrolled contacts with the representatives of the embassy or consulate of his or her country of citizenship.

Overcoming barriers faced by those with particular difficulties

As noted above, defense is mandatory when the defendant is blind, mute, deaf, or mentally handicapped. (See also section 2.2.1 for a discussion of the defendant’s right to request counsel and the corresponding court practices.)

There are other vulnerable groups whose special needs are considered within the legal framework. For example, under Section 63 of the Code of Criminal Procedure, children may be heard as witnesses only if their testimony is likely to contain evidence that may not be acquired otherwise. If a person under eighteen years old is heard as a witness, the authority may allow his or her parent or teacher to be present. According to practicing judges, this degree of protection is not sufficient. Rather, they believe that children ought to be heard as witnesses only once (in the investigative phase), under special circumstances, by or in the presence of a psychologist so that the trial does not traumatize them.

Article 88 (3) of the Code of Criminal Procedure may serve to protect vulnerable witnesses (for example, victims of domestic violence): “if the protection of the wit-
ness requires so, the confrontation of the witness with the accused/defendant shall be abstained from.”

2.2.4 Legal aid for victims of crimes

Under Section 53 of the Code of Criminal Procedure, the aggrieved party may be present at certain stages of the investigation, if the law explicitly authorizes him or her, and at all acts within the trial phase unless the law explicitly excludes it. After the conclusion of the investigation, the aggrieved party may inspect the files concerning him or her. He or she may file motions, make comments, and request information on his or her procedural rights and obligations from the authority at all stages of the procedure. In the trial phase, he or she may propose that a certain question be posed to the person heard by the court and may also express opinions about issues raised before the court.

Under Section 58 of the Code of Criminal Procedure, the aggrieved party may exercise his or her rights through a representative. Representation may be provided on the basis of power of attorney. The representative’s procedural rights are derivative; i.e., the lawyer representing the aggrieved party may exercise those rights that are available to the aggrieved party. However, this kind of representation is not available for those who cannot afford a lawyer; i.e., the state does not provide free legal assistance for indigent victims of crime. No reference to such a possibility is found in Government Resolution 1074/199 (VII. 7) on the Legislative Tasks and Other Measures Related to the Protection of Crime Victims and their Relatives either.

Practicing lawyers also criticize the system of representation for aggrieved parties, claiming that the present legislation leaves them with practically no means to effectively influence the criminal procedure. In the opinion of the lawyers, the deficiencies of the present system are a heritage of the Socialist regime and its state-centered approach to the criminal procedure, according to which only state organs are entitled to enforce a claim. As a result of this view, the consecutive “socialist” codes of criminal procedure restricted the procedural rights of the aggrieved party to an ever greater extent, until practically only one function remained for the aggrieved party—providing the authorities with evidence.

Many practicing lawyers mention that the aggrieved party is not entitled to appeal the main issues of the procedure, i.e., the guilt of the defendant or the punishment. So if the judge acquits the defendant, or the aggrieved party disagrees with the type and degree of the punishment, the aggrieved party may not in any way appeal the sentence. The Code of Criminal Procedure guarantees the aggrieved party’s right to be present at the hearing. However, he or she may take notes only with the permission of the judge. His or her right to record what is happening in court is not guaranteed in any way by the Code of Criminal Procedure.
Another problem is that the authorities tend to interpret the aggrieved party’s rights in a restrictive manner. Under Section 119/B of the Code of Criminal Procedure, the authority before which the criminal procedure is in progress shall, upon the request of the defendant, the defense counsel, the aggrieved party, etc., provide a copy of the documentation created in the criminal procedure within fifteen days. The provision says, however, that a copy of only those files that concern the procedural actor is obligatory within this time frame. In the authorities’ interpretation, documents that “concern” the aggrieved party are those that come from him or her (e.g., the police report he or she filed). In this regard, the authorities are more generous with defendants than with aggrieved parties. According to some explanations, this is because instead of an ally, they see a kind of undesired control in the aggrieved party, if he or she is too eager to exercise his or her procedural rights.

The new Code of Criminal Procedure will greatly improve the situation by reintroducing the institution of “auxiliary private prosecution.” This institution existed before World War II but was eliminated by socialist legislation in accordance with the aforementioned ideology of the state’s near-exclusive right to assert penal claims. Under Section 53 of the new Code of Criminal Procedure, the aggrieved party may act as an “auxiliary private prosecutor” if the investigative authority or the prosecutor rejects the report submitted to initiate the criminal procedure, or terminates the investigation for certain reasons (listed in the new Code of Criminal Procedure), or drops the charges. Under Section 236 of the new Code of Criminal Procedure, the auxiliary private prosecutor exercises the rights of the prosecutor with some exceptions; e.g., he or she may not motion that the defendant be taken into pretrial detention. The procedural rights of the auxiliary private prosecutor are therefore much wider than those of the aggrieved party at present; e.g., he or she may appeal the court’s decision or receive all the files, although with some exceptions.

A severe problem in connection with access to justice of the indigent will be that in terms of Section 230 of the new Code of Criminal Procedure, the auxiliary private prosecutor shall be represented by a lawyer. The legal representative of the auxiliary private prosecutor must be present at the court hearing, and the closing speech shall also be held by the attorney representing the auxiliary private prosecutor. To sum it up, no auxiliary private prosecution is possible without the assistance of a lawyer, which means that the application of this institution will cost a lot of money. The new Code of Criminal Procedure does not contain provisions about the facilitation of access to justice of indigent aggrieved parties. This means that if the aggrieved party does not have enough money, he or she will not be able to use the opportunity provided by this institution. A potential argument against the state-financed sup-
porting of auxiliary private prosecution is that a state organ (the prosecution or the investigative authority) has already decided against the continuation of the given criminal procedure so the state may not be required to “invest” in such a continuation. It may be a solution to this problem if the state donates support to qualified non-governmental organizations dealing with the representation of aggrieved parties, because this way these NGOs could screen the cases and assess when financial support for the auxiliary private prosecution initiated by the indigent is justified.

Another paradoxical aspect of the existing system is that according to the practice of the Supreme Court, no representation exists for the “aggrieved party” in cases of the most severe crime: homicide. Under Section 53 of the Code of Criminal Procedure, those persons shall be regarded as aggrieved parties whose rights or rightful interests are infringed or endangered by the offense. Although this could be interpreted as including the relatives of a homicide victim, the Supreme Court’s view is that such persons are not to be regarded as aggrieved parties from a procedural point of view. This also means that they are not entitled to the representation to which aggrieved parties may resort. According to our information, the planned amendment of the new Code of Criminal Procedure may change this. However, this is still uncertain.

2.3 Other cases

We have mentioned above the defendant’s right to request the appointment of a defense counsel. However, as we have pointed out, the authority is not bound to comply with the request.

Another possibility for the defendant is to turn to NGOs. The Hungarian Helsinki Committee’s Human Rights Legal Counseling Office provides free legal assistance to those whose human rights have been violated. This may be the case, for example, if someone falls victim to police brutality and the police launch a criminal proceeding against him or her on counts of “violence against an official person” as a preemptive measure. However, the office does not provide free legal assistance to defendants who are not victims of human rights abuses.

In addition to ex officio appointed defense counsel (in criminal cases) and protector attorneys (in civil cases), there are two forms of state-provided legal assistance: the lawyers’ network set up for Roma victims of discrimination, and the complaints centers of the Ministry of Justice. Both organizations will be discussed in greater detail in section 4.4.

2.4 Procedure for granting legal aid

As discussed above, there are two possible situations in which counsel may be appoint-
ed: defense is mandatory, and the accused/defendant fails to retain a lawyer; defense is not mandatory, and the accused/defendant cannot afford a lawyer, so he or she requests the proceeding authority to appoint one.

**Mandatory defense**

Repeating what has already been outlined, after the communication of suspicion the accused must be informed of his or her right to choose a defense counsel or to ask for the appointment of a counsel by the investigating authority. When defense is mandatory, the investigating authority must inform the accused that if he or she fails to appoint a lawyer within three days, appointment will be made *ex officio*. The communication of suspicion, the informing of the accused, and his or her statement concerning whether he or she wishes that a counsel be appointed shall be recorded in writing.

The appointment of counsel is carried out by the authority having power over the given phase of the procedure: the police, the prosecutor, or the court. A private attorney or a law firm may be appointed. In the latter case, the head of the law firm appoints the lawyer who shall perform the actual tasks. This blurs the responsibility for effective legal assistance, since, as the ombudsman pointed out, if the head of the law firm fails to appoint the particular lawyer or to send a notice to the appointing authority, the investigator cannot notify the appointed counsel about the time and place of the procedural activities and it will be impossible for the defendant to know who his or her appointed counsel is. More importantly, there will be no personal ownership of legal responsibility. To avoid this situation, judges often appoint individual attorneys working within law firms. This arrangement is favorable for the defendant but—strictly speaking—is in violation of the aforementioned provision of the Code of Criminal Procedure, namely, that either a private attorney—i.e., an attorney not working for a law firm—or a law firm shall be appointed. This means that an attorney working for a law firm may not be appointed by the authority. Therefore, if the authority directly appoints an attorney working for a law firm, it is a violation of the above-cited provision, although it may be more favorable for the defendant. To resolve this problem, the new Code of Criminal Procedure prohibits the practice allowing the authorities to appoint a law firm without specifying an individual attorney to represent the defendant.

Under Section 35 (1) of the Attorneys Act, the Bar Association shall maintain a register of attorneys who may be appointed. The proceeding authority may appoint an attorney from the register received from the Bar. According to Section 36 (1) of the act, the Bar shall compile the register of appointed attorneys, ensuring that the number of attorneys on the register is commensurate with tasks requiring appointment and effective operation of the justice system. For example, the attorneys belonging to the Budapest Bar Association have to make a statement about whether they are willing to act as appointed counsels. Those
who are not willing are required to pay a nominal yearly sum of HUF 10,000 (40 euros) in exchange for exemption. Out of the approximately 4,000 attorneys working in Budapest, 2,000 make use of this exemption.\textsuperscript{87}

Under Section 49 (4) of the Code of Criminal Procedure, there is no appeal against \textit{ex officio} appointment. The right of the accused/defendant to choose or to change his or her officially appointed lawyer is not secured under Hungarian law. However, the accused/defendant has the general right to make motions, and he or she may indicate the person whom he or she wishes to act as lawyer on his or her behalf. Depending on the stage of the process at which the appointment takes place, the police, the prosecutor, or the court has discretion to accept or reject this motion. Under Section 34 (3) (c) of the Attorneys Act, the authority may relieve the appointed counsel if the accused/defendant’s request is well-founded. At this time, there is no unified judicial practice as to what constitutes a well-founded request. The most frequent complaint judges receive is that the defendant never met with the defense counsel during the investigative phase (for further discussion, see section 2.1.2). The unfortunate reality is that there are hardly any appointed defense counsels who maintain regular contact with the accused/defendant during the investigation. Therefore, if the judge knows that the appointed counsel is otherwise a reliable and conscientious lawyer, who will do his or her best in the trial phase, the judge is not likely to appoint a new lawyer upon the defendant’s request.\textsuperscript{88}

\textbf{Non-mandatory defense}

As we have pointed out under 2.2.1, in terms of Section 49 (2) of the Code of Criminal Procedure, the proceeding authority may appoint a defense counsel—\textit{ex officio} or upon the request of the defendant—if it finds this necessary in the interest of the accused/defendant. The relevant practices are discussed in greater detail in sections 2.2.1 and 2.2.2.

\textbf{2.5 Scope of legal aid}

Again, it is important to emphasize that there is no legal aid system for the indigent. Therefore, the analysis will focus on \textit{ex officio} appointment. Section 50 (1) of the Code of Criminal Procedure declares that “the effect of \textit{ex officio} appointment expires when the court decision becomes absolute.” “Accordingly, . . . representation does not extend to retrial or revision, both being extraordinary remedies of final court judgments. If the conditions which make defense mandatory still exist, such as when the convicted person is deprived of his liberty or is mentally handicapped, the authorities have the duty to appoint a new defense counsel. It follows from all the above provisions that \textit{ex officio} appointment does not extend to the preparation and submission of complaints to international human rights bodies and representation before them.”\textsuperscript{89}

As we have pointed out, the presence of
the appointed defense counsel is mandatory only in the trial phase. Investigative activities, the hearing preceding the ordering of pretrial detention, etc., may all be held in the absence of the counsel, with the exception of the hearing on pretrial detention for juveniles. Under Section 31(2) of the Attorneys Act, the appointed counsel is required to conduct the case, appear when summoned by the authority, and contact the defendant, while the already-quoted Section 8/4 of the Code of Conduct prescribes that following the receipt of the appointing decision, the counsel shall immediately report to the appointing authority, request information about the case, and personally contact the client in pretrial detention. However, as the statistical data outlined in section 2.1.2 show, participation of ex officio defense counsels is very rare in the investigative phase. As already mentioned, no legal aid is available from the outset of the deprivation of liberty.

2.6 Application of the Legal Aid Norms in Practice

See the problems of practical implementation above (sections 2.1, 2.2, 2.4, and 2.5).

2.7 Quality of Free Legal Representation

As we have pointed out, experience shows that the quality of legal aid provided by ex officio appointed counsels is often below the standard of effectiveness. It may be deemed a violation of the state’s international and constitutional obligations if the quality of ex officio legal assistance consistently and continuously fails to meet this standard.

Empirical research shows that dissatisfaction with the work of appointed counsels is widespread. In a 1998–99 survey of fifty pretrial detainees incarcerated in Somogy County, out of the twenty-eight individuals defended by appointed counsels, twenty said that the counsel “had done nothing.”90 In 1996 research carried out by the National Prison Administration, 21.6 percent of the almost 1,000 interviewed inmates were very dissatisfied with the counsel, and only 7.8 percent were very satisfied.91

In her 1996 report, the ombudsman noted a number of problems with regard to the efficiency of the system of appointed counsel, including a lack of adequate sanctions for failure to perform appropriately or at all: if a defense counsel fails to fulfill his or her obligation to appear at procedural activities at which his or her presence is compulsory under the Code of Criminal Procedure, the court may impose a fine on the attorney and is obliged to postpone the given act at his or her expense.93 Opinions differ on how lenient courts tend to be in imposing such fines. According to Judge Zsuzsa Sándor, the expenses are minimal (basically the travel costs of the experts and witnesses, which are usually not too high), while the fines are relatively low: HUF 10,000–50,000 (40–200 euros),94 if any.95
As we have pointed out, under Section 195 (5) of the Code of Criminal Procedure, when defense is mandatory, the court hearing may not be held in the absence of the counsel. If the summoned counsel fails to appear, the judge may appoint another counsel. If this is not immediately possible or the new counsel needs time to prepare for the defense, the hearing shall be postponed at the expense of the originally summoned counsel. If the case is simple, it often happens that the judge appoints a new counsel on the spot. In cases of greater gravity and complexity, the judges do not resort to this possibility but instead postpone the hearing. In the Budapest Bar Association, for example, trainee lawyers take turns of duty, so that such immediate appointments are possible. In practice this means that two trainee lawyers are sitting in the lounge of the Bar Association during the office hours of the courts (between 8:00 A.M. and 4:00 P.M.), and if a counsel fails to appear at a trial where his or her presence is mandatory, the judge can call the Bar Association, and these trainee lawyers will go to the court immediately and provide defense. Some judges have expressed their dissatisfaction with this form of substitution. In their opinion, the trainee lawyers do not know the cases (which is not surprising, as they usually have ten minutes to look through the files at the court). Neither do they have the knowledge and experience that would enable them to provide effective defense (which is again not surprising, as they are trainee lawyers).

If, however, the case (and the substitution of the negligent defense counsel) can be resolved this way (or by finding in the court building an attorney willing to substitute the negligent colleague), judges usually do not bother to impose the procedural fine on the negligent defense counsel, because it means additional paperwork on top of their already enormous workload. This is also, according to another judicial opinion, because the legal basis of hindering the functioning of the justice system is missing.

Reports on the judicial practice concerning the amounts of the fines imposed on negligent defense councils are inconsistent. Several attorneys noted that “a substitute can usually be found” and “the courts are tolerant with regard to absences.” By contrast, the Hungarian Bar Association’s high commissioner in charge of disciplinary affairs claims that the courts impose extremely high fines, between HUF 50,000 and 200,000 (200 and 800 euros), for attorneys’ absences.

Regardless of the amounts, this sanction is merely a formal measure; i.e., no sanctions are applicable if the counsel appears before the given authority but does not provide effective or any assistance to the accused/defendant. It is basically the Hungarian Bar Association’s right and duty to call its members to account for not abiding by professional rules (which, as was pointed out in section 2.5, contain guidelines as to how an attorney shall act in the case of an ex officio appointment). Under Section 37 of the
Attorneys Act, an attorney commits a disciplinary offense if he or she fails to perform his or her duties stemming from the law or the code of conduct. The possible sanctions are: a warning, a fine, or exclusion from the Bar. Disciplinary complaints are decided on by the competent Bar’s disciplinary council, consisting of three attorneys. An appeal may be filed against the council’s decision. The appeal is decided on by the Hungarian Bar Association’s disciplinary council, which consists of three attorneys (five if the first-instance decision calls for exclusion from the Bar).

Experience shows that there are few disciplinary procedures related to ex officio appointment. In 1996, for example, there were two cases in Budapest in which the performance of an appointed counsel was at issue (and both cases were directed against the same attorney). According to information provided by János Zimnic, high commissioner of the Hungarian Bar Association in charge of disciplinary affairs and a member of the Budapest Bar Association’s disciplinary council, in the past six or seven years there have been no complaints against appointed defense counsels in Budapest (where the number of cases is about 180–200 per year). In addition, there have been only one or two unfounded complaints submitted to the Hungarian Bar Association against the regional Bar Associations’ decisions terminating disciplinary procedures initiated against defense counsels (the annual number of such complaints is about 700). Zimnic also told us that these are estimates, since no related statistics are available at the Bar Associations and, in fact, no such records are kept.¹⁰¹

The discrepancy between the experiences of the aforementioned empirical studies (showing a wide-ranging dissatisfaction with the activities of appointed counsels) and the information on the (minimal) number of complaints is rather surprising. The reason for this discrepancy (i.e., why there are so few disciplinary complaints when so many are concerned about the quality of defense provided by appointed counsels) is unclear. One possible explanation is that judges feel a kind of collegiality toward attorneys. As one of the judges said, it would feel awkward to “initiate a disciplinary procedure against a colleague. All I can do is to never ever appoint that particular attorney again.”¹⁰² In 1996, Károly Bárd wrote that “the relatively mild disciplinary sanctions imposed on defense counsels failing to perform their duties also account in part for the problem of ex officio performance.”¹⁰³ It seems that now we have to talk about a complete lack of disciplinary sanctions, as without complaints no sanctions may be imposed.

In order to secure the independence of the Bar Association, the state has limited rights to control the Bar Association’s activities, which means that it lacks proper instruments to compel, if necessary, defense counsels to provide the accused/defendants with substantive assistance. It is for this reason that the ombudsman suggested that the minister of justice examine how the
state could monitor the implementation of the fundamental right to defense. She also recommended that appointed defense counsels should be required to meet precise statutory standards throughout the course of their work. In the ombudsman’s view, this set of standards should be supported by an effective system of sanctions, which may be imposed against counsels failing to put forth an acceptable performance.\(^{104}\)

It is worth noting the response of the legal community to these recommendations. In a letter addressed to the ombudsman, the president of the Budapest Bar—who otherwise endorsed most of the suggestions included in the report—expressed his disagreement with the recommendation calling on the minister of justice to prepare legislation setting the minimum standards for the performance of appointed lawyers. “In his view, this would only result in formal requirements unlikely to bring about any improvement in substance. He also voiced his strong opposition to the proposal that state control be imposed over the performance of *ex officio* appointed attorneys and expressed his conviction that the only body suitable to exercise control and supervision, while respecting the independence of the profession, is the Chamber of Attorneys.”\(^{105}\)

In the same year as the publication of the ombudsman’s report, Minister of Justice Péter Bárándy, a practicing defense lawyer at the time, put forth a suggestion on how the quality of the work of appointed defense lawyers could be controlled and guaranteed in a more efficient manner: if a notification arrives at the Bar Association from either the accused/defendant or the appointing authority that an appointed counsel has been negligent, the Bar’s presidium shall establish a “conciliation committee,” which must make a decision within forty-eight hours on whether the appointed counsel committed a violation of his or her obligations. If so, the committee will inform the appointing authority and warn him or her that the appointment of another attorney will be necessary.\(^{106}\) No further action has been taken regarding this suggestion. It will be interesting to see whether, in his new position as minister of justice, Bárándy will take steps for the practical implementation of this potentially efficient solution.

The most recent research on the quality of legal representation for the indigent dates back to 1998–99.\(^{107}\) The main conclusions of this research are included in this report.

We have also approached the Ministry of Justice to see whether it has gathered statistical data, has conducted any such research during the past five years, or operates some monitoring mechanism concerning the quality of legal aid. The answers were negative to all three questions. (For more details, see section 5.)
3. Civil Law: Effective Access to the Judicial System for the Indigent in Civil Cases

3.1 Normative Basis of the Right to Access to Courts in Civil Cases

The Constitution broadly provides the following rights:

- Section 57 (1): In the Republic of Hungary, everyone is equal before the law and has the right to have accusations brought against him or her, as well as his or her rights and duties in legal proceedings, judged in a just, public trial by an independent and impartial court established by law.

- Section 57 (5): In the Republic of Hungary, everyone may seek legal remedy, in accordance with the provisions of the law, to judicial, administrative, or other official decisions that infringe on his or her rights or justified interests. A law passed by a two-thirds majority of the votes of the Members of Parliament present may impose restrictions on the right to legal remedy in the interest of, and in proportion with, adjudication of legal disputes within a reasonable period of time.

The Constitution does not, however, contain any express provisions concerning legal aid in civil cases.

Act III of 1952 on the Civil Procedure Code (1952. Évi III. Törvény a polgári perrendtartásról; hereinafter, the Civil Procedure Code) lays down a number of fundamental principles governing civil procedures, such as the right to a fair and public trial within reasonable time, the right to petition, the right to seek legal remedies, and the equality of the parties, as well as the principle of assisting access to justice.

On 1 January 2000, as a result of the 1999 amendment of the Civil Procedure Code, significant improvements have entered into force with regard to the legal framework concerning access to justice in civil cases.

Until 31 December 1999, the Civil Procedure Code provided, in Section 3 (1), the following:

The task of the court is to endeavor to establish the truth in accordance with the purposes of this act (Section 1). The court shall ensure that the parties exercise their rights in the lawsuit appropriately and fulfill their procedural obligations. The court shall be obliged to provide the necessary information—related to his or her procedural rights and obligations—to the party who does not have a legal representative. The court shall consider requests and statements made by the party in accordance with their content rather than their form.

The original 1952 text of the Civil Procedure Code contained a general obligation for the court to provide information (“educate the party”) about both substan-
tive and procedural issues. Until the 1972 amendment of the Civil Procedure Code, this obligation was valid even in case the party had authorized a legal representative. By the 1990s, it became obvious that this wide-ranging requirement results in the dominance of the court acting *ex officio* rather than allowing adversarial procedures, which in some cases could even impair the equality of the parties.

The 1995 and then the 1999 amendments of the Civil Procedure Code eliminated the court’s general obligation to provide information and restricted that to extend only to information about procedural rights and obligations. From the point of view of ensuring access to justice, the court’s main obligation is to facilitate enforcement of one’s rights. The 1999 Commentary to the Civil Procedure Code explains that as a less fortunate solution responding to the lack of mandatory legal representation, the court in trial and non-trial procedures, if necessary, shall provide assistance to the party in need. If the party has no legal representative (proxy), the court is obliged to provide the necessary information and call the party’s attention to his or her rights and obligations.

The obligation is realized, for example, by:

- including in the text of the judgment, following the ruling, information about legal remedies and the place and deadline for submitting remedies;
- making reference to the compulsory elements of an appeal, and the legal consequences of leaving out certain compulsory elements, etc.

As of 1 January 2000, the amended text of the Civil Procedure Code has given a more precise definition to the court’s role, in Section 3 (3), by obliging it to provide the parties with information in advance related to the burden of proof. The Civil Procedure Code provides a list of criteria that have to be included in the information given by the court: facts to be proved, the burden of proof, and the consequences of unsuccessful proof. Therefore, the court may no longer provide information about the applicable law or the interpretation thereof.

Furthermore, as a new provision, the principle of equality of arms was introduced in 2000 to the Civil Procedure Code, in Section 3 (6). Now parties have the statutory right to have access to all petitions, statements, and documents of the case. This right may not be subject to restrictions (e.g., classified documents).

The chief significance of the 1999 amendments from our point of view was that a completely new provision on access to justice was introduced to the Civil Procedure Code:

In accordance with [Section 7 (1) of the Civil Procedure Code], the court shall, at the request of the party, provide assistance in order for the party to turn to the court for the safeguarding of his or her rights or statutory interests in cases prescribed by law.
(2) In order for the achievement of the above provision, the court shall provide the necessary information to the party who has no legal representative about his or her procedural rights and obligations, or in cases determined by law the court shall appoint a legal representative for the party. In accordance with conditions and the manner established by law, the court shall fully or partially exempt the party at his or her request from the advancement or payment of costs related to litigation.

This provision, to be applied in cases started after 1 January 2000, specifies the court’s obligations that are required for ensuring access to justice, such as legal aid and information provision.

The court may provide assistance to the party who has no legal representative, at the party’s request, only in certain specified cases, for example:

- recording the party’s oral submissions (claim, other submissions, appeal) in the official minutes;
- ensuring exemptions from advancing or bearing procedural duties and other procedural costs;
- appointing a legal representative for the party (for more details, see section 3.3).

Unless the law provides otherwise, however, certain information also has to be provided by the court to the party who has retained a legal representative, e.g., the legal consequences of not appearing in court if summoned, the time and place of accessing the official minutes, the possibility of appeal, and the manner of presenting it.

Parties who are not represented by an attorney in the procedure may state their claims orally in any local court or the county court with competence over the lawsuit, and court staff will record the oral statement in the form of official minutes. Under Section 94 (1) of the Civil Procedure Code, court staff will also provide information about the procedure and call the party to submit any supplementary information as needed. These provisions facilitating access to court are expounded by Instruction no. 123/1973 of the minister of justice on the rules of judicial administrative matters (123/1973. (IK 1974. 1.) IM Utasítás a bírósági ügyvétel szabályairól).

According to Section 3 of the Civil Procedure Code, court staff (usually clerks) hold counseling hours during which individuals can present their petitions and complaints and will receive information and advice about possible legal actions and legal procedures. According to practitioners, the so-called “complaint day” is an effective method of providing basic legal advice or assistance in drafting documents in relatively simple cases. Clients served during the complaint day tend to be socially disadvantaged individuals. Furthermore, under Section 4 of the Civil Procedure Code, in cases falling under court competence, court staff will record in the official minutes all orally presented petitions (application for cost exemption, claim, complaint, appeal).
In case the petition in question does not pertain to court procedures, court staff will provide information about which authority has competence over the petition. A sign outside the court building’s entrance provides information about the time and place of the counseling service as well as the place where written documents may be submitted, and there is also a drop box there for submitting documents beyond working hours.

The Civil Procedure Code provides a further opportunity, in Section 9, for access to justice for parties who are unable to exercise their rights for any reason, namely the participation of the prosecutor in the procedure. The prosecutor may initiate a lawsuit if the person otherwise entitled to do so is unable to protect his or her right for any reason. The prosecutor participating in the lawsuit is entitled to all rights of the parties, except concludng a settlement or waiving or acknowledging rights.

Relevant provisions concerning appointed attorneys are set forth in Chapter V of the Attorneys Act (Sections 31–36).110 In civil procedures, an attorney may be appointed to act as a protector attorney, ad hoc guardian, or curator ad litem (see section 3.2).

3.2 Civil cases for which legal representation is mandatory

Act IV of 1959 on the Civil Code (1959. Évi IV. Törvény a Polgári Törvénykönyvről; hereinafter, the Civil Code) regulates legal competency for natural persons (Sections 11–17). In terms of the Civil Code, there are three categories of legal competency:

- full competency;
- diminished legal competency;
- legal incompetency.

Full legal competency means that the person is entitled to enter into contracts and make other legally valid statements on his or her own. A minor between the ages of fourteen and eighteen has diminished legal capacity. Persons of legal age may also be of diminished capacity if a court has placed them in the custody of a conservator. Persons whose necessary discretionary ability for conducting their affairs is permanently or recurrently diminished, owing to mental state, unsound mind, or pathological addiction, shall be placed by a court in a conservatorship (guardianship) that limits their competency, under Sections 12–13 of the Civil Code. Minors under the age of fourteen are legally incompetent. Persons whom the court has placed in a conservatorship precluding legal competency are also considered legally incompetent. Persons of legal age whose necessary discretionary ability for conducting their affairs is completely and permanently absent, owing to mental state or unsound mind, shall be placed by a court in a conservatorship that precludes their competency, under Sections 15–16 of the Civil Code.

Under Section 17 (1) and (2) of the Civil Code, legal statements made by incompetent persons shall be null and void; their rep-
representatives by law shall proceed on their behalf.

Based on the legal framework regulating legal competency, the Civil Procedure Code distinguishes between people who have procedural competency and those who do not. If a person has full procedural competency, he or she may proceed in a civil case on his or her own or with representation by his or her legal representative (proxy). However, there is no diminished procedural competency in civil lawsuits: the party to the lawsuit either is fully competent or lacks competency from the procedural point of view.

The Civil Procedure Code distinguishes between two types of representatives: statutory representative and representative (proxy).

According to Section 49 (2) of the Civil Procedure Code, if the party lacks procedural capacity or is a legal entity the statutory representative shall proceed on his or her behalf. The statutory representative shall proceed on behalf of the party without affecting his or her legal capacity, but only if the party does not proceed on his or her own. Under Section 74 of the Civil Procedure Code, if there is no statutory representative, the opposing party may request that the court order a curator ad litem.

Under Section 66 (1) of the Civil Procedure Code, if the law does not prescribe otherwise for certain procedural acts, a proxy selected by the party or by his or her statutory representative may proceed on his or her behalf.

The right to represent in cases involving a statutory representative is granted by law (or other legal regulation), while a representative (proxy) is authorized by the party to take legal action on the party’s behalf.

The main types of statutory representatives for natural persons are the following:

• the parent of a child of minor age;
• the guardian, in the case of a child who is not under parental supervision;
• the conservator, for persons of legal age who have been placed by a court under a conservatorship that limits or precludes their competency;
• the ad hoc conservator, if the parent, guardian, or conservator is unable to proceed pursuant to a legal regulation, the conservator’s orders, conflict of interest, or actual obstacle;
• the temporary conservator, ordered by the guardianship authority for a person of legal age whose necessary discretionary ability for conducting his or her affairs is permanently absent;
• the curator ad litem, ordered by the court at the request of the adverse party in case the party lacking competency has no statutory representative, under Section 49 (2) of the Civil Procedure Code, or if the party who is at an unknown location has no legal representative (proxy), under Section 74 of the Civil Procedure Code.

Under Section 67 (1) (a–c), the main types of representatives (proxy) for natural persons are the following:
• the party’s family member;
• the co-plaintiff and co-defendant, as well as his or her statutory representative or proxy;
• the attorney and the law firm (legal representative).

In civil procedures, it frequently happens that procedures are suspended or delayed due to the lack of a statutory representative or the unknown whereabouts of a party. The purpose of appointing a curator ad litem is therefore twofold: on the one hand, the Civil Procedure Code seeks to ensure that procedures begin and continue in a timely manner even when there are obstacles due to the absence of a party or his or her representative; on the other hand, the Civil Procedure Code seeks to ensure the representation of the absent party’s interests. According to Section 31 (1) of the Attorneys Act, the court may appoint only an attorney or a law firm as a curator ad litem.

The curator ad litem ordered by the court has the same legal standing as the proxy authorized to represent the case, with the exception that the curator ad litem may not accept money or make objections at trial without special permission by the court. In addition, under Section 74 of the Civil Procedure Code, the curator ad litem may enter into a settlement and may acknowledge or resolve the contested issue only if this will save the represented party from obvious damages. In light of the above, the curator ad litem is in a position somewhere in between the statutory representa-
tive and the legal representative (proxy): his or her right to represent the party does not originate from law, nor is it based on the agreement of the party and the proxy. The curator ad litem is not chosen by the party; rather, he or she is appointed by the court.

The Civil Procedure Code has no general provision requiring natural persons who are party to a lawsuit to be represented by an attorney. However, the it does require parties to be represented by a legal representative (attorney or law firm) in procedures before the Supreme Court.111

Until 29 August 1995, legal representation was not mandatory in all procedures before the Supreme Court. In 1992, legal representation became mandatory in review procedures before the Supreme Court (Act LXVIII of 1992). Later, Act LX of 1995 extended the scope of mandatory representation for the party submitting an appeal or joined appeal to all procedures before the Supreme Court, regardless of whether the appeal is ordinary or extraordinary. This obligation, however, does not extend to the adverse party.

The Civil Procedure Code calls for the nullification of any actions taken by a party without legal representation for cases in which regulations call for mandatory legal representation.

Mandatory representation before the Supreme Court imposes great difficulties on the party submitting the appeal in certain types of procedures. For example, in asylum procedures, where the first-instance court is normally a county-level court generally proceeding as the second instance, it
is the Supreme Court that adjudicates the appeal in a non-trial procedure. With no Hungarian language skills, contacts with attorneys, or money, rejected asylum-seekers face insurmountable challenges in finding an attorney who could represent them in the appeal procedure before the Supreme Court. Currently, attorneys working with NGOs, such as the Hungarian Helsinki Committee, provide the only source of free legal representation for asylum-seekers wishing to challenge a decision by the court of first instance.

3.3 Eligibility Criteria for Granting Legal Aid in Civil Cases

The relevant law consists of the following:

- Sections 84–88 of the Civil Procedure Code;
- Act XCI of 1990 on duties (1990. Évi XCI. Törvény az illetékekről; hereinafter, Act on Duties);
- Decree 6/1986 (VI. 26.) of the Minister of Justice on Application of Exemption of Costs in Judicial Proceedings (6/1986. (VI. 26.) IM Rendelet a költségmentesség alkalmazásáról a bírósági eljárásban; hereinafter, the 6/1986 MJ decree);

The legal framework concerning exemption of costs, both objective and subjective, is highly complex. In general, litigants in civil cases are entitled to several benefits promoting their access to court in civil cases. First, in certain types of civil cases, litigants are exempt from paying the costs of the administration of justice regardless of the parties’ financial situation (objective exemption of costs or duties). Second, individuals may be granted exemption of costs if they lack adequate financial means, irrespective of the type of the case (subjective exemption of costs).

There are four main types of cost benefits in terms of the Civil Procedure Code, under Section 84 (1):

- **exemption of costs** (objective and subjective);
- **exemption of duties** (objective and subjective);
- **right of prenation of duties**;
- **reduced duties**.

Exemption of costs refers to the costs arising in the course of the procedure: fees of witnesses, experts, curators *ad litem* and interpreters, costs of on-the-spot hearing and inspection, etc. According to Section 84 (1) (b) of the Civil Procedure Code, these costs do not have to be advanced or paid by the party unless otherwise prescribed by law. Costs for which the party is grant-
ed exemption are advanced by the state, except for the fee of the curator ad litem. The defeated party will be obliged to pay the fee of the curator ad litem even if he or she was granted exemption of costs.

As in the case of exemption of costs, exemption of duties may be based on criteria that are either objective (depending on the type of case) or subjective (income and financial situation).

The right of prenotation of duties, which arises when the party is exempted from advancing the duties of the procedure based on both objective and subjective criteria, and reduced duties are additional benefits to the full exemption of costs. The right of prenotation of duties is a lower level of cost benefits, whereby the party is exempt only from advancing the duties, and the court will determine at the end of the procedure which party will have to pay the duties. Duties are reduced with the aim to promote the parties’ lawful behavior when they settle their legal dispute in a voluntary manner in the course of the procedure.

Litigants who may benefit from objective or subjective exemptions have the right to ask the court to appoint an attorney acting on their behalf as a protector of their interests (hereinafter, protector attorney) for them. Appointment of a protector attorney, therefore, is not automatic.

An outline of the main types of exemption benefits is set out below. This outline is followed by a summary of the protector attorney system.

3.3.1 Substantive criteria

Objective exemption benefits are:

- objective exemption of costs;
- objective exemption of duties;
- objective right to prenotation of duties.

Section 2 (1) of the 6/1986 MJ decree lists the main types of civil lawsuits in which parties benefit from objective exemption of costs, regardless of their income and financial situation. For example, objective exemption of costs is applied to proceedings related to:

- the establishment of paternity and other suits concerning establishing biological origin;
- termination or reestablishment of parental supervision;
- placement under conservatorship and the termination thereof;
- custody and transfer of a child;
- alimony payments that are based on provision of law;
- employment as a civil servant or public servant, other service relations;
- damages caused by mines;
- claims for compensation of damages caused by a criminal act affecting the person’s life, physical integrity, or health, etc.

Additional cases for objective exemption of costs may be set forth by separate regulation (for example, judicial cases concerning the treatment of psychiatric
patients; lawsuits concerning health care, health insurance, or pensions).

Objective exemption of costs includes all benefits that a party granted subjective exemption of costs would enjoy, with a few differences. For example, in the case of objective exemption of costs:

- the state advances the fee of the curator ad litem, and if the party loses the lawsuit, he or she shall not be obliged to pay the fee;
- foreigners may benefit from objective exemption even if there is no international treaty or practice of reciprocity;
- foreigners are exempt from depositing a guaranty for the legal costs only if there is an international treaty or practice of reciprocity;
- the parties are not exempt from advancing and paying the costs of forensic examinations necessary for establishing biological origins or for DNA tests.

Section 57 (1) of the Act on Duties regulates the cases of objective exemption of duties. The following shall be exempt from duty in civil cases:

- the proceedings, if the court ex officio rejects the petition therefore without the issue of a subpoena, without investigation in merits in non-trial proceedings, or without conducting an insufficient procedure in respect of company registration, or if the legal action is dismissed on the basis of Section 157 (a) of the Civil Procedure Code;
- proceedings for legal remedy instituted against decisions in cases of exemption of costs and rights of prenotation of duty;
- in actions for divorce, the counteraction instituted with regard to the marriage;
- proceedings related to the declaration of death and the establishment of the fact of death, if disappearance or death took place in consequence of an event of war or natural disaster;
- proceedings for the registration of foundations, public foundations, nongovernmental organizations, not-for-profit companies, public corporations, furthermore, ESOP organizations established in accordance with Act XLIV of 1992 on the Employee Share Ownership Program (1992. Évi XLIV. Törvény a munkavállalói résztulajdonosi programról);
- petitions for the dissolution of terminated firms, including the case prescribed in Section 48 (5) of Act VI of 1988;
- petitions for the correction and/or supplementation of decisions;
- proceedings related to the electoral roll;
- proceedings related to reported changes upon being registered in the register of legal advisers;
- appeals against resolutions prescribing transfer;
- legal actions for court review of
administrative decisions passed in indemnification cases;
• tax settlement proceedings of local governments;
• proceedings initiated by independent court bailiffs in connection with proceedings of execution by court;
• proceedings instituted on the basis of a favorable decision by the Constitutional Court.

The Act on Duties, in Section 62, also regulates criteria for the objective right to prenotation of duties. Irrespective of their income and financial conditions, the parties shall be entitled to the right of prenotation of duties:

• in labor actions, if instituted in connection with willful or grave damages caused by the negligence of an employee or the liability of indemnity of an executive employee in accordance with the provisions of civil law, and furthermore, in respect to the part in excess of the amount due by law in actions for severance pay, if it is more than twenty times the minimum wage;
• in claims for compensation of damage caused to the life, physical integrity, or health of another person, and infractions;
• in marital suits, with the exception of actions for divorce, as well as pecuniary claims awarded in marital suits;
• in suits for the termination of the right to bear a particular name;
• in actions in connection with the civil law defense of persons;
• in actions for the compensation of damages caused within administrative authority;
• in proceedings for the review of administrative decisions;
• in court proceedings instituted by a bankruptcy trustee, receiver, or financial trustee under bankruptcy proceedings or liquidation proceedings, and in the debt consolidation proceedings of local governments;
• in civil court and non-trial (execution) proceedings instituted in connection with inventions, prototypes, innovations, industrial designs, topographies, know-how, and/or assistants’ fee by inventors of inventions and prototypes, innovators, and authors of industrial designs and topographies, as well as assistants;
• in proceedings instituted by housing cooperatives against their members or non-member owners, and condominium associations against their owners, for the refund of operational, renovation, or common maintenance costs;
• in legal actions filed against the state for
the enforcement of compensation claims in connection with a criminal proceeding.

Other legislation may also provide for objective cases of exemption of duties.

3.3.2 Financial criteria

Subjective cost benefits are:

- subjective exemption of costs;
- subjective exemption of duties;
- subjective right to prenotation of duties.

Sections 84–85 of the Civil Procedure Code regulate the subjective exemption of costs. A party who cannot meet the costs of proceedings because of income and financial conditions is entitled to the following benefits (exemption of costs) in order to facilitate assertion of his or her rights:

- exemption of duties;
- exemption from advancing or paying—unless otherwise provided by this act—costs arising in the course of the proceedings (remuneration of witnesses, experts, curators ad litem, and interpreters, costs of on-the-spot trial and inspection, etc.);
- exemption from depositing a guaranty for the costs of the proceedings;
- claim for the appointment of a protector attorney.

The state shall advance the costs mentioned in the second item above that need not be advanced by the exempt party, with the exception of the curator ad litem’s remuneration. The defeated party must pay the curator ad litem’s remuneration—according to the general rules applying to bearing the costs of proceedings—even if he or she is exempt from paying costs.

The minister of justice determines by decree (6/1986 MJ decree) the types of lawsuits in which a party is entitled to exemption from payment of costs, irrespective of income and financial condition. These costs shall be advanced by the state in the case of objective exemption of costs. However, it may be stipulated by the decree that a party must advance or bear certain expenses in spite of the exemption from payment of costs.

A party who is supported by a parent or who lives with a spouse may be exempt from payment of costs if the conditions for exemption are met both by the party and by the parent or spouse. This rule does not apply to suits carried on between a party and the parent or spouse.

However, a party who is acting male fide or whose claim is presumably completely unsuccessful or presumably attempts to evade lawful costs may not be granted exemption of costs even if he or she would otherwise meet the need-based criteria. The Constitutional Court considered this issue in 1997 and ruled that it is not contrary to Section 57 (1) of the Constitution: “The fundamental right of recourse to the courts does not mean that the state has to support
even *male fide* or presumably completely unsuccessful litigation. Under Section 57 (1) of the Constitution, it is sufficient if such litigation is allowed to be carried out according to the general rules but without special financial support.”

Sections 4–6 of the Act on Duties regulates *subjective exemption of duties*. In case of subjective exemption of duties, no duty needs to be paid and no duty may be claimed from a party who benefits from subjective exemption of duties, even if that party would otherwise be obliged to pay the duty.

The following shall be granted full subjective exemption of duty:

- the State of Hungary;
- local governments;
- budgetary organs, and the Hungarian Privatization and State Holding Company;
- non-governmental organizations, public corporations, and not-for-profit companies;
- churches, association of churches, religious institutions;
- foundations, including public foundations;
- water management companies;
- the National Health Insurance Fund and the National Pension Insurance Administration;
- the National Bank of Hungary;
- the Hungarian News Agency Company;
- the North Atlantic Treaty Organization—and furthermore, the armed forces of the parties to the North Atlantic Treaty and other nations participating in the Partnership for Peace, ratified by Act LXVII of 1995, that are stationed in Hungary, including the military and civilian personnel with citizenship other than Hungarian who are employed by such armed forces, in respect of duties that are related to the service obligations of such personnel;
- county development councils and territorial and regional development councils.

The duty exemption of international organizations, the officers of such, their family members, foreign states, the diplomatic, consular, and other representations of foreign states in Hungary, the members of such, and their family members shall be governed by international agreements, or in the absence thereof by reciprocity.

The Act on Duties, in Section 60, also regulates the *subjective right of prenotation of duties*. The party granted prenotation is exempt only from the advance payment of duties, and the court at the end of the proceedings will decide which party will eventually pay the incurred duties.

If advance payment of a duty is likely to impose an unreasonable burden on a person due to his or her financial situation, that person may be granted exemption from the advance payment of duty, particularly if the amount of such duty exceeds 25 percent of the taxable per capita income of the previous year for the party and his or her
spouse, as well as their dependent children living in the same household.

A person who relies on the support of parents, or who lives together with a spouse, may be granted the right of prenotation of duties only if the conditions exist for both the person in question and the persons living with him or her.

Curators ad litem and conservators ad hoc appointed by the guardian authority, as well as parties who have filed for legal action for the purpose of the enforcement of a due claim, shall be entitled to the right of prenotation of duties.

A person whose litigation appears in bad faith or is likely to fail, or who presumably attempts to evade lawful costs, may not be granted the right of prenotation of duties.

The benefit of litigation with the right of prenotation of duties may be granted to foreign nationals only by virtue of an international convention signed by the State of Hungary, or in the event of reciprocity. In respect of reciprocity, the statement of the minister of justice shall be authoritative.

No right of prenotation of duties may be permitted for actions filed for divorce.

Subjective right of prenotation of duties is conditional on the outcome of the proceedings: if the grantee succeed in his or her claim, the defeated party shall be obliged to pay duties, while if the grantee is defeated, he or she will have to reimburse the duties for the state.

**Financial threshold**

Section 84 (1) of the Civil Procedure Code only makes reference to the “party who cannot meet the costs of proceedings because of his or her income and financial conditions” with respect to subjective exemption of costs. This reference is implemented in the 6/1986 MJ decree, which regulates in detail the financial threshold that applicants for subjective exemption of costs have to meet.

Based on Section 6 of the decree, granting exemption of costs may be mandatory or optional. Exemption of costs must be granted if the party’s income (wages, pension, or other regular financial gain) does not exceed the minimum amount of the old-age pension determined on the basis of employment, and if the party has no estate beyond what is necessary for the normal conduct of life. Additionally, exemption of costs may be granted even if these criteria are not met but, taking into consideration the party’s other circumstances, the court determines that the party’s livelihood is threatened.

**Certifying the financial threshold for qualifying for benefits:** The 2/1968 MJ decree regulates the procedures concerning certification of the basis for granting exemption of costs.

If the party applies for subjective exemption of costs, he or she is required to complete the forms contained in Annexes of the decree. Information to be provided in the forms includes data about the applicant and his or her relatives who are supported by him or her, taxable estate or income, and real estate property. If the applicant or relatives are employed, their
employer must certify current level of income. Furthermore, documentation concerning the taxable income for the previous calendar year must also be submitted. If the applicant is a pensioner, the previous month’s pension check must be submitted. The court will establish the applicant’s income and financial situation, taking into consideration taxable property, sources of income, annual taxable income, and real estate property. In case of subjective exemption of costs, the income and financial situation of the applicant’s spouse or other relatives living in the same household shall also be taken into consideration. However, this rule does not apply to lawsuits between the party and his or her parent or spouse.

The forms (contained in Annexes 1–5 of the decree) that have to be attached to the formal request for exemption of costs are available at the court.

Person eligible for legal aid: Subjective exemption of costs applies to the specific grantee. Therefore, if there is succession from the individual grantee, the grant will cease and the successor will be required to certify that he or she also qualifies for exemption of costs.

If the court rejects the application for exemption of costs, it may still grant the right of prenotation of duties.

Protector attorney

Section 87 (1) of the Civil Procedure Code provides that in the case of exemption of costs, a law firm operating in the jurisdiction of the court shall be appointed by the court as protector attorney to proceed in the case at the request of the party, if the court deems it necessary.

The party benefiting from exemption of costs does not have an automatic right to be appointed a protector attorney. In all cases, the court will take into consideration the nature of the lawsuit, its complexity, the party’s personal circumstances, etc. However, according to established judicial practice, the court will appoint a protector attorney to a party who benefits from exemption of costs and is not familiar with the law. The Supreme Court has established that it is not necessary to appoint a protector attorney to the party who represented his or her own interests clearly and appropriately in both written and oral submissions, sometimes even making reference to legal provisions.

The protector attorney shall be appointed from the register of appointed attorneys compiled by the Bar.

The protector attorney is not obliged to appear for the party in the proceedings in the petitioned court or in the court of appeal, unless the seats of these are at the same place as the court of first instance. In the petitioned court, the party or the appointed protector attorney may request the appointment of another protector attorney to act on the spot.

A protector attorney may collect the remuneration due to him or her directly from the defeated party if that person is required to bear the costs of the proceedings.
3.3.3 Other eligibility questions

**Legal aid for non-citizens**

Under Section 85 (4) of the Civil Procedure Code, the benefits of subjective exemption from the costs of litigation may be granted to foreigners only when there is an international treaty concluded between the foreigner’s country of citizenship and the State of Hungary, or in the case of reciprocity. Foreigners shall be entitled to objective exemption of costs even if there is no international treaty or reciprocity. However, a foreigner shall be exempt from depositing a guaranty for the costs of the proceedings only if it is permitted by an international convention or by reciprocity. A declaration by the minister of justice regarding reciprocity shall be binding.

Nevertheless, in the case of objective cost benefits, foreigners are entitled to objective exemption of costs, duties, and the right to prenotation of duties irrespective of international treaties or reciprocity.

Citizens of states that are party to the Hague Convention of 1 March 1954 relating to civil procedure (promulgated by Law Decree 8 of 1966) are subject to the same conditions as Hungarian citizens with respect to subjective exemption of costs (Article 20 of the Convention). Therefore, the foreign party has to submit a certificate of indigence from the competent authorities of his or her residence. Bilateral treaties on judicial assistance contain similar provisions.

**Asylum-seekers**

Subjective (i.e., needs-based) exemption of costs may be granted to foreign citizens only in the case of an international legal assistance treaty or reciprocity. Therefore, rejected asylum-seekers who request judicial review of the administrative decision are unlikely to benefit from the assistance of a protector attorney, as their countries of origin generally have no international treaty or reciprocity with Hungary.

The right of prenotation of duties applies to judicial review procedures for administrative decisions; therefore, asylum-seekers do not have to advance judicial duties when filing a request for review against a negative administrative decision on refugee status. However, as judicial review procedures concerning asylum decisions are not within the scope of objective exemption of duties, asylum-seekers whose case in the first- or second-instance court upheld the rejecting decision by the refugee authority are obliged by law to pay the duties of the judicial proceedings. Nevertheless, even if the court’s resolution requires the asylum-seeker to pay duties, the court has never enforced this.

**Domestic violence**

In civil cases related to domestic violence, under Section 85 (1) of the Civil Procedure Code, the court will not take into consideration the financial conditions of the spouse or parent of the party applying for subjective exemption of costs, since these parties are obviously adversaries in the proceedings.
3.4 Procedure for Granting Legal Aid

The parties and the interpleader are entitled to submit a request for exemption of costs, according to Section 84 (4) of the Civil Procedure Code.

The plaintiff may request subjective exemption of costs at the following stages of the proceedings:

- prior to filing a claim,
- simultaneously with filing a claim,
- at any time until the decision of the first-instance procedure.

The defendant may submit the request not later than the time of filing the appeal against the first-instance judgment.

The request should be filed in a single copy, enclosing the required certificates prescribed by the 2/1968 MJ decree (see section 3.3.2 on certifying the financial threshold for qualifying for subjective exemption of costs). If the party has no legal representative, the court will inform him or her about the conditions of obtaining exemption of costs.

If the request does not meet the criteria set forth in the 6/1986 MJ decree, the court shall call the party to supplement the application. In its decision, the court shall warn the party about the consequences of missing the deadline for submitting the required supplementary information. If the court fails to include this warning in the decision, the legal consequences may not be imposed even if the party has failed to supplement his or her application during the set deadline.

In terms of Section 5 (2) and (3) of the 6/1986 MJ decree, the court adjudicating the lawsuit will decide whether to grant subjective exemption of costs and subjective prenotation of duties based on the party’s request. The objective cases of exemption of costs are based on law; therefore, no special judicial decision is required. When considering the request, the court may hear the adverse party if necessary. The court will bring a formal decision (resolution) about permitting exemption of costs.

During the procedure, the court will review the existence of grounds for granting exemption of costs either annually, until the end of the procedure, or at any stage of the procedure when it is discovered that the criteria were lacking when exemption was granted or have ceased to exist in the meantime. During this review, the court may order the party to submit the required certificates. If the party fails to comply, the court will withdraw the subjective exemption of costs, under Section 8 of the 6/1986 MJ decree.

Remedies

The party may file a separate appeal against the court’s decision concerning exemption of costs or the right of prenotation of duties if the court

- denies granting subjective exemption of costs or subjective right to prenotation of duties;
• withdraws subjective exemption of costs or subjective right to prenotation of duties;
• establishes that criteria for objective exemption of costs have not been met.

In all other cases, under Section 16 of the 6/1986 MJ decree, a separate appeal cannot be filed, and this issue may be contested only in the appeal against the in-merit decision on the claim.

**Selection of the protector attorney**

Under Section 87 of the Civil Procedure Code, the court may appoint a protector attorney at the request of the party granted exemption of costs if the conditions of the case so require. The court will appoint an attorney or law firm operating within the seat of the court, from the register of appointed attorneys compiled and maintained by the county Bar. In Budapest, for example, the Budapest Bar maintains a separate register of attorneys willing to undertake appointments as protector attorneys.

The party is not able to select the appointed attorney. As specified in Section 34 of the Attorneys Act, the protector attorney is obliged to notify the court if there are any mandatory grounds for releasing him or her from these duties, e.g., conflict of interest, representation of the adverse party, or suspension or termination of membership in the Bar. In other cases, under Section 34 (3), the court may release the protector attorney from the appointment if the attorney would need to work outside the operational area of the Bar, if circumstances that would hinder the appointment have arisen, or if the defendant or the represented person requests the release of the appointed attorney on justified grounds. There is no uniform judicial practice concerning what grounds presented by the parties may be deemed as justified—though the obvious and continuous passivity of the protector attorney should qualify. The court will also release the protector attorney if the party states that he or she no longer needs representation in further stages of the procedure.

### 3.5 Scope of legal aid

**Legal services provided by the protector attorney**

The protector attorney is not obliged to provide legal representation in procedures before the second-instance court. If a case goes to the second-instance court, the party or the protector attorney may request the appointment of a different protector attorney. Under Section 87 (2) of the Civil Procedure Code, this rule does not apply if the seat of the first- and second-instance court is the same.

Section 31 (2) of the Attorneys Act provides that the appointed attorney must proceed in the case, satisfy court summons, and contact the represented person. The decision on appointment substitutes the letter of authorization for the appointed attorney.
Fees and expenses of the protector attorney

The protector attorney is entitled to fees and reimbursement of expenses under Section 31 (4) of the Attorneys Act. The amount of the fee is determined by Decree 3/1984 (V. 27.) of the Minister of Justice on the fees of protector attorneys (3/1984. (V. 27.) IM Rendelet a pártfogó ügyvéd díjazásáról; hereinafter, the 3/1984 MJ decree). If the party is granted exemption from costs, he or she shall not pay fees to the protector attorney.

The court determines the amount of fees for protector attorneys in a decision concluding the entire procedure.

The 3/1984 MJ decree provides that if the party represented by the protector attorney is successful in pursuing his or her claim, the protector attorney may claim his or her fees directly from the defeated party. If the party represented by the protector attorney is defeated, the state will bear the protector attorney’s fees.

Until 28 April 2002, Decree 12/1991 (IX. 29.) of the Minister of Justice on Attorneys’ Fees (12/1991. (IX. 29.) IM Rendelet a bíróság által megállapítható ügyvéd költségekről; hereinafter, the 12/1991 MJ decree) regulated the amount that courts could determine as attorney’s fees. Under this decree, in civil trial procedures, the fee was a minimum of HUF 1,000 (4 euros) but not more than 5 percent of the claim. For cases in which the financial value of the claim could not be estimated, the fee was a maximum of HUF 7,500 (30 euros). In second-instance and review procedures, the fee was a maximum of 50 percent of the first-instance fee. In exceptionally complicated cases, the fee could be increased by an additional 50 percent of the basic fee, regardless of which party won. Therefore, the only motivation for protector attorneys to diligently represent their clients was that in complicated cases, their fee (generally 5 percent value of the claim) could be increased to 7.5 percent of the claim if they won the case.

If the state bears the fees of the protector attorney (i.e., the party represented by the protector attorney is defeated), the fee is 50 percent of the fee determined by the 12/1991 MJ decree on attorneys’ fees, and

- in trial procedures, HUF 1,300 (5.2 euros) maximum;
- in non-trial procedures, a minimum of HUF 130 (0.52 euros) and a maximum of HUF 400 (1.6 euros).

As of 30 April 2002, Decree 8/2002 (III. 30.) of the Minister of Justice on Attorney’s Fees Determined by Courts in Judicial Procedures (8/2002. (III. 20.) IM Rendelet a bírósági eljárásban megállapítható ügyvédi költségekről; hereinafter, the 8/2002 MJ decree) regulates the amount of attorneys’ fees that the successful party can claim from the defeated party in judicial procedures. According to the new rules, the party may request that the court determine his or her attorney’s fees based on fees set in the retainer agreement between the party and
the legal representative. If the court believes
that this fee is exaggerated, it shall reduce
the fee of the attorney to a reasonable
level.

As of 1 January 2003, a new decree—
Decree 7/2002. (III. 30.) of the Minister
of Justice on Fees and Expenses Determined
for Protector Attorneys and
(III. 1.) IM Rendelet a pártfogó ügyvéd és
a kirendelt védő részére megállapítható
díjról és költségekről; hereinafter, the
7/2002 MJ decree)—will regulate, under
Sections 1–2, the amount the court may
determine as the fees and expenses for
the protector attorney. This decree will
replace the 3/1984 MJ decree.

The changes will mean that in the first-
instance procedure, the fee will be

• in civil trial procedures, a minimum of
  HUF 2,000 (8 euros) and a maximum
  of HUF 7,500 (30 euros)

• in civil non-trial procedures, a minimum
  of HUF 1,000 (4 euros) and a maximum
  of HUF 5,000 (20 euros).

In the second-instance and review pro-
cedures, the fee will be 50 percent of the
fee set in the first-instance procedure.

The defeated party shall bear the costs
(fees and expenses) of the protector attor-
ney, if the party represented by the pro-
tector attorney is successful. If the party
represented by the protector attorney is
defeated, the state will bear these costs.
Therefore, from 2003, the protector attor-
ney will be entitled to the same amount of
fees regardless of the outcome of the pro-
ceedings.

Reimbursement of expenses: From 1 Janu-
ary 2003, the protector attorney may claim
reimbursement of expenses (postal, com-
munication, travel, accommodation, typ-
ist’s fee, copying, and other kinds). The
attorney is entitled to the reimbursement
of travel and accommodation expenses if
he or she appears at a hearing that is not
at the seat of his or her law firm or his or
her residence. For travel costs, the attor-
ney may claim expenses related to travel-
ing to and from his or her seat to the hear-
ing; the rate of travel costs is calculated
based on the costs of public transpor-
tation. If the attorney has to arrive a day in
advance or leave a day later than the hear-
ing, his or her accommodation costs will
be reimbursed. The attorney must file an
itemized account with the court detailing
expenses.

The 3/1984 MJ decree, in force until 31
December 2002, contains similar provi-
sions concerning the expenses of the pro-
tector attorney.

Exemption of costs

According to Section 86 of the Civil
Procedure Code, exemption from payment
of costs may be granted by request by the
court. A decision on the revocation of
exemption shall also be made by the court.
The right to exemption of costs, duties,
and the right of prenotation of duties
extends, unless otherwise provided by
statute, throughout the duration of a law-
suit from the filing of the petition to the
procedure of execution—including any review procedure and any repeated procedure started as a consequence of the review procedure.

Exemption from payment of costs or duties shall not exempt the parties from bearing duties unpaid in the course of the execution procedure, as well as bearing costs advanced by the state.

If the party benefiting from exemption of costs is defeated in the procedure, he or she will have to pay the legal fees of the adverse party, as the rights of exemption of costs, duties, and the right of prenotation of duties do not affect the obligation to refund costs of proceedings awarded to the adverse party.

Legal aid, i.e., the services of a protector attorney, is not provided for initial advice.

Under Section 84 (1) (b) of the Civil Procedure Code, exemption of costs covers the advancement or payment (unless otherwise provided by the Civil Procedure Code) of costs arising in the course of the proceedings (remuneration of witnesses, experts, curators ad litem, and interpreters, costs of on-the-spot trial and inspection, etc.). Exempted costs are advanced by the state, except for the fee of the curator ad litem. Under Section 84 (2) of the Civil Procedure Code, the defeated party will be obliged to pay for the fee of the curator ad litem even if he or she was granted exemption of costs.

3.6 Quality of Free Legal Representation

For a description of complaint mechanisms against appointed attorneys, including protector attorneys, see section 2.7.

The high commissioner in charge of disciplinary affairs of the Hungarian Bar Association is in charge of examining complaints against members of the Bar that have been rejected or dismissed in the first instance. In the past ten years, the high commissioner has examined a few cases of complaints lodged against protector attorneys. All complaints were dismissed as ill-founded, as it was established that the complainants were merely dissatisfied with the outcome of the trial and the protector attorney had performed his or her duties in a satisfactory manner.

The government elected in May 2002 stated that “[f]or socially disadvantaged individuals the institutional system of ‘people’s attorney’ as it is known in Europe should be established, where those in need may receive professional advice or free legal representation if necessary. The government also plans to amend regulations concerning appointed counsels and protector attorneys.” In line with these plans, the Ministry of Justice expected to formulate a legislative concept paper by the end of 2002 concerning the establishment of the “people’s attorney initiative.” Taking into account existing European experiences and models, the concept paper will serve as the basis for future legislation on this matter.
3.7 Application of the Right to Legal Aid in Practice

There is no systematic data collection carried out by courts, the Bar Associations or the National Council of Justice on the number of cases in which a protector attorney was appointed for a party in civil proceedings. The only relevant data available concerns the annual budgetary spending on protector attorneys’ fees (see section 6.2), which contains only the financial figures for cases where the protector attorney claimed his or her fee from the state, i.e., the party represented by the protector attorney was defeated in the lawsuit. Nevertheless, when compared to spending on appointed defense counselors, this data supports the general opinion among the legal community that protector attorneys are appointed less frequently than appointed defense counselors.

3.8 Other Barriers to Effective Access to Courts in Civil Cases

Court fees

Duties in civil procedures: Chapter VI (Sections 39–51) of the Act on Duties regulates court duties. The relevant provisions for civil procedures concerning calculation of the basis of duty and the rate of the duty are the following: Unless otherwise prescribed by law, the basis of duty in civil trial and non-trial proceedings is the value of the subject matter of the proceedings at the time of the initiation of the proceedings, or the value of the claim or part of claim for legal remedy.

If the value of the subject matter of the proceeding cannot be established in accordance with the above rule, the basis for calculating the duty is the following, unless otherwise provided by law:

- HUF 150,000 (600 euros) in civil trial proceedings before local courts, and HUF 75,000 (300 euros) in non-trial proceedings;
- before the Metropolitan Court of Budapest and before county courts, HUF 250,000 (1,000 euros) in court proceedings of the first instance, or HUF 125,000 (500 euros) in non-trial proceedings;
- in appeal proceedings before the Metropolitan Court of Budapest and before county courts, HUF 125,000 (500 euros) in trial proceedings, or HUF 70,000 (280 euros) in non-trial proceedings;
- before the Supreme Court, HUF 150,000 (600 euros) in non-trial proceedings of the first instance;
- before the Supreme Court, HUF 225,000 (900 euros) in trial proceedings for legal remedy, or HUF 100,000 (400 euros) in non-trial proceedings.

The actual rate of duties to be paid in first-instance civil procedures is calculated on the basis of the duty, as described above:
• in trial proceedings: 6 percent, but no less than HUF 5,000 (20 euros) and no more than HUF 750,000 (3,000 euros);
• in a case contesting a court order: 3 percent, but no less than HUF 3,000 (12 euros) and no more than HUF 300,000 (1,200 euros);
• in a case to petition summons for settlement, and application for the immediate hearing of verbal petitions: 1 percent, but no less than HUF 2,000 (8 euros) and no more than HUF 10,000 (40 euros);
• in proceedings of payment order: 3 percent, but no less than HUF 2,000 (8 euros) and no more than HUF 300,000 (1,200 euros);
• 1 percent in execution proceedings, but no less than HUF 2,000 (8 euros) and no more than HUF 10,000 (40 euros); if the effectuation of the execution falls within the competence of the Budapest Court or the county court bailiff, 3 percent but no less than HUF 6,000 (24 euros) and no more than HUF 300,000 (1,200 euros);
• in proceedings initiated for permission for payment by installments after a resolution has become definitive, the amendment thereof, or for permission of payment by installments: 1 percent, but no less than HUF 2,000 (8 euros) and no more than HUF 10,000 (40 euros);
• in proceedings initiated for permission for deferred payment or payment by installments of fine as imposed: 1 percent, but no less than HUF 2,000 (8 euros) and no more than HUF 10,000 (40 euros);
• in other non-trial proceedings: 3 percent of the value of the subject matter of the proceeding, but no less than HUF 2,000 (8 euros) and no more than HUF 100,000 (40 euros).

Additionally, there are itemized duties, the rate of which does not depend on the basis of the duty, for example:

• the duty on divorce actions is HUF 7,000 (28 euros);
• the duty on proceedings instituted for the court review of administrative resolutions, unless otherwise provided for by law, and unless the resolution is not connected with tax, dues, or obligations of tax nature, social insurance benefits, or customs obligations, shall be HUF 10,000 (40 euros);
• for review of a resolution for indemnification for expropriation on legal grounds, the amount of duty shall be HUF 6,000 (24 euros);
• the duty on labor suits set forth in Section 349 of the Civil Procedure Code, if the value of the subject matter of the proceedings cannot be established, shall be HUF 5,000 (20 euros).

Duties in appeal proceedings include the following:

• On the duty base established in accordance with Sections 39–41 of the Act on Duties, the rate of duty shall be 6
percent in the case of appeals submitted against judgments, but no less than HUF 5,000 (20 euros) and no more than HUF 750,000 (3,000 euros);

- For an appeal submitted in response to a judgment passed in an action for divorce, the duty shall be HUF 5,000 (20 euros). If an appeal is submitted regarding the provision of the judgment on property rights (except for the provision pertaining to the use of residential properties), the above provisions apply.

See sections 3.3.1 and 3.3.2 for summaries of substantive and financial criteria for legal aid (specifically, objective and subjective exemption of duties) and waivers.

Copying fees: Section 3 (6) of the Civil Procedure Code obliges the court to ensure that parties have timely access to all documents of a case. In practice, parties can access and copy documents in administrative services found in each court building, where court staff provides information, access to documents, and copying services. Administrative services are open at least two hours per workday and one full workday each week, under Section 38 (1) and (6) of Order no. 123/1973 of the minister of justice on the rules of judicial administrative matters. Copying fees are extremely high, however, amounting to HUF 100 (4 euros) per page.

Under Section 93 (2) of the Civil Procedure Code, parties are required to file all documents in several copies so that the court may forward one copy to the adverse party. Any costs incurred by protector attorneys in copying documents would need only to be advanced, as the protector attorney can later claim copying costs from either the defeated adverse party or the state.

Court accessibility

Currently the court system is organized so that there are local-level courts (town courts), county-level courts (county courts), and the Supreme Court. Town courts are generally located in larger towns and are accessible to the general population. County courts are each mostly in the county seat, while the Supreme Court is located in Budapest.

During “complaint days” (see section 3.1), parties who are not represented by an attorney in the procedure may state their claims orally in any local court or the county court with competence over the lawsuit, and court staff will record the oral statement in the form of official minutes. This provision facilitates access to court in general. However, if the lawsuit falls into the competence of a county court, the person wishing to initiate a lawsuit has to travel to the seat of the county court, which in certain cases may require long hours of travel from a more remote village in the county.

Sections 75 (3) and 186 of the Civil Procedure Code and lower-level regulations (e.g., Decree 1/1969 of the Minister of Jus-
tice on Fees of Witnesses) allow for the reimbursement of the winning party’s and witnesses’ travel expenses by the defeated party, if these expenses are expressly claimed as costs and are reasonable.

Bar Associations are organized in each of the nineteen counties and Budapest. The national bar (Hungarian Bar Association) is the main governing body of attorneys.

As regards the right to use one’s native language in court procedures, the Civil Procedure Code states, in Section 6 (1), that Hungarian is the language of the judicial procedure, but that no one shall be disadvantaged for not knowing Hungarian. The 1999 amendment of the Civil Procedure Code, which entered into force in 2000, expanded the provision by stating in Section 6 (2) that, as provided by international treaty, everyone has the right to use his or her native, regional, or minority language in the judicial procedure. This provision now reflects Hungary’s obligations assumed by becoming a party to the 1992 European Charter on Regional or Minority Languages (restricted to Croatian, German, Romanian, Serbian, Slovenian, and Slovak languages).

Under Section 6 (3) of the Civil Procedure Code, the court is obliged to provide an interpreter if the enforcement of these rights so requires. This guarantee applies to oral procedural actions and to written submissions as well. The participation of the interpreter and translator is governed by Section 184 of the Civil Procedure Code, which provides that an interpreter shall be used during the hearing if the person to be heard in the proceedings does not speak Hungarian and the court does not have sufficient command of the foreign language to be able to carry out the proceeding.

A sign-language interpreter shall also be used to communicate with deaf or mute persons at the hearing if written communication is not possible.

Until 31 December 1999, costs related to the use of interpreters or translators were advanced by the state, but were later borne by the party obliged to bear the costs of the procedure. This effectively meant that in case the party who had used a foreign language was defeated in the procedure, he would have to bear the costs of interpretation or translation. Since 2000, as a result of the 1999 amendment of the Civil Procedure Code, Section 78 (4) states that an interpreter’s fees are now both advanced and paid for by the state.

3.9 Alternative Dispute Resolution (ADR) and Similar Schemes

The system of alternative dispute resolution is evolving in Hungary; however, in its current state it does not offer effective solutions to facilitate access to justice for the indigent.

According to Section 7 of the Civil Code, dispute resolution may be used instead of court litigation only in cases determined by law. The Civil Code itself
elaborates one of these: arbitration. At the same time, the law states that arbitration clauses may be honored only in cases in which at least one of the parties conducts economic activities by profession and the dispute is related to these activities. It is therefore apparent that the legislators designed this institution to serve primarily as a dispute resolution option for entrepreneurs.

A range of further laws discusses the conditions of mediation in Hungary. In practice, however, such alternative means have not reached wide social acceptance. In addition, many dispute the appropriateness of their operations. Clauses stating that the parties are obliged to show efforts to reach a consensus before going to state courts are rare in Hungarian legislation. The task of the Conciliatory Body set up by Act CLV on Consumer Protection (1997. Évi CLV. Törvény a fogyasztóvédelemről) is to reach a consensus in disputes between the consumer and the entrepreneur. A similar procedure is made available for the patient and the medical service provider in legal disputes regarding the service provided by the latter, through Act CXVI of 2000 (2000. Évi CXVI. Törvény az egészségügyi közvetői eljárásról). Section 199/A of Act XXII of 1992 on the Labor Code (1992. Évi XXII. Törvény a Munka Törvénykönyvről) defers labor disputes to a conciliator in case the collective agreement or the individual agreement between the parties so disposes. Only in case the conciliation proves to be unsuccessful are the parties entitled to turn to the state courts to vindicate their claims. Finally, Act IV of 1992 on marriage, family, and guardianship (1992. Évi IV. Törvény a házasságról, a családról, és a gyámságról) also leaves significant room for the consensus reached by the spouses in the process of divorce.

Apart from the institutions established by law and maintained by the state, nongovernmental for-profit and not-for-profit initiatives are also available for disputants. The most important of these is the market-based service provided by a private law firm (Eörsi and Partners Ltd.), which offers solutions through the involvement of a mediator in the process of peaceful conciliation.

In practice, these opportunities offer very limited assistance to the indigent in settling their disputes.

This is well demonstrated by the fact that according to the general contract terms of Eörsi and Partners Ltd., there is a charge of HUF 50,000 (200 euros) for each hour of mediation, and expert opinions are provided for HUF 90,000 (360 euros) per hour of work, while an additional fee is charged if a consensus is reached.

Further, consumer protection mediation is almost entirely unknown to the public. The adequate functioning of medical mediation is also often questioned by some of the experts.

4.1 Normative Basis

Act XXXII of 1989 on the Constitutional Court (1989. Évi XXXII. Törvény az alkotmánybíróságról) ensures the right to petition the Constitutional Court. Private persons submit the vast majority of motions. According to the relevant rule, Section 21 (4), anyone may contest any statute of the Hungarian legal system (except the Constitution) or any other legal instrument of public administration (e.g., a ministerial instruction), irrespective of whether it affects or violates any fundamental right of the given person. Furthermore, anyone whose rights guaranteed by the Constitution have been violated may lodge a constitutional complaint with the Constitutional Court, if their grievance has been due to the application of a statute contrary to the Constitution and provided they have already exhausted all other means of legal remedy. Under Section 48 of the act, complaints may be lodged within sixty days of delivery of a final judgment. The 1999 amendment of the Civil Procedure Code made it possible for petitioners to submit a petition for a new trial of their case by ordinary courts provided that, on the basis of the complaint, the Constitutional Court establishes with retroactive effect the unconstitutionality of the application in the given case of the contested statute. Under constitutional complaints, the Constitutional Court may review the constitutionality of already repealed statutes as well. Thus, constitutional complaints have become a real means of legal remedy, although motions lodged within this competence are still quite few (only about 1 percent of all motions before the Constitutional Court), due to strict conditions for lodging such complaints.

Act IV of 1957 on the General Rules of Public Administrative Procedure (1957. Évi IV. Törvény az államigazgatási eljárás általános szabályairól; hereinafter, the Public Administrative Procedure) ensures equality before the law, non-discrimination for both Hungarians and foreign citizens, and the right to use one’s native language both orally and in writing. The Public Administrative Procedure also requires the public authorities of the proceedings to provide information to clients about their rights and obligations.121

The Public Administrative Procedure allows clients to be represented by proxy (representative). Unlike the rules under the Civil Procedure Code, the proxy is not limited to an attorney or law firm or a relative of the client. Basically, anyone can act as a representative if the client gives proper authorization.122

The scope of possible representatives is wider in tax procedures, where, according to Section 76 (2) of Act XCI of 1990 on the tax procedures (1990. Évi XCI. Törvény az adózás rendjéről), private persons may
authorize their statutory representative or any other person, as well as an attorney or law firm or a tax consultant, to represent them in tax procedures.

4.2 Eligibility criteria

Legal aid is not available for indigent clients in public administrative procedures, or in proceedings before the Constitutional Court or international tribunals.

In terms of Section 18 (4) of the Public Administrative Procedure, a curator ad litem is to be appointed for clients whose location is unknown.

4.3 Procedure for appointment

Similar to the provisions of the Civil Procedure Code, the Public Administrative Procedure provides, in Section 18 (4), that the curator ad litem is appointed by the guardianship authority; Section 132 (1) (c) of Government Decree 149/1997 (IX. 10.) on Guardianship Authorities, and on Child Protection and Guardianship Procedures, also applies.

4.4 Alternative (non-state) mechanisms

Non-governmental legal aid services

A number of human rights non-governmental organizations provide free legal counseling and legal representation services to clients. A list, by no means exhaustive, of NGOs providing free legal representation includes the following:

- Hungarian Helsinki Committee (in cases of human rights violations, particularly abuses by law enforcement agencies, detention cases, asylum and expulsion, immigration);
- Hungarian Civil Liberties Union (criminal procedures regarding drug use, data protection, patients’ rights);
- Legal Defense Bureau for National and Ethnic Minorities (NEKI) (discrimination based on ethnicity or race),
- legal aid center for women and children (spousal abuse, child abuse);
- Hátér Society for Gays (legal counseling and legal aid for gays and lesbians);
- Romany Parliament Conflict Prevention and Legal Aid Office (discrimination against Roma).

Legal clinics operate at several law faculties (ELTE Budapest and Győr: asylum clinic maintained by the Hungarian Helsinki Committee, not-for-profit law, criminal law; street law; law faculty in Miskolc: criminal law; Debrecen: asylum and criminal law).

In addition, a large number of organizations provide general as well as specialized free legal counseling, e.g., local units of political parties, trade unions, consumer protection associations, etc.
Miscellaneous governmental legal counseling and legal aid initiatives

The Ministry of Justice operates complaint centers in twelve counties and Budapest where clients receive free legal advice or clarifications about judicial organs, procedures, and legal regulations. Furthermore, complaint centers provide assistance in explaining complex judicial and administrative decisions, as well as counseling on seeking legal remedies. The complaint centers do not provide legal representation and do not assist in drafting legal documents. Centers are open for six hours per week and are located in the local restitution offices.123

In addition, on 15 November 2001 the Ministry of Justice launched a project whereby it set up an anti-discrimination lawyers’ network in all nineteen counties of Hungary and in Budapest.124 The aim of the project is to set up a legal aid network to provide legal assistance to Roma who have suffered violations of their rights on account of their Roma origin. The network is maintained in cooperation with the state secretary for Roma affairs and the Office for National and Ethnic Minorities. The Ministry of Justice concluded long-term retainer agreements with attorneys around Hungary to provide legal advice, and legal representation before courts in discrimination cases. As of October 2002, the Ministry pays a monthly fee of HUF 150,000 (600 euros) to each attorney, while the National Gypsy Self-Government provides free office space for attorneys. Clients receive free legal services from attorneys participating in the network. A review by the Ministry of Justice on the activities and performance of the anti-discrimination lawyers’ network will be concluded by the end of September 2002.125

4.5 Implementation

There is no right to free legal aid in administrative procedures (see above).

5. Organization of the system for provision of legal aid

5.1 Special state body authorized to administer the legal aid system

There is no special entity with a mandate to administer the legal aid system. As an official of the Ministry of Justice said, “the issue has no real master” at present.126 The structure is rather scattered: the system of appointed defense counsels and protector attorneys is mainly managed by the Bar Associations (see section 5.2), while the complaint centers and the anti-discrimination lawyers’ network is operated by the Ministry of Justice.

Interestingly and characteristically, Section 12 of the Attorneys Act (the provision enumerating the tasks of the Bar Associations) makes no mention about the management and administration of the legal aid system. Under Section 121 of the Attorneys Act, the minister of justice provides
legal supervision over the operation of the regional Bar Associations and the Hungarian Bar Association. The minister supervises the statutes, regulations, guidelines, and resolutions of the Bar Associations and determines whether they operate in accordance with the laws, the statutes, and the regulations. This, however, does not enable the minister or the Ministry to interfere with the operation of the Bar Associations in order to guarantee the effectiveness of legal aid. This is an unfortunate arrangement, because the provision of legal aid is an obligation of the State of Hungary under international law—a conclusion supported by the ombudsman’s report.127

As noted in section 3.6, the new government, acknowledging the shortcomings of the present legal aid system, is planning to introduce the institution of “people’s attorney,” whereby the indigent may receive professional advice or free legal representation. According to a letter sent by Minister of Justice Péter Bárándy to the Hungarian Helsinki Committee, the new institution “will be based on the Bar Associations in a way that the associations would take part. The state would finance and monitor or supervise their activity through the Ministry of Justice.”128 It is hard to say how this monitoring or supervision would differ from the existing, yet insufficient, supervision exercised by the Ministry.

5.2 ROLE OF THE BAR ASSOCIATION IN THE ADMINISTRATION OF THE LEGAL AID SYSTEM

As has been partly outlined above, the Bar Association has the following tasks with regard to the administration of the legal aid system:

- ensures that on-duty attorneys are available to fulfill ex officio appointments on resting days and bank holidays, under Section 31 (3) of the Attorneys Act;
- maintains a register of attorneys who may be appointed, under Section 35 (1) of the Attorneys Act;
- compiles the register of appointed attorneys and takes care that the number of attorneys on the register is commensurate with tasks requiring appointment and effective operation of the justice system, under Section 36 (1) of the Attorneys Act;
- establishes the rules for compiling the register of appointed attorneys, ensuring that, in addition to voluntary registration, attorneys are represented in the register in an equal manner, so that responsibilities may be shared equally, under Section 36 (2) of the Attorneys Act;
- informs the authorities about any change in the register of appointed attorneys, within fifteen days of the change, under Section 36 (3) of the Attorneys Act;
• conducts the disciplinary procedure against those attorneys who violate the relevant laws and rules of the code of conduct, prescribing, among other things, the professional rules of acting as an appointed defense counsel, under Section 37–65 of the Attorneys Act.

According to information provided by János Zimnic, high commissioner of the Hungarian Bar Association in charge of disciplinary affairs, there are no institutionalized mechanisms in place within the Bar Association for the monitoring and evaluation of the legal aid system (i.e., the activities of \textit{ex officio} defense counsels and protector attorneys). 129

While the Bars are, in large part, responsible for operating the legal aid system, they have limited influence on the budget of the legal aid system. The president of the Hungarian Bar Association is a member of the National Council of Justice, which prepares and submits the budgetary proposal for the judicial chapter (including the amounts allocated for legal aid purposes). Under Section 39 of Act LXVI of 1997 on the Organization and Administration of Courts, if there is a difference between the proposals of the National Council of Justice and the budgetary bill submitted by the government, the government is obliged to explain the reasons. This provision, however, is not implemented in practice.

This budgetary solution (namely, that the legal aid budget is included in the budget of the judiciary) creates an inevitable tension in the system: the fees of appointed attorneys (appointed counsels and protector attorneys) are paid from the judiciary budget, so they in fact reduce the amount that could be spent on judicial expenses otherwise. Although we do not believe that individual judges take this fact into consideration when deciding on the appointment of attorneys in non-mandatory cases, this structure again shows how incoherent the whole system is.

5.3 \textsc{Role of the courts}

The court’s right and duty to appoint \textit{ex officio} defense counsels and protector attorneys is discussed in the relevant sections (see sections 2.1.2, 2.2.1, 2.4, and 3.4).

As outlined in section 6.4, existing regulations on establishing and processing the fees of appointed defense counsels and protective attorneys will change in the near future. According to the regulation presently in effect—Decree 1/1974 (II. 15.) of the Minister of Justice on the Fees and Expenses of Defense Counsels Appointed in Criminal Procedures (hereinafter, the 1/1974 MJ decree)—the courts establish, within the framework defined by the law, the fees of appointed attorneys for procedural activities conducted before them. The 7/2002 MJ decree takes the same approach: the competent authority (the investigative authority in the investigative phase, the prosecutor in the prosecutorial phase, and the court in the trial phase) establishes the fee for defense counsels on the basis of the decree’s provisions and ensures that the
fee is processed. With regard to protector attorneys, it is the court’s task to establish the fee and take the required measures for the processing of the amount.

If the defendant requests the replacement of his or her appointed attorney, the court is entitled—but not obliged—to do so. The court may also ex officio (i.e., without any request from the defendant) appoint a defense counsel. (For a more detailed discussion of these issues, see sections 2.2.1, 2.2.2, and 2.4.) It is important to note that the Code of Criminal Procedure does not authorize the court to ex officio relieve the appointed counsel if it finds that the counsel’s performance is unsatisfactory, but it happens sometimes that the judge (without any particular statutory authorization) simply appoints another counsel if he or she is not convinced that the counsel would provide appropriate defense. The judge may also initiate a disciplinary procedure against negligent appointed attorneys. However, as the data and standpoints in section 2.7 show, this does not happen frequently.

5.4 Role of the Prosecution and the Police

In the respective phases of the criminal procedure—investigative and prosecutorial phase—it is the task of the police and the prosecutor to establish whether the appointment of an ex officio counsel is necessary or required by law, to appoint a counsel from the registry of the Bar Association, and to notify the counsel about those procedural activities at which his or her presence is mandatory or permitted.

Under the 7/2002 MJ decree, the decision on the establishment of the appointed counsel’s fees and the reimbursement of his or her expenses will also be the task of the police and the prosecutor.

5.5 State Models of Organization of the Provision of Legal Aid

In Hungary, legal aid is provided through ex officio appointed private lawyers. For detailed analysis of the existing problems, see sections 2 and 3.

In her 1996 report, the ombudsman also recommended that the minister of justice look into the possibility of establishing a public defender’s office. This has not been done to date.

Also in 1996, Károly Bárd wrote the following with regard to the Bar’s reaction to this recommendation:

The president [of the Budapest Bar Association] also expressed his doubts about setting up a state-financed legal aid service. Referring to cultural and legal traditions, he was of the opinion that Hungarian society would never trust such an institution. Criminal defendants would never consider public defenders as their benefactors. Rather, they would
regard them as state “spies.” Instead of making “doubtful attempts” to introduce a legal aid service, he proposed to set up the list of “attorneys acting in criminal cases” on the basis of German and Austrian examples. The list would include those attorneys who are willing to take criminal cases on appointment. Only the attorneys included in this list could receive authorization to act as lawyers on retainer in criminal cases. It is difficult to decide whether Hungarian society would actually reject the idea of the legal aid service. Under the present conditions, setting up a state-financed legal aid system in the near future seems to be unlikely. The opposition of attorneys is too strong and the government does not seem to be determined to bring about radical changes.131

Bárd’s assessment of the situation is still valid. The president’s reference to social traditions is somewhat doubtful, as the inefficiency of the existing system of ex officio defense counsels is widely known in both the legal community and among those who encounter these problems as accused or defendants.

As noted in section 5.1, the newly elected government is planning to improve the system by increasing the fees of protector attorneys and appointed defense counsels to a more realistic level and by setting up the institution of the “people’s attorney”—which might not, as mentioned above, significantly improve the present system.

5.6 Evaluation and training

Csaba Fenyvesi’s empirical research gives a revealing picture of how the “stakeholders” evaluate the effectiveness of the legal aid system. Although the research focuses on the criminal procedure, its conclusions may well be generalized. Below, we quote the research’s conclusions concerning the opinions of the different groups interviewed.

- Judges: “Most of them see a significant difference between the activity of the two types, i.e., retained counsels and appointed counsels, having a more favorable opinion of retained lawyers.”132

- Prosecutors: “They definitely consider retained lawyers to be better, more active, and more prepared. [Only] one-third of them regard the appointed counsel system as appropriate.”133

- Attorneys: “They agree . . . that the work of retained lawyers is of better quality than that of appointed counsels . . . Therefore, most of them do not regard the institution of appointed counsel as good.”134

- Police officers: “Policemen (85 percent) also see a difference between the work of retained and appointed counsels; [in their opinion,] the former represent the interests of the clients more actively and efficiently.”135

Potential reforms mentioned by the interviewees include the following:
• increased fees;
• stricter professional control and sanctions;
• specialization of the attorneys (so that only attorneys specialized in criminal law could be appointed as defense counsels);
• a requirement that the authorities notify the Bar Associations in the event that an appointed counsel violates the professional norms;
• establishment of a public defender’s office (based on the American example);
• extension of the mandatory presence of the counsel to the whole procedure;
• permission for counsels to have access to copies of case files free of charge.136

As no institutionalized evaluation process is in place, the role of non-governmental organizations is not institutionalized either. To our knowledge, there have been no efforts to raise public awareness, and there has been no detailed analysis prepared by any NGO. The Hungarian Helsinki Committee has launched a two-year project for the effective enforcement of the right of defense through the establishment of a model public defender’s office. The project consists of two phases. In the first phase, the Committee produced a comprehensive report in Hungarian on the present framework in Hungary, identifying the main shortcomings of the system. As a next step, in October 2002, the Committee organized a two-day workshop involving key stakeholders, including the Bar Associations, the Ministry of Justice, the National Council of Justice, representatives of the courts, the Chief Public Prosecutor’s Office, the ombudsman, NGOs engaged in rights protection, etc. The aim of the workshop was to discuss the findings of the report, to identify possible solutions for problems and potential foreign models, and to promote reform. The project’s second phase—building upon the conclusions of the workshop—will be aimed at setting up a “pilot public defender’s office” with contracted attorneys paid from the project’s budget. These attorneys will provide free legal representation for 100 indigent detainees in criminal cases. Based on the experience of the model, the Hungarian Helsinki Committee will expand the campaign to raise public awareness, elements of which will be present throughout the whole project.

In this respect again, there is a lack of institutionalized solutions. No such education or other program to raise public awareness is in place. The training provided by the Bar Associations for trainee lawyers (three hours every second week for six months) includes education on professional ethics; while ethical aspects of appointment are covered in this educational framework, it hardly provides adequate analysis of the relevant issues.
6. Financial aspects of ensuring effective access to justice for the indigent

6.1 Determination of the legal aid budget

The state does track budget allocations for legal aid, in the same way it does for other budget allocations. The National Audit Office (Állami számvevőszék) has not looked into this issue yet.

Most chapters of the Hungarian state budget are determined by taking the previous year’s expenditures and adjusting them for inflation. The budget of the Republic of Hungary is passed by the Parliament. The Parliament then confirms spending in the appropriation accounts in each of the following years. Hungarian budgeting practice differs somewhat from that of other democracies in that the approved budget is frequently amended during the base year and even in the course of the subsequent year. Previously, this was a result of inexperienced and economic/financial crises. However, in recent years, the government intentionally strove to expand the budgetary framework approved by the Parliament. According to EUSTAT and INTOSIDE sources, budgetary discipline in Hungary is satisfactory, and it has even improved from year to year through 2000. Since then, however, several problems have arisen; e.g., the Parliament passed a two-year budget in 2000 for the years 2001 and 2002.

On behalf of the government, the minister of finance submits the bill on the budget to Parliament. The government is responsible for the implementation of the budget. Act XXXVIII of 1992 on State Finances (1992. Évi XXXVIII. Törvény az államháztartásról) contains the basic regulations regarding the state financing system. The National Audit Office also provides opinions on the budget and appropriation accounts bills, and it continuously supervises public spending. The heads of the organs in charge of the supervision of the individual budgetary chapters (in the case of the court system, the president of the National Council of Justice, who is simultaneously the president of the Supreme Court; in the case of the Ministry of Justice, the minister) also take part in preparing the subsequent year’s budget policies, and they are responsible for directing the planning and appropriation of budget chapters under their supervision.

The largest items of state-provided legal aid (e.g., the fees of appointed attorneys, the expenses related to exemptions, etc.) are contained in the budgetary chapter determined for the judiciary, while a smaller part is included in the budgetary chapter of the Ministry of Justice. Calculating the likely expenses related to appointed defense counsels, protector attorneys, and curators ad litem is relatively simple, as the fees paid in relation to these forms of legal aid have been the same for years. Aside from the change in the number of cases, what may
modify the amounts from year to year is the increase in costs reimbursed by the courts, especially travel costs.

According to information provided by the Judicial Administration and Codification Department of the Ministry of Justice, the new provisions regulating the fees and expenses of appointed defense counsels and protector attorneys, effective as of 1 January 2003, will increase the costs of state-provided legal aid by approximately HUF 300 million (1.2 million euros) per year.

### Table 2: Main expenditures of the central budget, 1997–2002, in millions of HUF (and millions of euros)

<table>
<thead>
<tr>
<th></th>
<th>Planned (budget)</th>
<th>Actual spending (appropriation accounts)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997</td>
<td>2,564,381.2</td>
<td>(10,257.2)</td>
</tr>
<tr>
<td>1998</td>
<td>2,845,823.1</td>
<td>(11,383.3)</td>
</tr>
<tr>
<td>1999</td>
<td>3,510,634.1</td>
<td>(14,042.5)</td>
</tr>
<tr>
<td>2000</td>
<td>3,788,275.6</td>
<td>(15,153.1)</td>
</tr>
<tr>
<td>2001</td>
<td>4,322,440.5</td>
<td>(17,289.8)</td>
</tr>
<tr>
<td>2002</td>
<td>4,556,251.4</td>
<td>(18,225.0)</td>
</tr>
<tr>
<td></td>
<td>2,703,051.3</td>
<td>(10,812.2)</td>
</tr>
<tr>
<td></td>
<td>3,176,594.5</td>
<td>(12,706.4)</td>
</tr>
<tr>
<td></td>
<td>3,565,766.4</td>
<td>(14,263.1)</td>
</tr>
<tr>
<td></td>
<td>4,049,734.2</td>
<td>(16,198.2)</td>
</tr>
</tbody>
</table>

Source: Budget and appropriation accounts acts.

### 6.2 Budgetary Information

There is no separate chapter on the justice system for acts on the central budget and the appropriation accounts. Instead, data on spending for the justice system is found in several budgetary chapters. Until 1997, three chapters (Supreme Court, courts, Ministry of Justice)—and since then, two chapters (Courts, Ministry of Justice)—contained related budgetary allocations. However, these chapters contain only summary figures. (Figures in Table 3 also include operational, investment, and accumulative expenditures.) Moreover, since 1999, the competence of the Ministry of Justice and organs under its supervision has considerably expanded. Several organs from the Prime Minister’s Office were transferred to the Ministry of Justice (e.g., the Office for National and Ethnic Minorities, the Central Restitution Office, and a number of public foundations, as well as minority self-governments).
Table 3: Expenditures for the justice system by budgetary chapter, 1997–2002, in millions of HUF (and millions of euros)

<table>
<thead>
<tr>
<th></th>
<th>Supreme Court</th>
<th>Courts</th>
<th>Ministry of Justice</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Planned</td>
<td>Actual</td>
<td>Planned</td>
</tr>
<tr>
<td>1997</td>
<td>1,267.7 (5.1)</td>
<td>1,368.5 (5.5)*</td>
<td>16,856.6 (67.4)</td>
</tr>
<tr>
<td>1998</td>
<td>-</td>
<td>-</td>
<td>24,754.2 (99.0)</td>
</tr>
<tr>
<td>1999</td>
<td>-</td>
<td>-</td>
<td>31,403.8 (125.6)</td>
</tr>
<tr>
<td>2000</td>
<td>-</td>
<td>-</td>
<td>34,081.6 (136.2)</td>
</tr>
<tr>
<td>2001</td>
<td>-</td>
<td>-</td>
<td>36,348.8 (145.4)</td>
</tr>
<tr>
<td>2002</td>
<td>-</td>
<td>-</td>
<td>37,836.5 (150.5)</td>
</tr>
</tbody>
</table>

*Source: Budget and appropriation accounts acts.*

*As of 1998, the Supreme Court’s budget is included in the overall judicial budget.*

Table 4: Legal aid from the judicial budget (actual spending in HUF)

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1999</td>
<td>HUF 959,686,000 (3,838,744 euros)</td>
</tr>
<tr>
<td>2000</td>
<td>HUF 1,004,557,000 (4,018,228 euros)</td>
</tr>
<tr>
<td>2001</td>
<td>HUF 1,093,442,000 (4,373,768 euros)</td>
</tr>
</tbody>
</table>

*Source: Ministry of Justice, Office of the National Council of Justice.*

From the above amounts, criminal and civil legal aid was financed as follows:

Table 5: Appropriations used in connection with appointed defense counsels (actual spending in HUF)

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1999</td>
<td>HUF 91,631,000 (366,524 euros)</td>
</tr>
<tr>
<td>2000</td>
<td>HUF 93,855,000 (375,420 euros)</td>
</tr>
<tr>
<td>2001</td>
<td>HUF 98,608,000 (394,432 euros)</td>
</tr>
</tbody>
</table>

*Source: Ministry of Justice, Office of the National Council of Justice.*
Table 6: Appropriations used for legal aid in civil cases
(actual spending in HUF)

<table>
<thead>
<tr>
<th>Year</th>
<th>Protector attorney</th>
<th>Curator ad litem</th>
</tr>
</thead>
<tbody>
<tr>
<td>1999</td>
<td>HUF 2,638,000 (10,552 euros)</td>
<td>HUF 47,304,000 (189,216 euros)</td>
</tr>
<tr>
<td>2000</td>
<td>HUF 3,403,000 (13,612 euros)</td>
<td>HUF 47,827,000 (191,308 euros)</td>
</tr>
<tr>
<td>2001</td>
<td>HUF 2,986,000 (11,944 euros)</td>
<td>HUF 53,192,000 (212,768 euros)</td>
</tr>
</tbody>
</table>

Source: Ministry of Justice, Office of the National Council of Justice.

Tables 4, 5, and 6 show that within the judicial chapter of the budget, the largest part of appropriations allocated for legal aid was spent on exemptions (from fees, expenses, etc.) and not on the fees and expenses of appointed defense counsels, protector attorneys, and curators ad litem.

The Ministry of Justice also operates state-financed legal aid institutions (see section 4.4). According to information provided by the Ministry, the expenditures related to the complaint centers (employing thirteen lawyers) will amount to HUF 24,180,000 (96,720 euros), while approximately HUF 27,600,000 (110,400 euros) will be spent on the anti-discrimination lawyers’ network (with twenty-three attorneys).

6.3 Number of cases supported by the state legal aid budget

According to information provided by the Judicial Administrative Department and the Statistical Department of the National Council of Justice, no records whatsoever are kept on the number of cases and the procedural phases in which appointed defense counsels, protector attorneys, and curators ad litem provide legal assistance. We are therefore unable to provide reliable information related to this section.

6.4 Lawyers’ fees

The minister of justice promulgated a decree on fees and expenses to be established by courts for protector attorneys and appointed defense counsels. The new 7/2002 MJ decree, promulgated in March 2002, has significantly increased the fees, and is effective as of 1 January 2003 (although its provisions will be implemented in cases in progress).

The following information describes provisions of decrees (1/1974, 3/1984, and 12/1991) related to lawyers’ fees and in force until the end of 2002:

Section 1 of the 1/1974 MJ decree sets attorneys’ honoraria at very low levels. For the initial hour of the defense counsel’s participation at trial (procedural action), the fee is HUF 1,000 (4 euros), while the fee is HUF 500 (2 euros) per hour for all sub-
sequent hours. If the procedural action is canceled for some reason, the fee is HUF 500. If the defense counsel acts as counsel for more than one defendant in the same case, the fee may be increased by a maximum of HUF 500. The decree does not say, however, if the increased fee should be multiplied in accordance with the number of represented persons. In review procedures, “normal” fees are applicable. However, the court shall grant a fee of a minimum of HUF 2,000 (8 euros) and maximum of HUF 15,000 (60 euros) to the counsel for writing the motion for review.

Under Section 3 of the decree, the defense counsel is entitled to reimbursement for travel expenses, if he or she participates in a trial that takes place at a location different from where his or her office or his or her residence is located. In terms of the decree, the authority may permit the use of vehicles only in justified cases. However, practice has superseded the rigid regulation, and courts have adapted to changed circumstances: they regularly allow reimbursement for car travel expenses.

In addition to low fees, this decree is unsatisfactory because it provides fees only for trial procedures and motions submitted in review procedures. Therefore, preparations for trial, visiting detained clients, and interpretation costs for foreign defendants are not covered.

The 3/1984 and 12/1991 MJ decrees both set attorneys’ fees at very low levels, and disregard several substantial issues relating to work performed by attorneys. The 12/1991 MJ decree regulates fee levels that courts may determine in different procedures; it does not expressly deal with fees of protector attorneys or appointed defense counsels. The fee of a protector attorney that is borne by the state is calculated in accordance with the 3/1984 MJ decree, which sets the limit at 50 percent of the fee determined by the 12/1991 MJ decree, to a maximum of HUF 1,300 (5.2 euros) in trial procedures, and from a minimum of HUF 130 (0.52 euros) to a maximum of HUF 400 (1.6 euros) in non-trial procedures. Moreover, the provisions in Section 2 (2) of the 12/1991 MJ Decree related to the possibility of increasing the fee (e.g., in especially complicated cases) and lump-sum expenses are not applicable when determining the protector attorney’s fee borne by the state.

According to Section 3 of the 3/1984 MJ decree, Sections 3–4 of the 1/1974 MJ decree shall be applicable when determining expenses borne by the state. In addition, the reimbursement of expenses for the protector attorney shall be exempt from personal income taxation.

In light of the above, current fees for protector attorneys are even worse than those for appointed defense counsels. For this reason, the Bar has continually asked the Ministry of Justice to increase the fees and to adjust the relevant decrees to reflect real legal work.

The new decrees of the Minister of Justice (the 7/2002 and 8/2002 MJ decrees), which will enter into force on 1 January 2003, regulate the fees and expenses of both appointed defense counsels and pro-
tector attorneys. In addition to a significant increase in fees, the 7/2002 MJ decree reflects a realistic approach to the entirety of the attorney’s work. Some of those changes, which constitute an improvement compared to the regulation in force until 2003, are enumerated below.

Under Section 1 (2) of the 7/2002 MJ decree, the protector attorney and the defense counsel may petition the court to grant a reimbursement for his or her expenses. Expenses include postal and communication costs, costs related to copying (see the dilemma raised in section 2.1.2 with regard to copies of case files) and “other” (which will probably include translation costs incurred in the defense of foreign defendants). Under Section 3 of this decree, the court shall determine the expenses to be reimbursed on the basis of an itemized account submitted by the attorney.

Another very positive aspect is that Section 6 of the new decree declares that appointed defense counsels shall be paid for consultations with detained defendants. The duration of the consultation will be verified by the authority detaining the defendant.

The old and new fees, along with recommendations by the Hungarian Bar Association, are shown in the table below:

**Table 7: Increase in fees for protector attorneys and appointed defense counsels, and the recommendations of the Hungarian Bar Association**

<table>
<thead>
<tr>
<th>Legal fees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prior to entry into force of the 7/2002 MJ decree</td>
</tr>
<tr>
<td>Following entry into force of the 7/2002 MJ decree</td>
</tr>
<tr>
<td>Recommended by the Hungarian Bar Association</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Protector attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>Private criminal charges</td>
</tr>
<tr>
<td>HUF 500–5,000 (2–20 euros)</td>
</tr>
<tr>
<td>HUF 2,000–12,000 (8–48 euros)</td>
</tr>
<tr>
<td>HUF 10,000–50,000 (40–200 euros)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Civil trial cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>HUF 500–1,300 (2–5.2 euros)</td>
</tr>
<tr>
<td>HUF 2,000–7,500 (8–30 euros)</td>
</tr>
<tr>
<td>HUF 10,000–12,000 (40–400 euros)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Non-trial cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>HUF 130–400 (0.52–1.6 euros)</td>
</tr>
<tr>
<td>HUF 1,000–5,000 (4–20 euros)</td>
</tr>
<tr>
<td>HUF 10,000–12,000 (40–400)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Appointed defense counsels</th>
</tr>
</thead>
<tbody>
<tr>
<td>Per hour + each additional hour per hour</td>
</tr>
<tr>
<td>HUF 1,000 + 500 (4 + 2 euros)</td>
</tr>
<tr>
<td>HUF 2,000 (8 euros)</td>
</tr>
<tr>
<td>HUF 3,000 (12 euros) per hour plus HUF 3,000 for the appearance itself</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>If the procedural action is canceled</th>
</tr>
</thead>
<tbody>
<tr>
<td>HUF 500 (2 euros)</td>
</tr>
</tbody>
</table>
HUF 1,000 (4 euros)
HUF 3,000 (12 euros)

Meeting with detainee

No separate fee
HUF 1,000 (4 euros) per hour
HUF 1,500 (6 euros)


Adequacy of legal aid fees

There is widespread and understandable dissatisfaction among attorneys with regard to the legal aid fees. After the promulgation of the new decrees of the minister of justice, the Budapest Bar published its position on the decrees in the Bar’s journal. The Bar presses for the prompt amendment of both decrees and has set up a three-member committee to draw up textual amendments to the decrees.

The Bar’s main concerns related to the 7/2002 MJ decree on the fees and expenses of protector attorneys and appointed defense counsels are summarized below:

• Fee levels for protector attorneys are still unrealistically low. When determining the fees, the Ministry of Justice did not take into account the work and hours performed by protector attorneys, as well as the responsibilities that this work entails, among other factors.

• The decree contains no provisions for the case when the party represented by the protector attorney is successful in the case. Nothing should prevent the defeated party from bearing the costs of the lawsuit.

• The decree contains erroneous references.

• The fees of appointed defense counsels are still unrealistically low, and they fail to take into account that a significant number of attorneys currently earn their living from appointments. The stinginess of the decree is particularly apparent when a comparison is made between the fees of interpreters and those of appointed counsels, although both act as fundamental safeguards in criminal procedures.

• The new Code of Criminal Procedure, which will soon enter into force, introduces auxiliary private charges where legal representation will be mandatory. It is expected that appointment of an attorney will be rather frequent in such cases. An attorney appointed in this way may not be considered an appointed defense counsel, while his or her work will be different from that of a protector attorney appointed to the victim. Fees and expenses for this type of appointed attorney should be regulated separately.

The fees that attorneys would regard as satisfactory are part of Table 7. The huge differences between the amounts prescribed by the new decree and the recom-
mendations of the Hungarian Bar Association also reflect the enormous gap between the fees of appointed attorneys and the market prices.

**Information regarding lawyers’ fees in general**

According to Section 9 of the Attorneys Act, the attorney is entitled to fees and reimbursement of expenses. The fee is not regulated at all, and is up to the client and the attorney to agree on.

In general, the practice of determining an attorney’s fees is based on several factors: the time spent on the case, the stage of the proceedings, etc. In certain non-trial civil cases, the fee is generally a fixed percentage of the value of the contract (e.g., real estate sales, 1–2 percent of the real estate value) or a fixed fee (e.g., company registration matters). In civil lawsuits, the attorney’s fee may be composed of an initial fee and a certain percentage of the claim (this may vary between 1 and 10 percent, or even more). A similar arrangement is often used in certain criminal cases as well. In other criminal cases, it is common for attorneys to ask for a fixed fee for each stage of the criminal procedure (e.g., release from pretrial detention, first-instance trial, appeal proceedings). In this scenario, attorneys also generally claim reimbursement of costs.

While the hourly fee arrangement is uncommon with smaller law firms or individual attorneys, larger or international law firms prefer this arrangement; the hourly rate is supplemented by reimbursement of itemized costs.

It is almost impossible to elicit information from lawyers concerning their fees, due in part to the fact that the actual fees depend on many factors (the type and complexity of the case, the characteristics of the law firm, the prestige of the lawyer, etc.) It may be stated, however, that market prices are significantly higher than the fees determined by the decrees described above. According to a Budapest attorney, a simple case of bodily harm that takes approximately eight to ten hours of work and is settled in one court hearing will be undertaken by a “cheap” attorney for about HUF 50,000 (200 euros). If the client chooses a more prestigious lawyer, the fee can go up to between HUF 100,000 and 500,000 (between 400 and 2,000 euros). In civil cases, the ratio of fees prescribed for protector attorneys by law and the fees received by retained lawyers can vary between 1:50 and 1:1000, depending on how prestigious the given retained attorney is.138

### 6.6 Support for non-state initiatives

As was outlined above (see section 4.4), there are a number of non-governmental organizations that provide different forms of legal aid. The Parliamentary Committee for Social Associations distributes some support among NGOs every year. Some of the NGOs performing such work may be among the beneficiaries of this funding. However, this support is not regular, not institutionalized, and not targeted, i.e., it is
not related to the fact that these NGOs provide legal aid. So although NGOs performing such work may incidentally receive state support, it is more accurate to say that no such funding—direct or indirect—exists.

7. Data Collection

Some information is available from the Statistical Department of the Ministry of Justice concerning those forms of legal aid that are managed by the Ministry. However, as noted under the relevant sections, at present no systematic data collection exists with regard to the most important forms of state-provided legal aid, i.e., appointed defense counsels, protector attorneys, and curators ad litem. This makes it impossible to assess the efficiency of the system, and consequently the extent to which Hungary fulfills its international obligations to provide the indigent with legal aid. We believe that it ought to be made clear, through legislation, which organ (the Ministry of Justice, the National Council of Justice, or the Bar Associations) is primarily responsible for guaranteeing the effective operation of the system, for regularly assessing its operation, and for systematically collecting the data that make such an assessment possible.

8. Legislative Developments

The most important legislative developments are described in this section.

Changes in the regulations on fees and expenses of ex officio counsels and protector attorneys

On April 30 of 2002, the 8/2002 MJ decree replaced the 12/1991 MJ decree on attorneys’ fees, and on 1 January 2003, the 7/2002 MJ decree replaces the 3/1984 MJ decree on the fees of protector attorneys and the 1/1974 MJ decree on the fees and expenses of appointed defense counsels in criminal procedures. These amendments do not concern only the amounts of the fees. Substantive modifications of the existing system will also take place (e.g., ex officio defense counsels will be entitled to a fee for consultations with the client). For further details, see section 6.4.

The new Code of Criminal Procedure

The new Code of Criminal Procedure (Act XIX of 1998) was adopted in 1998. However, in the same year a change of government took place, and due to lack of political will, the act would not enter into force until 1 January 2003. Some provisions of the act, in fact, will not become effective until January 2005.

The most important changes concerning access to justice are the following, indicated in italics:

Section 48: (1) The court or the prosecutor or the investigative authority appoints a defense counsel if defense is mandatory and the defendant does not have a retained lawyer. The defendant shall be informed about the person of the appointed counsel after the appointment.
(2) The court, the prosecutor, or the investigative authority appoints a defense counsel if defense is not mandatory but the defendant requests the appointment of a counsel due to his or her income conditions. This provision puts forth a solution to some of the problems of access to justice for the indigent in criminal procedures (at least formally). It remains to be seen what financial criteria will be established. Under Section 604 of the new Code of Criminal Procedure, the minister of justice shall provide regulations regarding the financial criteria in a decree issued in cooperation with the minister of interior and the minister of finance.

(5) There is no appeal against the appointment of the defense counsel; however, the defendant may file a grounded request for the appointment of another counsel. The request is decided upon by the court, prosecutor, or investigative authority before which the procedure is in progress.

(9) The appointed defense counsel is entitled to the reimbursement of expenses connected to his or her summoned appearance before the court, the prosecutor, and the investigative authority and his or her consultations with the detained defendant.

Section 70/A: This changes the deadline for providing the defendant and the counsel with copies of the case files, from fifteen days to eight days.

Section 74 (3): The fee of the appointed defense counsel is still only advanced by the state; however, under Section 74 (3), if—based on his or her income and property conditions—the defendant is not able to pay the criminal expenses (which include the appointed counsel’s fee), and this fact is verified in a manner prescribed by a separate statute (a decree to be issued jointly by the minister of justice, the minister of interior, and the minister of finance, under Section 604), upon the request of the defendant or his or her counsel, the court or the prosecutor may grant a personal exemption of costs. If a personal exemption of costs has been granted, (a) the court, the prosecutor, or the investigative authority appoints a defense counsel upon the request of the defendant; (b) the defendant and his or her counsel shall on one occasion be exempted from the costs of copying the case files; and (c) the fee and the expenses of the ex officio counsel are borne by the state.

This provision could bring about a significant improvement to the present situation. However, much will depend on how the joint ministerial decree will regulate the issue.

Section 179 (3): The accused has to be informed of his or her right to choose a defense counsel or to ask for the appointment of a counsel by the investigating authority. If defense is mandatory, the investigating authority has to inform the accused that if he or she fails to appoint a lawyer within three days, appointment will be made ex officio by the investigative authority or the prosecutor. If the accused asserts that he or she does not wish to retain a defense counsel, the investigative authority or the prosecutor shall immediately appoint a defense counsel.
9. Recommendations

In the course of our research, we have identified three main reasons for the inefficient functioning of the legal aid system in Hungary:

- the lack of adequate financing (extremely low fees for attorneys compared to market prices);
- the deficiencies of the legal framework (for a detailed analysis, see the relevant sections);
- deeply rooted structural problems.

The new amendments will bring definite improvement with regard to the first two factors. There are, however, no signs of change in connection with the third one, so we will analyze this issue in a little more detail. By structural problems, we mean the following:

The management of the legal aid system involves four main functions: (a) providing legal aid (in most cases, a legal aid lawyer) when mandatory or otherwise necessary (provision of legal aid); (b) monitoring and guaranteeing the quality of the individual lawyer’s legal aid work (individual quality assurance); (c) monitoring and guaranteeing the efficient functioning of the system (general quality assurance); (d) devising and implementing the budget of the legal aid system (budgetary functions).

In the Hungarian structure, several entities are responsible for each function, which leads to an inconsistent (and sometimes nonexistent) “system” of responsibility. Let us see how the system is structured.

Provision of legal aid: The responsibility for the provision of legal aid is shared by the Bar Associations (which compile the list of legal aid lawyers who may be appointed and guarantee that appointment would be possible on resting days and banking holidays as well, through a system of on-duty attorneys) and the authorities—the police, the prosecutor, the court—that actually appoint the attorneys. Here again, we have to emphasize the dangers involved in an arrangement in which, in the investigative phase, the police decide whom to appoint, even though the police are not (always) interested in effective defense work.

Individual quality assurance: There is no direct individual quality assurance in the legal aid system at present. The Bar could, in theory, perform a kind of indirect quality assurance through its disciplinary powers. However, in spite of the overall dissatisfaction with the activity of most appointed lawyers, there are no disciplinary procedures launched against negligent appointed counsels and protector attorneys. Although it would be the state’s (and thus the government’s) obligation under international law to guarantee really effective legal aid, the government has no instruments whatsoever to act against negligent appointed lawyers.
General quality assurance: General quality assurance is completely lacking from the Hungarian system. The field of legal aid has no master. Neither the Bar nor the Ministry of Justice nor the National Council of Justice monitors the overall functioning of the system. There is no systematic data collection on this issue, so it is impossible to assess the performance of the system.

(d) Budgetary functions: This area, too, is somewhat chaotic. The Bar Associations bear the brunt of responsibility for the operation of the legal aid system. However, they have a very restricted say in the budget of the field. The legal aid budget is included in the budget of the National Council of Justice, which is otherwise responsible for the management of the court system. In the meantime, the actual fees of appointed lawyers and the rules of the reimbursement of their costs are determined by the minister of justice.

In order to set up a truly efficient legal aid system, one single organization ought to be vested with the responsibility of appointing legal aid lawyers, monitoring their performance, sanctioning their omissions, and regularly assessing the efficiency of the whole system, as well as determining and implementing the legal aid budget. Another important condition is that this organ must be provided with sufficient financial means. Whether this organ ought to be organized within the framework of the Bar Associations, as a state-run public defender’s office, or in the form of an independent foundation or council is a question for further debate.

Notes

1 For the purposes of this report, the term “accused” will be used to refer to the person subject to criminal proceedings at the pretrial stage, and “defendant” at trial stage and stage of appeal. The term “defendant” will be used also in cases where a particular procedural norm applies to all stages of criminal proceedings.


3 Section 33 (1) (a) and (2) (b) of Act XXXIV of 1994 on the Police (1994. Évi XXXIV. Törvény a rendőrségről; hereinafter, the Police Act).

4 Source: Erina Cseré, expert of the Ombudsman’s Office, Roundtable of the Hungarian Helsinki Committee on the situation of access to justice in Hungary, 28–29 October 2002 (hereinafter, the Roundtable).

6 Article 31 of the Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 5 to 16 December 1999 (hereinafter, 1999 CPT Report); at http://www.cpt.coe.int/reports/inf2001-02en.htm.

7 Section 92 (1) of the Code of Criminal Procedure: “In the case of an offense punishable with imprisonment, the accused may be subjected to pretrial detention if a) he or she has escaped or hidden from the authorities or—due to the gravity of the crime or any other reason—it may be presumed that he or she may escape or hide; b) there is ground to presume that he or she would frustrate, hinder, or threaten the procedure if he or she was not taken into custody; c) if during the procedure he or she has committed another offense punishable with imprisonment, or there is ground to presume that he or she would accomplish the attempted or prepared offense or would commit another offense punishable with imprisonment if he or she was not taken into custody.” The new Code of Criminal Procedure narrows the possibility of ordering seventy-two-hour detention: under Section 126 of the statute, the accused may be taken into a seventy-two-hour detention only if his or her subsequent pretrial detention is expected.

8 Section 91 (2) of the Code of Criminal Procedure.

9 The new Code of Criminal Procedure was adopted in 1998. However, in the same year a change of government took place and, due to a lack of political will, the entry into force of the act was postponed until 1 January 2003. Interestingly, the act has been amended a few times while awaiting entry into force. A new amendment is in progress at the moment.

10 Section 379/A (1) of the Code of Criminal Procedure.

11 Erika Róth, Az őslét előtti főgurulás dilemmái (Dilemmas of pretrial detention), Budapest, Osiris kiadó, Doktori mestermunkák sorozat (Doctoral Masterpieces series), 2000, pp. 120–31.

12 Ibid., p. 130.

13 Section 379/A (1) of the Code of Criminal Procedure.

14 Section 379/A (2) of the Code of Criminal Procedure.

15 Ibid.

16 Ibid.

17 Section 302/A (1) of the Code of Criminal Procedure.

18 In connection with the proper implementation of the constitutionally guaranteed right to defense.


20 Information provided by former judge Erzsébet Kadlót (presently a counselor at the Constitutional Court) and Judge Vera Dénes at the Roundtable.

21 See footnote 15.

22 Section 84 (1) of the Code of Criminal Procedure: “An inspection shall be held if the revealing or establishing of a fact requires the direct examination or observation of a person, object, or premise.”

23 Section 84/A (1) of the Code of Criminal Procedure: “An on-the-spot survey shall be held if the authority regards it as necessary for the accused or the witness to show a premise, act, or material piece of evidence.”

24 Section 85 (1) of the Code of Criminal Procedure: “The authority shall order an evidentiary experiment if it needs to be established whether a certain event or phenomenon could have taken place at a certain time and place, in a certain way, and under certain circumstances.”

25 Section 86 (1) of the Code of Criminal Procedure: “A person or an object may be presented for recognition to the accused or the witness.”

26 Fenyvesi, p. 182.

27 Section 64 (2) of the Code of Criminal Procedure: “If the witness testimony is in contradiction with another witness testimony or the testimony of the accused/defendant, the issue shall be cleared up through confrontation. The confronted persons shall present their testimonies in each other’s presence. The authority may allow them to pose questions to each other.”

28 Fenyvesi, p. 190.


30 Tájékoztató az egészségügyi rendelkezést és igényezést bűnügyi statisztikája adatból—1999, kiadja BM adatfeldolgozó, nyilvántartó és változási bizottság és a sajátos ügyészség számítástechnika-alkalmazási és információ főszolgálatá (Selection from the data of the unified police and prosecutorial statistics—1999, published by the Ministry of Interior’s Office for Data Processing, Registration and Elections and the Computer Application and Information Department of the Chief Public Prosecutor’s Office.
31 1999. évi Fogyatéktörtéti Látványjelentés, kézirált a Bűntétés-vigye-
    bázis Országos Panaszközpontján (1999 Penitentiary Sta-
    tistics, issued by the National Prison Administration; hereinafter, Penitentiary Statistics), p. I.
32 2000 edition of Unified Police and Prosecutorial Sta-
    tistics, p. 311.
34 Punished before Sentence: Detention and Police Cells in Hun-
    gary. Constitutional and Legal Policy Institute and Hun-
35 In 1997 the ombudsman made a recommendation concerning the adoption of a new, unified statute gov-
    erning the implementation of measures and punish-
    ments, including the measures and punishments involv-
    ing detention. The preparation of this statute is in pro-
    gress. There was an agreement between the Min-
    istry of Justice and the Ministry of Interior to har-
    monize the regulations pertaining to the implementa-
    tion of detention in penitentiary institutions and police
    jails. This harmonization has been performed with regard to a number of issues (such as the number of visits and
    showers); however, the regulations concerning defense counsels are still not unified.
36 Punished before Sentence, p. 93.
37 See, for example, Cs. Herke and I. Péter, “A rendőrsé-
    gi foglalkozás foga tartottak helyzete a Magyar Helsin-
    ki Bizottság tapasztalatai alapján” (The situation of accused persons detained in police jails, based on the Hun-
    garian Helsinki Committee’s experiences), in Beli-
38 Fenyesi, p. 188.
39 Attorney Lilla Farkas (head of one of the monitoring
    groups) sent a letter dated 25 May 1999 to the Crim-
    inal Directorate of the National Police Headquarters,
    raising the following problem: “We paid a visit on 21
    April 1999 to the jail of the 3rd District Police Head-
    quarters, where, to our inquiries, the jail guards told us
    that in terms of the practice followed at their station,
    legal counsels may only give documents or have the
    accused sign documents via the jail guards. The guards
    read the contents of all documents to be given or
    signed, since—they said—an internal regulation oblig-
    es them to do so. Circumstances and the practice of
    reading such documents are similar in the jail of the
    6–7th District Police Headquarters. On 11 May, dur-
    ing our visit to the 1st District Police Headquarters, we
    discovered that the construction of the legal counse-
    l’s room does not permit handing over documents.
    Detainees told us that in case they do not want the jail
    guards to see their documents, they try to shove the
    documents under the small opening between the table
    and the fiberglass separating the detainee from the
    attorney. This practice violates the defense counsel’s
    statutory rights . . . in terms of which the defense coun-
    sel may communicate with the detainee both in writ-
    ing and orally without supervision.”
39 Herke and Péter, p. 41.
40 Ibid., p. 49.
41 Joint Decree 4/1991 (III. 14.) of the Ministry of Justi-
    ce and the Ministry of Interior, Section 5 (3); Act
    XCIII of 1990 on Fees, Section 42 (3).
42 As Professor of Criminal Law Mihály Tóth points
    out, the principle of equality of arms “requires that the
    defense counsel would receive free of charge all the
    documents the prosecutor has access to.” M. Tóth, A
    Magyar büntetőfélkör és az európai emberi jogi titkos
    tűzfalán (The Hungarian criminal procedure in the
    mirror of the practice of the Constitutional Court and
    the European Court of Human Rights), Budapest, KJK–Kersző, 2001, p. 106.
43 Interview with Zsuzsa Sándor, judge and spokes-
    person of the Metropolitan Court, 9 September 2002
    (hereinafter, Interview with Zsuzsa Sándor).
44 Decree 1/1974 (II. 15.) of the Minister of Justice on
    the Fees and Expenses of Defense Counsels Appointed
    in Criminal Procedures prescribes fees of HUF
    1,000 (4 euros) for the first hour of the given proce-
    dural activity and HUF 500 (2 euros) for every sub-
    sequent hour. This compares with “market” fees of
    HUF 10,000–15,000 (40–60 euros). However, appoint-
    ed defense counsels have to pay the same amount for
    copies as their retained colleagues. These fees will be
    increased in the near future to HUF 2,000 (8 euros) per
    hour of every procedural activity, and consultation
    with a detained client will also be paid (HUF 1,000 [4
    euros] per occasion). For more details, see section 6.4.
45 See A kirendelt védővel rendelkező jogászok védőkör
    helyezett személyek védelméhez való jogának érvényesülése a büntetőfélkör személyisé

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Ibid., p. 17.

Ibid., p. 22.

Punished before Sentence, p. 86.

Information provided by István Győrffy, practicing attorney and head of the Debrecen University's Legal Clinic, at the Roundtable.


For example, Section 36 (1) (d) of the Police Jail Regulation.

Article 32 of the 1999 CPT Report.

Ibid.

Fenyvesi, p. 125. Judicial experts—naturally—disagree with this conclusion (information provided by former judge Erzsébet Kadlós at the Roundtable).

The court may order a supplementary investigation and may send back the case files to the prosecutor in the interest of full exploration of the facts of the case, if further evidence needs be searched or if the necessary evidencing could be carried out only with significant difficulties at the trial.

Interview with Zsuzsa Sándor, and information provided by former judge Erzsébet Kadlós at the Roundtable. According to Kadlós, if the courts sent back the case files for supplementary investigation in such cases, the police would simply appoint a counsel and have the accused/defendant repeat his or her testimony (probably not even in the presence of the appointed counsel, as the counsel's presence at the hearing of the accused/defendant is not mandatory), so the whole supplementary procedure would be formal and superfluous anyway. Furthermore, if the accused/defendant is in pretrial detention, such a supplementary investigation would prolong the detention.

Such as prohibited prostitution (prostitution in places where it is forbidden), Section 143 of the Petty Offenses Act, or dangerous threat (threatening someone with a criminal offense aimed against the threatened person's life, health, or physical integrity), Section 151 of the Petty Offenses Act.


Section 46 of the Alien Policing Act.

Section 47 of the Alien Policing Act.

Section 48 of the Alien Policing Act.

For example, the attorneys participating in the Hungarian Helsinki Committee's program Effective Legal Counseling for Those in Need of International Protection.

Memorandum of the session of the Metropolitan Court's Criminal Justice Board on the alien policing procedure, 1 July 2002.

According to Section 188 of the Health Care Act, a patient with menacing behavior is someone who—due to the disturbance of his or her psychological condition—may pose a threat to his or her or others' life, physical integrity, or health, but whose urgent treatment is not necessary as a result of the nature of the illness. A patient with directly menacing behavior is someone who—due to the disturbance of his or her psychological condition—poses immediate and severe danger to his or her or others' life, physical integrity, or health.

Section 199 of the Health Care Act.

The patients' rights officer is an official who is vested with protecting patients' rights and assists the patients in getting to know and asserting their rights in accordance with Section 30 of the Health Care Act. The patients' rights officer is employed by the National Welfare and Health Service.

Order 120/1973 of the Ministry of Justice.

According to Section 219 of the Code of Criminal Procedure.


Fenyvesi, p. 160.

Interview with Zsuzsa Sándor.

Under Section 27 of Act LXVI of 1997 on the Organization and Administration of Courts, the Supreme Court shall guarantee the consistency of the judicial practice through legal consistency resolutions, which are binding for the courts.

Fenyvesi, p. 160, and interview with Zsuzsa Sándor.
Károly Bárd.

Fenyvesi, p. 160: “The persons entitled to do so seldom take advantage of the opportunity to put forth such a request.” See also interview with Zsuzsa Sándor.

Károly Bárd.

Information provided by former judge Erzsébet Kadlót (presently a counselor at the Constitutional Court) and Judge Vera Dénes at the Roundtable.

Section 222 of the Penitentiary Rules.

Section 225 of the Penitentiary Rules.

Section 224 of the Penitentiary Rules.

Information provided by Judge Vera Dénes at the Roundtable.

This entire section is based on an interview with practicing attorney A. K. 13 September 2002.


Interview with Zsuzsa Sándor.

Interview with János Zimmic, high commissioner of the Hungarian Bar Association in charge of disciplinary affairs, 11 September 2002 (hereinafter, Interview with János Zimmic).

Interview with Zsuzsa Sándor.

Károly Bárd.

Fenyvesi, p. 131.


Ibid., p. 32.

Sections 113 and 192 of the Code of Criminal Procedure.

Under Section 108 of the Code of Criminal Procedure, the procedural fine that courts may impose is between HUF 1,000 (4 euros) and HUF 200,000 (800 euros). If the violation is recurring or especially grave, this can go up to HUF 500,000 (2,000 euros).

Interview with Zsuzsa Sándor.

For example, Zsolt Csák, judge of the Metropolitan Court.

Interview with Zsuzsa Sándor.

Former judge Erzsébet Kadlót at the Roundtable.

Fenyvesi, p. 124.

Károly Bárd.

Interview with János Zimmic.

Judge Zsolt Csák at the Roundtable.

Károly Bárd.

Ombudsman Report 1996, p. 34.

Károly Bárd.


Fenyvesi, pp. 115–40.

Act CX of 1999.


Section 31 of Act XI of 1998 on Attorneys: (1) In case of appointment, attorneys shall proceed as criminal defense counsel, protector attorneys, ad hoc guardians, or curator al litis (hereinafter, appointed attorney). (2) The appointed attorney shall proceed in the case, satisfy court summons, and to contact the defendant, or if the nature of the case allows, the represented person. (3) The Bar shall ensure on duty attorneys in the interest of performing appointments on resting days and bank holidays. (4) The appointed attorney is eligible for fees and the reimbursement of expenses as determined by a separate regulation.

Section 32, the decision on appointment: The authority’s decision on appointment shall substitute the letter of authorization for the appointed attorney.

Section 33, substitution of the appointed attorney: (1) The appointed attorney shall ensure his or her substitution so that this should not hinder the procedure and should not infringe the rights of the defendant or the represented person. (2) The appointed attorney shall not commission an attorney for his or her substitution who may request to be released from the appointment in terms of Section 34.

Section 34, release from appointment: (1) The authority shall release the appointed attorney from the appointment if the appointed attorney a) terminated his or her membership in the Bar, b) suspended his or her activity as an attorney, c) has his or her activity as an attorney suspended, d) is not listed in the register of appointed attorneys, e) is representing the adverse party in another case, f) is a family member (Section 13 (2) of the Civil Procedure Code), guardian, or conservator of the adverse party, g) has a conflict of interest with the defendant or the represented person. (2) The appointed attorney shall report to the authority
the existence of the situation referred to in (1). (3) The
authority may release from appointment the appoint-
ed attorney if a) the attorney would need to proceed
outside the operational area of the Bar, b) any cir-
cumstances that would hinder the fulfillment of the
appointment have arisen, c) the defendant or the rep-
resented person requests based on a well-founded rea-
on the release of the ex officio defense counsel. (4) When
adjudicating the request for release referred to
in (3), attention should be paid to that the appointed
attorney should be the same person throughout the
case.

Section 35, the register of appointed attorneys: (1) The
Bar shall maintain a register of attorneys who may be
appointed. (2) The authority may appoint an attorney
from the register received from the Bar.

Section 36: (1) The Bar shall compile the register of
appointed attorneys, taking care that the number of
attorneys on the register is commensurate with tasks
requiring appointment and effective operation of the
justice system. (2) The Bar shall establish the rules for
compiling the register of appointed attorneys, taking
care that, in addition to voluntary registration, attor-
neys be represented in the register in an equal manner.
(3) The Bar shall inform the authorities about any
change in the register of appointed attorneys within
fifteen days of the change.

Section 67 (3) of the Civil Procedure Code: Unless
otherwise prescribed by law, legal representation shall
not be mandatory in procedures regulated by the act.
Section 73/A of the Civil Procedure Code: Legal repre-
sentation is mandatory:

in the procedure before the Supreme Court for the party
submitting an appeal (request for review),
in other cases specified by law.

Section 73/C (1) of the Civil Procedure Code: In the appli-
cation of Section 73/A, a legal representative shall be
(a) the attorney (law firm).

Section 73/B of the Civil Procedure Code: If legal repre-
sentation is mandatory, the procedural actions and
statements of the party who has no legal representa-
tive shall be invalid, except if law excludes proceedings
by the proxy for the given procedural activity.

Decision no. 539/B/1997 of the Constitutional Court.

Supreme Court Pe. III. 20657/1992.
Interview with János Zimnic.
The government plan of Péter Medgyessy, parlia-
and 4.6; see http://www.kormany.hu/.
Letter by Minister of Justice Péter Bárándy to the
Hungarian Helsinki Committee, 18 September 2002.

Section 2 of the Public Administrative Procedure: (5)
In the public administrative procedure, both Hungarian
and foreign citizens enjoy full equality before the
law and their cases shall be dealt with without any
discrimination and partiality. In public administrative
procedures, everyone has the right to use their moth-
er tongue orally and in writing. No one shall suffer for
not knowing Hungarian. (6) In the public administra-
tive procedure, the client has the right to make state-
ments and to seek legal remedies; the client is obliged
to cooperate to the best of his or her knowledge. In
the interest of the above, the proceeding organ shall
inform the client about his or her rights and obliga-
tions.

Section 18 of the Public Administrative Procedure:
(1) If law does not prescribe that the client shall pro-
ceed in person, his or her statutory representative or
proxy may proceed on his or her behalf. (2) If the client
does not proceed in person, the public administrative
organ may examine the right of representation of the
proceeding person. A legal regulation may require a
specific format for certifying the right of representa-
tion. (3) The public administrative organ may refuse
a proxy who is not suitable to perform representation,
or if he or she does not certify his or her right to rep-
resentation. (4) The guardianship authority shall
appoint a curator ad luem for the person who is at an
unknown place or is unable to proceed in the case on
his or her own and has no statutory representative or
proxy.

Letter by the head of the Department for Judicial
Administration and Codification to the Hungarian
Helsinki Committee, 13 August 2002.
For details, see http://www.im.hu/fooldal/cikk/
cikk.phtml?cikkid=1082.
125 Letter by the head of the Department for Judicial Administration and Codification to the Hungarian Helsinki Committee, 13 August 2002; for information from the Web site of the Ministry of Justice (in English), see http://www.mim.hu/violdal/cikk/cikk.phpml?cikkid=1246.
126 Interview with Zoltán Tallódi, official at the Human Rights Department of the Ministry of Justice, 10 September 2002.
129 Interview with János Zimnic.
130 Interview with Zsuza Sándor.
131 Károly Bárd.
132 Fenyvesi, p. 118.
133 Ibid., p. 120.
134 Ibid., p. 122.
135 Ibid., p. 126.
137 Pesti Úgyvéd, 2002/6, pp. 1–2.
138 Interview with A. K., attorney practicing in Budapest, 13 September 2002.
ACCESS TO JUSTICE COUNTRY REPORT: LATVIA

Solvita Harbacevica

EXECUTIVE SUMMARY

The Latvian Constitution (Satversme), in its Article 92, contains explicit guarantees of the rights of the defendants in criminal cases, including the right to a “fair court,” the right to be presumed innocent until their guilt has been established in accordance with the law, and the right to the assistance of defense counsel.

The Law on Judicial Power further details the constitutionally guaranteed right to a fair trial and, in its Article 22, determines that a defendant has the right to counsel. This right of a defendant during the adjudication of a matter shall be ensured by the court and is guaranteed by the state. The court is to appoint a defense counsel to a defendant who does not have a lawyer but requests one. If he or she cannot afford the lawyer’s fees, upon a decision by the court they will be paid from the state budget. If a criminal case has been examined without the presence of a defense counsel and the minutes do not contain an express refusal by the defendant to be represented by a lawyer, this can serve as an effective ground for appeal.

The investigative institution, prosecutor, court examining the case, and the Latvian Council of Sworn Advocates are authorized, in accordance with the procedure set out in Latvian law, to grant full or partial legal aid to defendants. If the investigative institution, the prosecutor, or the court has granted free legal aid, the lawyer’s fee is covered by the state budget according to a procedure set by the Cabinet of Ministers. After the proceedings have concluded, a convicted defendant may be ordered to reimburse these expenses.

No special procedure or criteria for determining indigence and granting free legal aid have been further established in the law. In practice, therefore, every person claiming that he or she cannot afford lawyers’ fees is granted free legal aid. If the person is subsequently sentenced, he or she will be required to repay the court’s expenses, including the lawyer’s fees. Nor-
mally full repayment is ordered, but in exceptional cases the court can reduce this sum. However, in practice only a small fraction of these expenses is usually recovered, as those who have been convicted often lack resources, and only a small number of them are employed while imprisoned.

This situation might raise a concern about compliance with the European Convention on Human Rights and Fundamental Freedoms (ECHR). Article 6(3)(c) of the ECHR does not prohibit a contracting party from requiring that a convicted person pay the costs of any free legal assistance that has been given, if he or she has the means to do so. Nonetheless, the possibility of having to repay the cost of legal aid might cause the accused to defend himself or herself without assistance, which might compromise the interests of justice. When reading the Convention’s use of the word “given,” it might go too far to consider the grant irrevocable, but the obligation to reimburse should be imposed only in a narrower class of cases than it currently is.

Legal aid is provided at all stages of the criminal proceedings. Lawyers’ fees for participating in an initial investigation, for becoming acquainted with the materials of the case, and for taking part in court proceedings are all covered. Travel expenses are also paid, based on the documents presented. However, costs for private investigation and expert witnesses are not covered.

There is no general right to free legal aid for the victims of a crime, with the exception of minors. For this category of victims, the proceeding authority (the investigator, prosecutor, or the court) may decide to invite a counsel, if it would be difficult to protect the child’s interests otherwise or if the child’s family or a children’s protection organization has submitted a motivated request. In such cases, a lawyer’s fee is covered by the state budget according to a procedure set by the Cabinet of Ministers.

The total sum granted by the state budget for legal aid is Ls 400,000.¹ There is no separate budgetary line for legal aid, however, so this sum is included in the program of the district/city and regional courts.

For civil cases, there is no state-supported legal aid system. Fortunately, three factors alleviate the potential problems that this lack of funding might create in terms of access to justice: the prosecutors’ role in the civil procedure, the possibility to waive court fees, and free legal aid granted by the Bar.

In brief, future reform efforts may have to tackle several substantive issues in the area of legal aid:

**Criminal law**

- Clear criteria need to be set for receiving free legal aid. In addition, criteria are necessary as a guide for judges as to when and to what extent a convicted person has to reimburse these expenses to the state.
- Coverage should be extended to the victims of crime, covering at least the people who have suffered from physical and sexual violence.
- Minors should be provided with legal
aid in all cases, with no discretion allowed on this matter. Free legal aid should also be provided when a person commits a crime as a minor, even if during the investigation or trial he or she reaches the age of eighteen.

**Civil Law**

- A system of legal aid in civil cases must be established, which will identify those cases when granting legal aid would be appropriate. This list can be extended in the future, but initially it should comprise at least those cases related to housing (eviction), family law, and labor law. Certain limited discretion should be given to judges, allowing them in exceptional circumstances to grant legal aid in other cases as well.

The institutional mechanism ensuring this aim should be integrated with the other developments in the area of judiciary. The task of the Judicial Administration is to create suitable working conditions in the courts so as to ensure the proper application of judicial power and judicial independence. The management of the legal aid system fits in with this overall aim and in principle should be entrusted to the Judicial Administration. Finally, it is important that the system also include a procedure for monitoring its implementation at the pretrial stage.

1. **Introduction**

The total population of Latvia is approximately 2.4 million people. The court system of the country consists of 34 city/district courts, 5 regional courts, a Supreme Court, and a Constitutional Court (Satversmes Tiesa). There are approximately 400 judges.

District/city courts form the first level of the court system. They were established mainly according to the administrative territorial divisions of the Republic of Latvia. The regional courts form the second level of the court system and were established according to the historical and existing regions of the state. The territorial jurisdiction of each regional court covers a particular number of district (city) courts.

The subject-matter jurisdiction of district (city) courts and regional courts is determined by the relevant criminal procedure and civil procedure laws. District (city) courts are the courts of first instance for civil matters, criminal matters, and matters arising from administrative legal relations, except for those within the jurisdiction of regional courts and the Supreme Court. A regional court is the first-instance court for certain criminal and civil matters. Regional courts also hear appeals for cases that have been adjudicated by the district (city) courts in the first instance.

The Supreme Court is the highest level of the court system in Latvia and is composed of the Senate and two Court Chambers—the Civil Chamber and Criminal Chamber. The Senate is composed of three departments: the Civil Department, the
Criminal Department, and the Administrative Department.

The Chamber of the Supreme Court hears appeals for matters that have been adjudicated by the regional courts as courts of first instance. The Senate of the Supreme Court is the court of cassation for all matters that have been adjudicated by district (city) courts and regional courts.

The Latvian Bar (Advokāta) is an independent, professional association of sworn Latvian lawyers. The executive body of the Bar is the Latvian Council of Sworn Advocates. It organizes the admission of members, supervises the activities of the lawyers and their assistants, reviews complaints and reports, and imposes disciplinary penalties. The structure of the Bar covers the territory of the entire state. Sworn advocates working in the regions are linked to the respective regional courts and headed by the “sworn advocate elder” (zvērinātu advokātu vecāks) of the advocate’s court region. There are approximately 660 sworn advocates and approximately 83 assistants of sworn advocates.

To date, Latvia has not entered any specific international agreements in the area of legal aid. However, as a member of the Council of Europe and bound by the ECHR, the state has assumed the international obligation to observe certain standards in the area of legal aid, as provided by Article 6 of the ECHR and elaborated by the European Court of Human Rights (ECHR) in its case law.

2. CRIMINAL LAW: EFFECTIVE ACCESS TO THE JUDICIAL SYSTEM FOR THE INDIGENT IN CRIMINAL CASES

2.1 RIGHT TO COUNSEL

2.1.1 Constitutional guarantees of the right to counsel and the right to legal aid

The Latvian Constitution (Satversme) was adopted on 15 February 1922 and came into force on 7 November 1922. A new Chapter VIII, “Fundamental Human Rights,” was added by amendment on 15 October 1998. Among other things, it provides for the following principles and individual rights: the principle of legality; the right to know one’s rights (Article 90); the right to equality before the law and the prohibition of discrimination; the right to a fair trial; the right to be presumed innocent until guilt has been established in accordance with law; the right to compensation in cases where the rights of the individual have been violated without basis; and the right to the assistance of counsel.

Since the introduction of the right to bring an individual constitutional complaint, the Constitutional Court (Satversmes Tiesa) has received and ruled on many individual cases. Several of these cases have dealt with Articles 90, 91, and 92 of the Satversme. The questions of legal aid—either of information about its availability or of any other state obligations—have not been raised so far before the court. Important for the interpretation of the defendant’s rights in
a criminal proceeding is the decision in case
2001-10-01, in which the Satversmes Tiesa
held the following:

Also the notion of “fair court,” incor-
porated into Article 92 of the Satversme,
includes two aspects, namely, a “fair
court” as an independent institution of
the judicial power and “a fair trial” as an
adequate process, characteristic to a law-
based state in which the case is being
reviewed. In the first aspect this notion
shall be read together with Chapter VI
of the Satversme, in the other—togeth-
er with the principle of a law-based state,
which follows from Article 1 of the
Satversme. Article 92 of the Satversme
provides both—the duty of establishing
a specific system of court institutions
and the duty of passing corresponding
procedural norms.

Thus Article 92 of the Satversme
requires a system in which criminal matters
shall be reviewed by a fair, objective court
and in a procedure that ensures fair and
objective court review.9

2.1.2 Right to counsel in criminal proceedings

The constitutional guarantees of the right
to a fair trial are further detailed in the Law
on Judicial Power.10 In its Article 22, the
defendant has the right to the assistance of
counsel. This right is ensured by the court
and guaranteed by the State. The court has
to appoint a lawyer to a defendant who
does not have a defense counsel but
requests one. If he or she cannot afford
lawyers’ fees, these fees will be paid from
the state budget upon a decision by the
court. If a criminal case has been examined
without the presence of a defense counsel
and if the defendant did not refuse legal
representation, this can in any case serve as
an effective ground for appeal.

The right to counsel (and, derived from
that—under certain circumstances—the
right to free legal aid) applies to all stages
of criminal proceedings, including appeal
and cassation.

The right to counsel in the criminal pro-
cedings arises at the moment a person is
arrested or when a security measure is
applied against him or her,11 according to
the procedure provided by law.

Before the first interrogation, which
should take place no longer than twenty-
hours after that person’s detention,
the relevant proceeding authorities are
obliged to explain the rights to the
accused.12 The minutes of the interrogation
should contain a special reference to the fact
that the rights of the accused have been
explained to him or her. The accused has
to sign this part separately.

Article 97 of the Criminal Procedure
Code (CPC) determines the rights and
obligations of the defense counsel. He or
she has the right to meet with his or her
client, to submit evidence, to submit chal-
lenge requests, to participate in inter-
rogations and court proceedings, and to
submit complaints about the actions and
decisions of the proceeding authorities.
On his or her own initiative or upon request by the defendant or the relevant proceeding authority, the defense counsel participates in any procedural actions. If the defense counsel cannot participate in a procedural action where his or her participation is requested, the investigator has to postpone it. If the Criminal Procedure Law provides for an obligatory participation of defense counsel, but he or she has not been present, information acquired in a procedural action cannot be used in court or the action itself is invalid.

A person can become a suspect in two ways: either a person is arrested or a measure of restraint is applied against the person before bringing a charge. Arrest is regulated in Article 120, CPC. A person suspected of committing a crime for which the Criminal Code provides the sanction of deprivation of liberty can be arrested (initially for no more than seventy-two hours) on the basis of a decision of the prosecutor or the investigator. The person can be arrested if caught while committing a crime, if there are eyewitnesses to the crime, or if evidence of the commission of a crime has been found on the person’s clothes or at his or her home. If there are other grounds to suspect that a person has committed a crime, the person can be arrested only if he or she has attempted to escape, if he or she does not have a permanent place of residence, or if his or her identity is unknown.

Measures of restraint are listed in Article 69, CPC. They are: required certification by signature that he or she will not change the place of residence, bail, police supervision (whereby the person has to report regularly to a police inspector), house arrest, and imprisonment (Article 76, CPC). A military person can be placed under the supervision of his or her commanders. A minor can be placed under the supervision of his or her parents.

According to Article 76, CPC, a person can be detained before trial if a crime has been committed for which the Criminal Code provides a sentence with a deprivation of liberty. Pretrial detention can be applied only by a decision of a judge on the basis of evidence submitted by an investigator or prosecutor. The defense counsel should be present at the hearing.

The investigative institution, prosecutor, and the court examining the case, as well as the Latvian Council of Sworn Advocates (Zvērinātā advokātu padome), are authorized to grant full or partial free legal aid to the defendant in accordance with the procedure set out in the legal acts of the Republic of Latvia. If the investigative institution, the prosecutor, or the court has granted free legal aid, the lawyer’s fees are covered by the state budget according to a procedure set by the Cabinet of Ministers. The defendant might be ordered to reimburse these expenses after the proceedings.

The CPC determines certain instances when participation of defense counsel is mandatory:
1. If the defendant is a minor (under the age of eighteen). There are no special
procedures for trying cases of minors; however, the Code of Criminal Procedure provides for several additional procedural guarantees.
2. If the defendant is deaf, blind, unable to speak, or unable to defend himself or herself due to some other physical or psychiatric disability. As there is no special list of medical conditions, it is left to the discretion of the proceeding authority to decide whether the condition qualifies for mandatory defense. There is no evidence that this would cause problems in practice.
3. If the defendant does not know the language of the trial. This provision applies equally to foreigners as to residents of Latvia.
4. If the case involves a crime for which the death sentence can be imposed. In practice, however, only a small fraction of these expenses are recovered, as the convicts often simply lack the resources to do so; only a small portion of them are employed while imprisoned. This situation might raise concerns about noncompliance with the ECHR. Article 6(3)(c) of the ECHR does not forbid a member state to require a convicted person to repay the costs of legal assistance that he or she has been given if the convicted person has the means to do so. Nonetheless, the possibility of having to repay the cost of legal aid might lead an accused to defend himself or herself without assistance, which would compromise the interests of justice. In reading the Convention formulation “given,” it might be a stretch to consider the grant irrevocable, but stricter requirements are necessary if the reimbursement obligation is to be imposed.

In summary, the access to legal aid for suspects in criminal cases is simple and straightforward. In practice, no attention is given to determine whether the suspect
is indeed indigent. That would be difficult to do, as no criteria have been set by the legislation. Nearly all convicts are asked to repay the expenses incurred by the state, but actually recouping this loss proves extremely difficult. Thus, from the state’s perspective, the present situation can be viewed as ineffective and costly.

2.1.3 Right to counsel and the right to legal aid in non-criminal proceedings when deprivation of liberty is at stake

Proceedings for placement in special schools

Application of coercive educational measures to minors is regulated by a special law. This law provides for the possibility of applying coercive educational measures to minors (11-18 years old, without further distinctions) who have committed criminal offences stipulated in the Criminal Code. The decision to apply such measures is made by the court or by a single judge if the criminal case is finished or has been sent to the court for their application. The law provides for a range of coercive measures, from a warning by the court, to compensation for the harm done, to release on bail or to placement in a re-educational establishment. When necessary, these establishments have to provide medical treatment for alcoholism and drug addiction.

The minor, his or her parents, the child protection inspector, defense counsel and the prosecutor have to be present at the court hearings. According to Article 19 of the law, the judge has the right to grant — in part or in full — legal aid to the minor and his or her parents.

Proceedings for placement in special psychiatric clinics

The Law Regarding Medical Treatment provides that people with psychiatric illnesses are guaranteed their civil, political, economic, and social rights and should not be discriminated against on the ground of their medical conditions. Psychiatric treatment is voluntary, or it can be carried out against the will of the patient in the following cases: if a person causes a threat to his or her own life and health or that of others; if such behavior is noted by the person’s doctor; if the illness does not permit a person to make a conscious choice about treatment; or if the lack of treatment could lead to a serious deterioration of health and social status or disturb public order.

If such a person causes a disturbance of the peace, he or she can be arrested and brought to a psychiatrist by the police. The police are to give a written report to the psychiatrist about the nature of the patient’s behavior.

If a patient is hospitalized against his or her own will, a council of psychiatrists must examine the person within seventy-two hours and make a decision about any further treatment. This decision has to be announced to the family. In theory, the decision about placement in a psychiatric hospital is an administrative act. It can be
appealed (by a representative of the patient) to the Office for Medical Treatment and Quality of Capacity for Work Expertise, an institution under the Ministry of Welfare. The decisions of this office can be further appealed to the courts. In practice, however, it is very difficult, if not impossible, to initiate judicial review, as the patient is confined to the hospital and his or her representatives often have problems accessing relevant documents.

The present procedural rules do not provide for legal aid in such cases. With the entry into force of the new Administrative Procedure Law, however, there will be an opportunity for the judge to decide to grant remuneration to a representative of the individual. This clause could at least partially remedy the situation. In addition, the new Administrative Procedure Law is premised on the principle of finding the objective truth, and so in theory the judge personally would have to secure the rights of the patient. However, the person remains fully dependent on his or her representative to bring the case to the attention of the authorities and, eventually, to the court.

**Procedures related to complaints of prisoners and convicted people**

This form of supervision is carried out by the Prosecutors’ Office. In practice, the prosecutor visits the prison at least once a month, and those who are detained can make an appointment. Another developing form of controlling prison conditions is the constitutional complaint that an individual can submit to the Satversmes Tiesa. By this process, prisoners have been successful in challenging several internal regulations of the prison administration. However, no free legal aid is available for this proceeding.

In addition, according to the Enforcement of Punishments Code, a convict receiving free legal aid has the right to meet with his or her lawyer. The number of these meetings is not limited, and they are not included in the number of long- and short-term meetings provided for in the code. Meetings can take place only during the working hours of the detention facility. The content of conversations is not controlled, and, if the lawyer wishes, nobody else may participate in the meeting.

There are two other recent initiatives relevant to the protection of the legal rights of prisoners. First, the prison administration is working on creating a position of legal counsel in each prison. The consultations by the member of the prison staff would be available free to the prisoners. For obvious reasons, this cannot be an effective mechanism for supervision of the prison administration. However, its role would be beneficial in helping to solve the manifold social and civil law problems of the prisoners. Second, beginning this year, a legal clinic will be established in the Police Academy. Within the framework of this project, students work in prisons, counseling the inmates.
Procedures for temporary restriction of liberty of drug users, persons suffering from alcoholic addiction, or similar groups

According to the law on medical treatment, upon conditional release and with the agreement of the person, a drug user or person suffering from alcohol addiction can be ordered by the court to receive treatment in a specialized hospital. As this can happen only within the framework of a criminal case and according to the criminal procedure, legal aid is available.

Procedures for detention of foreigners in connection with violations of immigration laws

According to Article 92 of the Satversme, “Everyone has the right to the assistance of counsel.” This provision also applies to foreigners. There are few refugees or asylum seekers in the country. In the past, there have been some difficulties in finding a suitable lawyer (one who has mastery of both the languages spoken in Latvia and that of the detained person, and whose contact information is available) with physical access to the centers where these persons are placed.29 At present, however, these problems seem to be solved by providing adequate facilities and training to staff in the Ministry of Interior that deals with these matters.

2.2 RIGHT TO LEGAL AID: Eligibility criteria for granting legal aid in criminal cases

2.2.1 Substantive criteria

Article 98, CPC, determines the circumstances in which the defendant must be represented by a lawyer. In a criminal case, the accused can opt to represent himself or herself or hire a lawyer, but in practice if he or she informs the judge of an inability to cover the costs of legal aid, a lawyer is provided free of charge. As a part of a judgment, the court decides whether and to what extent the convicted person will have to reimburse the state for these expenses (in full or part, or not at all). As already explained above, the CPC makes reference to “procedure set out in the legal acts of the Republic of Latvia,” but no special procedure or criteria have been set for determining indigence for purposes of granting free legal aid. Therefore, in practice, every person claiming that he or she cannot afford to pay lawyers’ fees is granted free legal aid.

2.2.2 Financial

There are no special tests of indigence or income thresholds for granting legal aid. When deciding whether to relieve the defendant of his or her obligation to repay the costs of legal aid, the court will look at any
evidence provided. Normally, sufficient evidence for this decision is available only in cases where confiscation of property is at stake, but it is a common (though probably dubiously effective) practice to order full reimbursement.

On the question of a defendant’s obligation to reimburse court costs and expenses, including the expenses for legal representation, see section 2.1 above.

2.2.3 Other eligibility questions

Legal aid for non-citizens

The decision to grant legal aid does not depend on nationality.

Barriers for disadvantaged groups

Free legal aid in criminal cases will be provided to anyone who claims to need it, so there is no special provision for any disadvantaged groups. The court will not accept a person’s refusal of a court-appointed lawyer on the grounds that he or she cannot repay the lawyer’s fees. Requiring reimbursement of the expenses for legal aid is at issue only if the person is convicted.

2.2.4 Legal aid for victims of crimes

There is no general right to free legal aid for the victims of a crime, with the exception of minors. For this category of victims, the proceeding authority can decide to appoint a lawyer if it would be difficult to protect his or her interests otherwise, or if the child’s family or children’s protection organization has submitted a request with reasons. In these cases the lawyer’s fee is covered by the state budget, according to the procedure set by the Cabinet of Ministers.30

Although there is no free legal aid for victims of crimes, the prosecutor theoretically acts in their interests in criminal cases. In addition, court fees may be waived for civil actions filed in criminal proceedings. According to criminal procedure law, a person who has suffered damages as a result of a criminal offense has the right to bring a civil lawsuit against the accused or against those persons financially responsible for the actions of the accused. This civil lawsuit is examined together with the criminal case. The victim is also entitled to ask the proceeding authority (that is, the investigator, prosecutor, or judge) to take care of securing the civil suit.31 No state tax has to be paid for a civil lawsuit in a criminal case.32

2.3 Other cases

As there are no particular eligibility criteria, this question is irrelevant.
2.4 Procedure for Granting Legal Aid

The proceeding authorities are required to explain to people involved in criminal proceedings what their rights are, and to facilitate the exercise of these rights.33

Thus, the police shall provide those who are detained with the opportunity to exercise their right to be assisted by a defense counsel in the criminal proceedings.34 If the person does not have his or her own counsel, the police (or the relevant proceeding authority) will contact a defense counsel and appoint him or her to represent the interests of the accused. Before the first interrogation, which should take place no longer than twenty-four hours after detention, the proceeding authority should inform the accused about his or her rights and explain them.35 The standard written form for the interrogation of the suspect contains a special point on his or her rights, specifically indicating the right to counsel.

The same is true for the trial stage. If the minutes of a court session do not indicate either the presence of counsel or a clear refusal by the suspect to be represented, it can always serve as an effective ground for appeal and reversal of the judgment.

Legal aid is granted ex officio only for cases in which participation of defense counsel in the proceedings is mandatory as provided by Article 98, CPC (see section 2.1.2). In other cases, defense counsel is appointed only upon the request of the defendant to the proceeding authority. This request can be submitted either in writing or orally; the law does not prescribe a specific form. If the person is detained, this request is submitted upon meeting with the investigator or through the prison authorities.

The defendant can either request or refuse legal aid at each stage of the criminal proceeding. Therefore, the decision to grant legal aid is taken by the proceeding authority in charge of the relevant stage of the trial: the investigator, prosecutor, or the court. Normally, the accused is present before the proceeding authority, which decides on the request for legal aid and can be asked directly on this question.

At first, the accused is given the opportunity to contact the lawyer of his or her choice and to agree on representation. The fact that the accused has contacted a lawyer of his or her own choice does not waive the right to receive legal aid. If this lawyer agrees to represent the accused, the fee will be covered by the state. If the accused does not succeed in hiring a lawyer, the police or the prosecutor should contact counsel on his or her behalf. According to the police, they do not experience a shortage of lawyers who are willing to work on cases paid for by the state. The courts in Riga usually identify lawyers for these cases through the Bar. In Riga, the police, the Bar, and the Courts seem to agree that the system functions smoothly provided sufficient state financing. Problems can arise in the countryside, where in certain
regions there are not enough lawyers, and appointing them from other administrative districts takes more time. The lawyers’ travel expenses are covered by the state budget.

Decisions to grant or refuse legal aid can be appealed before the higher-instance court as part of the appeal of the judgment; as described above (see section 2.1), legal aid is usually granted in most of the cases in which it is sought.

The decision to refuse legal aid can affect the stability of the judgment. If the minutes from a court session do not indicate either the presence of counsel or a clear refusal by the accused to be represented, that fact is an effective ground for appeal and reversal of the judgment.

2.5 Scope of legal aid

Legal aid is provided for all stages of criminal proceedings. The lawyer’s fees are paid for participation in the initial investigation (Ls 25 per day), for becoming acquainted with the materials of the case (Ls 25 in total, unless the case is very long and requires more than a day), and for participation in court (Ls 25 for a day). Travel expenses are also covered, based on the documents presented. Private investigation and expert witnesses are not covered. There are no advice centers in the prisons (besides the legal clinic currently being established in the Police Academy, described below; see section 4.2.)

2.6 Application of the legal aid norms in practice

The legal aid in criminal cases is easily available and sufficiently financed. However, the system should be further structured through development of clear criteria for granting legal aid. Control over the quality of the legal aid needs to be further developed, providing the court with a role in quality control.

2.7 Quality of free legal representation and evaluation

According to the Law Regulating the Bar (Advokātiņa), sworn advocates shall be disciplinarily and materially responsible for their actions. The Latvian Council of Sworn Advocates may start a disciplinary case against a lawyer for violations of the law or of the instructions regulating the activities of sworn advocates and the norms of professional ethics. The Council will start a disciplinary proceeding upon receiving either a recommendation to this effect from the court or the prosecutor or a complaint from a party to the court proceedings, or upon its own initiative.

In practice, most of the complaints received by the Council of Sworn Advocates come from the law enforcement institutions and clients. In 2000, seventy-eight complaints were filed and fourteen penalties were imposed. Seventy complaints were filed in 2001. Of course, only a small proportion of these relate to cases of free legal aid.
Upon opening a disciplinary proceeding, the Council of Sworn Advocates can temporarily discharge the sworn advocate from his or her duties during the time the case is being heard. For actions that breach the duties of a sworn advocate, the advocate may be warned, reprimanded, designated to another location for practice, prohibited from practicing law in a specific location for a period of up to three years, prohibited from carrying out the duties of an advocate for no longer than a year, or disbarred. The lawyer subjected to disciplinary proceedings and the party who has initiated the proceeding can appeal the decision of the Council to the courts.

If the sworn advocate has permitted an infringement of the rights of a client resulting in some kind of damage to the client, the client is entitled to compensation.

Based on discussions with representatives of the Ministry of Justice, prosecutors, state police, and the courts, the general conclusion emerging is that in criminal cases the system functions comparatively well when sufficiently funded. The most pressing issues here include the shortage of lawyers in some regions, a lack of special training for lawyers, and poor quality control over the legal aid delivered. Victims, especially for crimes involving physical aggression, should be provided with legal aid. Criteria set for acquiring and reimbursing legal aid should be elaborated.

3. CIVIL LAW: EFFECTIVE ACCESS TO THE JUDICIAL SYSTEM FOR THE INDIGENT IN CIVIL CASES

According to the Civil Procedure Law (Civilprocesa likums), every person is entitled to defend, via the civil courts, his or her rights and his or her interests protected by the law. There is, however, no state-supported legal aid system in civil cases. Three factors alleviate the problems this lack of funding might present with respect to access to justice for the indigent: the role of the prosecutor in the civil procedure, the possibility to waive court fees, and the free legal aid granted by the Bar.

Role of the prosecutor

Having received information concerning a violation of law, a prosecutor, in certain circumstances, shall carry out an examination in accordance with the procedures prescribed by law. The prosecutor must investigate if the victim of the violation is a person without the capacity to act, has a restricted capacity to act, is disabled, is a minor, is imprisoned, or otherwise has a limited capability to protect his or her own rights.

According to the Office of the Prosecutor Law, the prosecutors shall bring an action before the court in cases of violations of individual rights on behalf of persons lacking legal capacity to act, disabled persons, minors, prisoners, or other such persons who have limited means to protect their rights.
According to data provided by the Prosecutor General’s Office, 11,440 complaints were filed under this procedure in 2001, almost half (6,678) in non-criminal matters. In a number of cases, the prosecutors established violations of the law and have issued 47 warnings, 83 protests, and 114 applications to court. During 2001, a total of 3,272 individuals turned to prosecutors in person.43

**Waiver of court fees**

According to the Civil Procedure Law, the costs of the court proceedings consist of court costs and costs related to conducting the matter.44 Court costs are composed of state fees, office fees, and costs related to adjudication. Costs related to conducting the matter are costs of assistance of sworn advocates, of attending court sittings, and of gathering evidence.

A state fee is paid for each claim: original claims or counterclaims; applications of third-party statements of claim with an independent claim regarding the subject matter of the dispute, submitted in proceedings already commenced; applications in special adjudication procedure matters; and other claim applications provided for in this section, submitted to the court.

Several categories of litigants are exempted from paying court costs.45

**A. Plaintiffs**

- for claims regarding recovery of remuneration for work and other claims of employees arising from legal employment relations;
- for claims arising from personal injuries that result in mutilation or other health impairment, including the death of an individual;
- for claims regarding recovery of support payments;
- for claims regarding compensation for financial loss and non-financial injury resulting from criminal acts.

If a plaintiff is exempted from court costs, recovery of such court costs, in proportion to that part of the claim that has been satisfied, may be adjudged against the defendant for payment to the state. If both parties are exempt from payment of court costs, the court costs shall be assumed by the state.46

**B. Applicants in non-contentious proceedings**

- in matters regarding the establishment of a lack of capacity to act, and establishment of trusteeship;
- in cases concerning the establishment of trusteeship for a person because of a dissolute or spendthrift lifestyle, or excessive use of alcohol or drugs;
- involving a spouse and heirs of the first and second degree, in that part of inheritance matters regarding inheritance of privatization certificates.
C. Defendants in matters regarding reduction of support payments adjudged by a court, and reduction of such payments as the court has assessed in claims arising from personal injuries resulting in mutilation or other health impairment, or the death of an individual; court expenses are covered by the losing party.

D. Prosecutors, state or local government agencies, and people authorized to defend the rights and legal interests of others in court.

The parties may also be exempted from payment of court costs in other cases provided for by law. A court or a judge is entitled, upon considering the financial situation of a person, to exempt him or her partly or fully from payment of court costs to the state, to postpone payment of assessed court costs, or to divide payment into installments. An ancillary complaint may be submitted in regard to a decision concerning an issue related to court costs.

If the plaintiff’s claim has been granted fully or in part, or if the plaintiff does not maintain the claims because the defendant has voluntarily satisfied them after the action is brought, the defendant should cover the plaintiff’s costs related to conducting the matter. If the action is dismissed, the costs related to conducting the matter shall be adjudged as against the plaintiff and in favor of the defendant.

**Free legal aid by the Bar**

According to Article 34 of the Law Regulating the Bar, the Latvian Council of Sworn Advocates shall provide legal assistance through consultations with indigent persons. This provision is not limited to oral consultations and may include court representation, drafting of legal documents, and written consultations, depending on the client’s needs.

As the state covers the costs of legal assistance in criminal matters, the Bar partially fills the gap for civil cases. The system is organized as follows: Applications for free legal aid, together with documents establishing indigence, are submitted to the Council of Sworn Advocates. The nine-member Council examines the request in its regular meetings and votes on the matter. There is no possibility to appeal the decision, but the request can be resubmitted with additional evidence. In practice, there are certain categories of cases in which it is relatively easy to get free legal aid, for example, in labor law disputes, disputes related to housing, and disputes related to protection of minors. In cases in which the plaintiff seeks material benefits (for example, inheritance), free legal aid is not normally granted.

Once the decision to grant free legal aid is made, the matter is forwarded to the district’s practicing “sworn advocate elder” who nominates the advocate for the case. When the advocate is nominated by the Council of Sworn Advocates, his or her pay is covered by the resources of the Council.
Alternative dispute resolution (ADR) and similar schemes

Alternative dispute resolution mechanisms exist for some labor law disputes. ADR is applied with regard to collective labor agreements. Thus, according to the Labor Law, disputes involving rights and interests arising from collective labor agreements shall be settled by a conciliation commission. This commission is established by the parties to a collective agreement and consists of an equal number of representatives of each party to the agreement.

In case of a dispute, the parties to the collective agreement draw up a report explaining the differences in their positions and submit it to the conciliation commission within a three-day period. The conciliation commission examines the report within seven days.

The conciliation commission resolves the issue by agreement. The decision is binding on both parties to the collective agreement and has the validity of a collective agreement. If the conciliation commission does not reach an agreement on the dispute, the case is referred to the court or a special arbitration board.

Disputes arising from breach of contract in the banking sector are widely referred to arbitration bodies, rather than to the court.

At present, the Ministry of Justice is drafting amendments to the Civil Procedure Law. Among other things, these amendments would provide for the possibility of extending the use of ADR to housing disputes and divorce cases.

In a discussion with representatives of the Ministry of Justice and other legal practitioners, the consensus was that a legal aid system for civil cases should be established, but there is not yet a common opinion about how broad it should be.

4. Public law: Effective access to the judicial system for the indigent in administrative and constitutional cases and cases before international tribunals

Administrative Procedure Law

On 1 January 2003, a new Administrative Procedure Law (Administratīvā procesa likumi) entered into force. Until then, all administrative cases were tried according to the Civil Procedure Law, and therefore the same principles applied (see section 3).

According to the new law, the administrative proceedings will consist of two stages: administrative proceedings in an institution, and administrative proceedings in court. Administrative proceedings in an institution shall be free of charge for all people, unless otherwise prescribed by law.

If the complaint is brought to court, the petitioner should pay a state fee determined in accordance with the procedures and in the amount set out in Chapter 13 of the law. Witnesses, interpreters, and forensic experts in administrative proceedings in court will be given remuneration from the state budget. The Cabinet shall determine the procedures and amounts to be paid. In
complicated administrative matters, pursuant to a decision of the institution or the court handling the matter, the fee of a representative of a party to administrative proceedings shall be paid from the state budget in accordance with a procedure and in an amount determined by the Cabinet.

**Constitutional Court Law**

According to Article 16 of the Constitutional Court Law, the Constitutional Court has jurisdiction over cases regarding: (1) compatibility of laws and international agreements (before and after ratification) with the Constitution; (2) compatibility of national legal norms with international agreements entered into by Latvia, which are not contrary to the Constitution; (3) compatibility of other normative acts or provisions with the legal norms (acts) of greater authority; (4) compatibility of other acts (with an exception of administrative acts) by the Saeima, the Cabinet of Ministers, the President, the Chairperson of the Saeima and the Prime Minister with the law; (5) compliance of regulations, by which the minister authorized by the Cabinet of Ministers has rescinded binding regulations issued by the Dome (Council) of a municipality with the law.

A person whose constitutional rights have been violated has the right to submit an application to the Constitutional Court seeking to establish that the act violating his or her rights is unconstitutional on grounds (1) through (3) mentioned in the preceding paragraph. In such cases, the State Human Rights Bureau is authorized to start a procedure with the Constitutional Court as well.

The constitutional claim shall be submitted only after exhausting all other legal remedies. In exceptional circumstances—if the review of the constitutional claim is of general importance or if the generally applicable legal remedies cannot avoid material injury to the applicant—the Constitutional Court may reach a decision to review the application before other legal remedies have been exhausted. In such cases the civil, criminal, or administrative proceedings are suspended until the Constitutional Court pronounces its judgment.

A constitutional complaint must be submitted to the Constitutional Court within six months from the date the decision of the final judicial instance becomes effective. The constitutional complaint does not suspend the execution of the court decision, unless the Constitutional Court has ruled otherwise.

Applicants in constitutional cases can be represented by lawyers authorized to practice law in Latvia. The lawyer has the same rights as the applicant and the other participants in the constitutional proceedings, except for participation in the closing of proceedings. There is no free legal aid available for these proceedings.
4.4 Alternative (Non-State Mechanisms)

Legal clinic at the University of Latvia
The legal clinic at the University of Latvia was established in 1999, and for its first three years it was financially supported by the Soros Foundation. Now the University of Latvia has completely taken over its financing. The legal clinic is a four-credit course in the general law school curriculum.

The work of the legal clinic is focused primarily on labor and housing disputes. It also attempted to deal with the subject of refugees and asylum seekers, but due to a lack of cases, this topic was abandoned. Recently the clinic has entered into cooperation with the Patient Rights Center and the Consumer Protection Center. It also consults the Non-governmental Organizations Center and cooperates with the local branch of Transparency International, Delna.

The legal clinic is well known to the citizens of Riga, and demand for its services exceeds its capacity; clients have to sign up and wait for an appointment. The clinic operates with eight permanent lawyers and lawyers’ apprentices, all of good professional reputation.

Legal clinic in the Police Academy
The legal clinic in the Police Academy, established in 2002 with the aim of providing legal counseling to prisoners, operates with seventeen students from the Police School and several practicing lawyers. Eight students teach street law in prisons, and nine serve as consultants for prisoners on civil law problems. The primary target group of this clinic is prisoners nearing the end of their terms. Through the services of the clinic, they receive information on social, housing, and family law matters. The program operates in two prisons: P?uciemis and Š?rotava, both located in Riga.

Legal clinic in Rēzekne
The clinic of Rēzekne—the only legal clinic outside the capital—is two years old and operates with students of R?zekne University. By working for the clinic, the students satisfy their requirements for professional training of their university legal education (professional praxis). The clinic does not have any particular specialization and deals with various legal problems.

Soros Foundation
The Soros Foundation supports the legal clinics and works with the problems of the mentally ill in psychiatric hospitals.

Human Rights and Ethical Studies Center
Since 1999, the non-governmental organization Human Rights and Ethical Studies Center has given free legal advice on human rights matters, especially concentrating on rights of prisoners, persons who have suffered from police brutality, and the mentally ill.
4.5 Implementation

As mentioned above, administrative cases are tried according to the Civil Procedure Law and do not figure separately in court statistics. Legal aid is available only through the Bar.

After discussions with representatives of the Ministry of Justice and other legal professionals, the general opinion with regard to the administrative cases was that an assessment of the needs and problems of this area should be postponed until after a period of practical experience with the new Administrative Procedure Law.

5. Organization of the System for Provision of Legal Aid

5.1 Special State Body Authorized to Administer the Legal Aid System

Before 1 January 2003, Cabinet regulations NR 216 of 17 June 1997 were in force. According to the regulations, legal aid expenses were paid from the budget allocated to the Ministry of Justice. Every fiscal quarter, the Ministry transferred these resources to the Council of Sworn Advocates, which managed the payments and submitted financial reports to the Ministry.

On 1 January 2003, Cabinet regulations NR 187 of 21 May 2002 enter into force and establish a new system for the management of the legal aid system. The Ministry of Justice will manage the pay system for legal aid cases. In order to receive payment, a lawyer will submit to the Ministry of Justice the court’s decision to grant legal aid from the state budget and a certificate of his or her participation in proceedings.

Lawyer’s fees will be covered by the state budget if: (1) the proceeding authority has pronounced a decision granting free legal aid to a person; (2) the lawyer has been appointed to participate in the pretrial investigation and in the court proceedings by the investigator, prosecutor, or the judge; or (3) the lawyer has been called to represent the interests of a minor.

After reviewing the submitted documents, the Ministry of Justice transfers payment to the lawyer within ten days. In exceptional cases, when checking documents requires more time, the pay can be transferred within a month.

If the lawyer requests payment for participation in the pretrial investigation stage, the Ministry of Justice sends a copy of the bank transfer documents to the investigative institution or the prosecutor, and these documents are included in the criminal case file.

Standard forms of invoices and certificates are attached to the regulations.
5.2 Role of the Bar Association in the Administration of the Legal Aid System

The Council of Sworn Advocates is the managerial and executive body of the Bar. According to the Law Regulating the Bar the Council is obliged to provide legal assistance in all cases to indigent persons through written consultation, representation in court, or other methods depending on the needs of the client. No further details of this obligation are given in the law, but in practice the functions of the Council differ in criminal and civil cases. As the state budget finances legal aid for indigent persons in criminal cases, the Council’s role in those cases is limited to occasional help with finding and appointing an appropriate lawyer. There is no formal procedure for these appointments.

In civil cases, the Council decides on request whether to grant legal aid, and then finances it from its own funds. Members of the Bar cannot refuse to fulfill duties assigned to them without providing justification. The quality of representation is regulated only by examining the complaints and does not seem to be effective (see sections 3 and 5.1).

5.3 Role of the Courts

If defense is mandatory or requested by the defendant, it is the obligation of the court to secure the participation of a defense counsel. The courts in Riga usually ask the Council of Sworn Advocates to appoint a lawyer to the case. In the countryside, where there are fewer lawyers and their places of practice are geographically linked to the regional courts, the judges know the lawyers in person and contact them directly. There are no special procedures regulating the process of selection and appointment of counsel. The courts also approve the claims of expenses (Ls 25 for becoming acquainted with the case, Ls 25 for a day in court).55

The role of the courts in monitoring the quality of legal representation could, in principle, be more active. The courts could make ancillary decisions on the quality of legal representation, but do not do this in practice.

5.4 Role of the Prosecution and the Police (if any)

Police and prosecutors are obliged to provide the accused with a lawyer. In civil cases, as described above, the prosecutor can intervene on behalf of a disadvantaged party, thus in effect providing legal assistance free of charge.

5.5 State Models of Organization of the Provision of Legal Aid

The present system of legal aid is based on ex officio appointed private lawyers. Legal advice and assistance on specific matters is also given by various specialized state insti-
tutions such as the Consumer Rights Protection Center, or the Human Rights Office.

5.6 Evaluation and Training

Currently the relevant state institutions do not carry out any formal evaluations of the effectiveness of the legal aid system in Latvia. The Bar Association and the NGO sector do not conduct such evaluations either.

Training for the Bar has been on the decline for several years, but the recently elected Council is willing to renew the training programs, with human rights among the subjects to be taught. The legal clinics in Latvia have a good relationship with the Bar.


6.1 Determination of the Legal Aid Budget

The year 2001 was the first in which a budgetary amendment allocated funds (Ls 400,000) specifically for legal aid. Before then, the Ministry of Justice had been partly financing legal aid by lowering costs elsewhere in the judicial system, for example, renovation of court buildings. Thus, in 1997, the Council of Sworn advocates received Ls 126,000, and in 1999 and 2000, Ls 145,000 each year.

As these sums were not sufficient to cover the needs of free legal aid, in May 1999 the Council of Sworn Advocates decided to cover 40 percent of the tariff price in each legal aid case. Unfortunately, there was still a shortage of resources, so in July 2001 the Council decided to pay lawyers only after receiving transfers from the Ministry of Justice. The question of lawyers’ fees was eventually discussed in the Human Rights Office.

In 2001 the Council of Sworn Advocates received Ls 145,000 from the Ministry of Justice, and an additional Ls 400,000 as a result of budgetary amendments in the fall. The estimates presented to the Ministry of Finance were based on the statistics of the free legal aid cases in the previous year and the average expense per case. Thus, in 1999 there were 9,271 cases and Ls 212,329.60 paid; in 2000, 9,820 cases and Ls 209,390.26 paid (both on the basis of paying only part of the official tariff). In addition, from 1 January 2001, advocates were obliged to pay the value added tax.

Even though a portion of the additional resources was used to cover expenses related to the legal aid previously not covered, by the end of 2001 there was a surplus of more than Ls 200,000. In 2002, the budget allocations for legal aid were Ls 400,000, this sum being part of the base and therefore able to be used in future years as well.
6.2 Budgetary Information

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<tr>
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<th>2002</th>
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<tbody>
<tr>
<td>State budget</td>
<td>Ls 1,524,500,389</td>
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<tr>
<td>Judicial system budget</td>
<td>Ls 14,426,502</td>
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<tr>
<td>(including prosecution)</td>
<td>Ls 400,000</td>
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<tr>
<td>Legal aid budget (total)</td>
<td>Ls 400,000</td>
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<tr>
<td>Legal aid budget for criminal cases</td>
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<td>Legal aid budget for civil cases</td>
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<td>Legal aid budget for legal advice</td>
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According to the Law on State Budget 2002, the income of the state budget is set at Ls 1,524,500,389 and the expenses at Ls 1,664,721,569. Funds allocated to the district/city (Ls 6,433,700) and regional courts (Ls 2,867,530) are included in the budget of the Ministry of Justice. The Supreme Court and Satversmes Tiesa have their own separate budgets which total Ls 775,987 and Ls 340,707, respectively. The Prosecutors’ Office receives a budget of Ls 6,847,455. Ls 400,000 is allocated to legal aid, all of which is to be used in criminal cases. This does not have a separate budgetary line, but it is included in the program of the district/city and regional courts.

6.3 Number of Cases Supported by the State Budget for Legal Aid

Currently no information is available regarding the number of criminal cases supported per year by the amounts allocated for criminal legal aid in courts of first instance, courts of appeal, or cassation courts.

As there is no state budget for civil legal aid, legal aid in these cases is provided by the Bar Association. Upon request, the Bar Association has promised to deliver the figures for the last five years. To illustrate, the last meeting of the Council examined twenty-six requests for legal aid in civil cases, and about one-half of these requests were granted.

6.4 Lawyers’ Fees

The lawyers are paid for providing free legal aid on the basis of Cabinet regulations NR 216 of 17 June 1997, and according to the tariffs set by the chairperson of the Council of Sworn Advocates and endorsed by the ministers of justice and finance in spring 1998. Initially, this system worked poorly due to the lack of specifically earmarked funds for free legal aid in the budget.
Lawyers’ fees are paid per day. Pay is received for participating in the preliminary investigation, for becoming acquainted with the case, and for representing the client in court. The pay per day is Ls 25, regardless of whether the lawyer is court appointed or privately chosen.

Since the new Cabinet Regulation NR 187 of 21 March 2002 took effect, lawyer’s fees have been paid for in one installment or upon completion of each stage of the proceedings (pretrial investigation, examination of the case in court), depending on the lawyer’s choice. The fee is calculated according to a tariff approved by the ministers of justice and finance on the proposal of the Council of Sworn Advocates. The fees are calculated on the basis of the hours spent on the case, but they cannot exceed the pay for one full working day. The travel expenses are included in the tariff.

If the lawyer is privately engaged in a case where no legal aid is involved, the lawyer and his or her client can either agree on the pay or follow the tariffs set by the Latvian Council of Sworn Advocates (and endorsed by the minister of justice and minister of finance). The legal aid sums are comparable to the tariff. Privately arranged sums can be very different depending on the case, client, or qualification of the lawyer. However, the legal aid sums must not be deemed inadequate.

6.5 Support for non-state initiatives

No direct funding or tax relief exists.

7. Data Collection

Practically no reliable data can be found on legal aid. The following data should be collected in the future:

- The number of criminal cases covered by legal aid. At which stages of proceedings was legal aid granted (appeal and cassation included)? How much time/how many days on average did lawyers spend per case? How many complaints were received against lawyers from their clients or other actors in the criminal proceedings? How many/what kind of disciplinary measures were imposed? How much compensation was paid to the clients? How many convicted people have been ordered to repay the expenses for legal aid? Was repayment ordered in full or in part? What percentage of these expenses was actually collected?

- The number of civil cases covered by legal aid. At which stages of the proceedings was legal aid granted (appeal and cassation included)? How much time/how many days on average did lawyers spend per case? How many complaints were received against lawyers from their clients or
other actors in the criminal proceedings? How many/what kind of disciplinary measures were imposed? How much compensation was paid to the clients?

8. LEGISLATIVE DEVELOPMENTS

At present, the Ministry of Justice is working on several draft laws and concept papers that either directly deal with the question of legal aid or seek to reshape the environment—procedural and institutional—in which legal aid schemes function.

**New draft Law on Judicial Power and Concept Paper on Judicial Administration**

The draft Law on Judicial Power deals with numerous issues: the structure and financing of the judicial system, and the appointment, work, and working conditions of judges. However, the main objective of the draft law is to provide further guarantees for the independence of the court system, including removing from the authority of the Ministry of Justice the technical management functions of the court system and centralizing them in the Judicial Administration.

The draft Law on Judicial Power provides for the establishment of a Council of Justice. The Council will be an independent agency representing and organizationally administering judicial power. The Council of Justice shall draw up a national policy and strategy for the development of the judicial system. The Council shall be funded from the national budget.

The Council of Justice will consist of thirteen members: the chairperson of the Supreme Court; the chairperson of the Constitutional Court; the minister of justice; the prosecutor general; the chairperson of the Saeima Legal Commission; one member of the Council of Justice to be elected from among the Supreme Court judges by the general meeting of the Supreme Court; five members to be elected from among the judges of the relevant jurisdictional region by the general meeting of those judges (one member from each region); one representative of the Latvian National Human Rights Office; and one representative delegated by the Council of University Rectors from among the Doctors of Law.

Subject to the Council of Justice is the Judicial Administration, which, according to the draft law, will be responsible, among other things, for organizing, training, and continued education of judges and court staff, planning and implementing the budget of the judiciary, maintaining the information system of courts, organizing statistics of the court work, and systematizing and publishing the judicial practice.

**New Code on Criminal Procedure, drafted and submitted for review to the ministries and judicial system**

The new Criminal Procedure Code will make possible grants of free legal aid in
accordance with the requirements of the European Convention of Human Rights. At the time of drafting the new code, the need to extend the legal aid system had not been discussed, and therefore the draft code does not envisage a possibility for legal aid for victims of crime beyond what is provided for by current legislation. However, the draft code makes it procedurally easier for victims to obtain compensation. The issue of extending legal aid to victims of crime can be addressed during the debates on the draft code in government and in the parliament.

New Administrative Procedure Law

A new Administrative Procedure Law was adopted and came into effect on 1 July 2002. Before that date, the Ministry of Justice, with the support of the World Bank, implemented a preparatory program, which involved training judges and civil servants, establishing administrative appeal mechanisms in government institutions, and informing the public about the rights guaranteed by the new law.

With the entry into force of the new Administrative Procedure Law, judges will be able to grant aid for legal representation of a person (but not for legal entities) in administrative proceedings.

Working group for development of the legal aid concept

An order of the minister of justice established a working group for drafting a concept paper on legal aid. This working group was composed of representatives of the Ministry of Justice, the Bar Association, and the Prosecutor General’s Office. The goal of the working group was to draft and submit to the Cabinet of Ministers a concept paper on reforming the legal aid system by the end of 2002, with a draft Law on Legal Aid and/or amendments to the existing legislation prepared in the spring of 2003. Meeting this timetable would allow for the submission of a budgetary request for legal aid for the 2004 budget.

9. Recommendations

At present, like several other European Union candidate states in Central and Eastern Europe, Latvia is on the verge of accession to the EU. This fact not only marks the end of one important phase of transition, but also indicates the need for rapid finalization of many costly reform projects in various sectors of law and economy. The needs of access to justice and the needs of legal aid, in particular, often compete with other urgent and important priorities. Thus, it is important to propose and implement a realistic project concentrating on the most urgent problems. The new system of managing legal aid has to have the capacity to grow, depending on (and balancing) both the well-founded demand for legal aid and the supply of public funds.

In sum, there appear to be several substantive issues that need to be tackled in the area of legal aid. There is also a consensus among the legal professionals interviewed that the following matters have to be addressed in the first place:
**Criminal law**

It is necessary to set clear criteria for receiving free legal aid. In addition, criteria are necessary as a guide for judges as to when and to what extent a convicted person has to reimburse these expenses to the state.

It is necessary to extend the coverage for the victims of crime, covering at least individuals who have suffered physical and sexual violence.

Minors should be provided with legal aid in all cases, with no discretion allowed on this issue. Free legal aid should also be provided in cases in which a person committed a crime as a minor, even if during the stage of investigation and trial he or she has already reached the age of eighteen.

**Civil law**

A system of legal aid in civil cases has to be established. This system should determine the priority of cases in which legal aid might be granted. This list can be extended in the future, but in the beginning it should comprise at least the cases related to housing (eviction), family law, and labor law. Limited discretion should be given to judges to allow them, in exceptional circumstances, to grant legal aid in other cases as well.

If the EU legal aid directive is adopted, Latvia should be ready to implement it upon eventual accession in 2004.

As the extension of the legal aid “coverage” will be costly in itself, it is important that the initial institution-building investment is not too ambitious. This approach would advocate leaving the delivery of legal aid in the hands of the private sector, while at the same time establishing an effective state-monitoring program for legal aid grants and the quality of the services delivered.

The institutional mechanism ensuring this aim must be designed to be integrated with other judicial developments. The task of the Judicial Administration is to create proper working conditions in the courts, to ensure the proper application of the functions of judicial power, and to ensure judicial independence. The management of the legal aid system fits in with this overall aim and in principle should be entrusted to the Judicial Administration. Ensuring smooth and adequate monitoring at the pretrial stage would also be a critical feature of this model.

It is also important to ensure that the structure deciding whether to grant legal aid is not located only in the capital, but has regional branches as well. There are not only financial, but also physical and psychological, problems related to access to the courts. Therefore, it is important that people can find the help required as close to home as possible. According to the established practice (for example, with regard to lawyers, notaries, registrars), regional units should function in all regional courts.

Initially, these units could deal primarily with examining requests for legal aid, selecting an appropriate lawyer, and monitoring the quality of the services delivered. Whether these structures could take certain
minor consultation duties themselves will depend on the question of the availability of resources. This might be considered the next step in the reform processes, since, as many of the professionals consulted emphasized, only easy and transparent models will work in practice.

NOTES

1 One euro is approximately 0.63 Latvian Lats.
2 The regional courts are the following:
   Kurzeme Regional Court, which covers five district (city) courts;
   Latgale Regional Court, which covers six district (city) courts;
   Riga Regional Court, which covers ten district (city) courts;
   Vidzeme Regional Court, which covers seven district (city) courts; and Zemgale Regional Court, which covers six district (city) courts.
4 After renewal of independence in 1991, Satversme was gradually returned into force; published in Official Gazette Latvijas Vēstnesis, NR 43, 1 July 1993.
5 Article 89 of the Latvian Constitution states: “The State shall recognize and protect fundamental human rights in accordance with this Constitution, laws and international agreements binding upon Latvia.”
6 Article 91. All human beings in Latvia shall be equal before the law and the courts. Human rights shall be guaranteed without discrimination of any kind.
7 Article 92. All people have the right to defend their rights and their lawful interests in a fair court.
8 Thus, case 2001-08-01, “On Conformity of Article 348 (the seventh part) of the Civil Proceedings Law with Article 92 of the Republic of Latvia Satversme (Constitution)” dealt with the question whether the notion “a fair court” always incorporates the right to appeal against a court decision in a civil case at the appellate level. A question on appeal was also raised in case 2001-17-0106, which dealt with appeal of decisions in administrative cases. Case 2001-07-0103, “On the Conformity of Article 2 of the Law on Compensation for Damages, Suffered as a Result of the Unlawful or Groundless Action of Investigator, Prosecutor or Judge and Item 3, Subitem 1 of the Cabinet of Ministers August 31, 1998 Regulations No. 327 ‘On the Procedure for Submitting and Considering Applications, Passing Decisions, Reinstating Employment and Social Guarantees and Payment of Compensation for Damages’ with Articles 91 and 92 of the Satversme,” dealt with the third sentence of Article 92, providing for a “corresponding compensation” in the event of groundless offense of rights. These and other decisions of the Satversmes Tiesa can be found at http://www.sarctiesa.gov.lv/Eng/спредуми.
11 The Latvian law distinguishes between suspect; accused, at the stage of pretrial investigation; defendant, at trial and appeals; and convicted person, after the sentence becomes final. For the purposes of this report, the term “accused” will be used to refer to the person subject to criminal proceedings at pretrial stage, and “defendant” will refer to the person at the trial stage and at the stage of appeal. The term “defendant” will also be used in cases where a particular procedural norm applies to all stages of criminal proceedings.
12 Article 123 of the Criminal Procedure Code (CPC), adopted 6 January 1961. On 22 August 1991 a special law was passed proclaiming this Code to be in force until adoption of a new Code, see Zinotājs, NR 33/34, 1991. The draft of the Criminal Procedure Law is at present examined by the Cabinet of Ministers.
13 Article 120, CPC.
14 Article 70, CPC.
15 Investigative institutions can be police, customs, a captain of a ship, etc., depending on the circumstances and subject matter of the case.
16 Article 96, CPC.
17 Article 98, CPC.
18 The death sentence can be applied only during time of war.
19 The chairman of the Criminal Case Chamber of the Riga regional court could recently remember only one case in which the sum to be paid to the state by the convict has been reduced due to his indigence and poor health.
21 This is the present situation, since 2002, when the government allocated additional financial resources for legal aid (Ls 400,000), which covered all demands. Before that, it was indeed often difficult to find counsel, especially at the stages of investigation and trial in the court of first instance.
22 The judges and police seem to share the opinion that if a person has resources, he or she would always search for counsel of his or her own choice rather than rely on state-appointed counsel.
24 Ārstniecības likums, in force since 1 October 1997.
25 The law was adopted and entered into force on 1 July 2002. Previously, the Ministry of Justice, with the support of the World Bank, implemented a preparatory program, which involved training judges and civil servants, establishing administrative appeal mechanisms in government institutions, and informing society about the rights guaranteed by the new law.
26 This principle applies to the procedure in criminal cases, but not to the civil proceedings, where the parties are supposed to compete in court.
27 According to Article 6(3)(b) of the ECHR, a prisoner must be allowed to receive a visit from his or her lawyer and to communicate with the lawyer, out of the hearing of prison officers, in order to convey instructions or to pass or receive confidential information relating to the preparation of the defense. See ECtHR cases Can v. Austria A 96 (1985), Campbell & Fell v. UK A80 (1984), and S v. Switzerland A220 (1991).
28 Article 46 of the Latvian Code of execution of punishments.
30 Article 104, CPC.
31 Article 102, CPC.
32 Article 101, CPC.
33 Article 106, CPC.
34 Article 5, the Law Regulating the Police.
35 At present, there is no legal obligation to explain the rights immediately upon arrest. However, this has been provided for in the new draft Criminal Procedure Law that is currently being examined by the government.
37 Data of the Council of Sworn Advocates, Latvijas Vestsnesis, NR 16, April 2000, and NR 9, 7 May 2002.
38 Civilprocesa likums, in force since 1 March 1999.
39 Article 1, Civil Procedure Law.
40 Article 16, Office of the Prosecutor Law.
41 Prokurāturās likums, in force since 1 July 1994.
42 Article 90.
43 Letter NR 5/1/1-7-7-407 of 15 March 2002 from the prosecutor general to the minister of justice.
44 Article 33.
45 Article 43.
46 Article 42.
47 Article 45.
48 Article 44.
49 There is no official list of documents to be submitted. The Council requests as much information as possible about the income, properties, family situation, etc., of the person seeking free legal aid. If the Council considers the evidence insufficient, the claim will be rejected, but it can be resubmitted with additional evidence.
50 A specific position, provided by the Law Regulating the Bar.
51 According to Article 54 of the Law Regulating the Bar, the chief judge, head of the preliminary investigation establishment, and the Latvian Council of Sworn Advocates shall assign a case to a sworn advocate only after coordination with the practicing sworn advocate.
elder of the advocate’s court region.

52 These resources are composed of the monthly payments of the sworn advocates and assistants. The sworn advocate normally is paid Ls 16 (27 euros) a month and the assistant Ls 12 (20 euros) a month. There are approximately 530 sworn advocates and assistants in Latvia

53 Darba likums, in force since 1 June 2001.

55 One euro equals approximately 0.59 Ls.
57 Also financed from the state budget.
59 At least with regard to Riga, where there are many advocates, the Bar should take responsibility to compile information on the specialization of lawyers and make that information available.
ACCESS TO JUSTICE COUNTRY REPORT: LITHUANIA

Linas Sesickas, Open Society Justice Initiative
Bernotas and Dominas Glimstedt

EXECUTIVE SUMMARY

In the past few years, Lithuania has made a marked improvement in reforming its system of access to justice. In 2000 the country adopted and implemented the Law on State-Guaranteed Legal Aid, which significantly broadened the scope of cases eligible for legal aid and set up clear procedures for qualified people to receive legal aid. In accordance with this law and in cooperation with private foundations—the Constitutional and Legal Policy Institute (COLPI) and Open Society Fund–Lithuania (Soros Foundation)—and international organizations (United Nations Development Programme), pilot public attorneys offices were set up in the cities of Šiauliai and Vilnius.

However, a lot remains to be done, as the newly adopted legal aid law and the new institutional models require further changes.

The quality of legal defense in ex officio criminal cases remains low for a variety of reasons, including, among others:

- a lack of quality monitoring mechanisms and procedures, coupled with a lack of professionalism in the case of many lawyers;
- a lack of specific procedure for the selection of ex officio lawyers;
- (3) low pay for lawyers in ex officio cases;
- a lack of financial and human resources to administer the legal aid system;
- the nonexistence of an administrative body with specific powers to manage and monitor the legal aid system;
- a lack of continual professional training programs for lawyers.

These problems are an obstacle to the improvement of the legal aid system and may even put into question the value of the legislative and institutional reform out in the field.

Furthermore, the state and the other
institutions involved should enhance the capacity of the administration to manage the legal aid system through the establishment of a legal aid board. This legal aid board could introduce quality-control procedures and clear quality requirements. Other necessary measures include government-funded training programs for legal aid lawyers, and programs carried out in cooperation with municipal bodies to disseminate information to the public at large about the availability of primary legal aid.

The progress of reforming the legal aid system will depend mainly on the government’s willingness to continue with reforms in order to ensure the availability of effective and free legal services to indigent people in all cases where the interests of justice so require.

1. INTRODUCTION

Lithuania has a total population of 3,483,972 citizens. The new Constitution of the Republic of Lithuania, adopted in a referendum on 25 October 1992, confirmed the founding principles and values of the state—an aspiration to create an open, just, and harmonious civic society, as well as a legal state respectful of human rights and freedoms.

The new Constitution authorized the Ministry of Justice to manage the reform of the legal system and significantly expanded its powers and the scope of its functions. The Ministry of Justice became responsible for drawing up the basic principles for the functioning of legal institutions (courts, prosecutors, lawyers, notaries), and for supervising and coordinating their activities. The Ministry has also been granted greater authority in preparing proposals for laws and other legal acts.

The 1994 Law on the Courts (Teismų įstatymas) introduced the four-tiered court system, which replaced the inherited two-tiered system, and outlined the competence of each level of courts. The four-tier court system, effective from 1995, is organized around sixty-seven courts: fifty-four local courts, acting as primary courts of first instance; five regional courts, acting as both courts of appeal and courts of first instance; one Court of Appeal; and the Supreme Court of Republic of Lithuania. In addition, there are five regional administrative courts, acting as courts of appeal in administrative cases, and one Head Administrative Court, acting as court of last instance in administrative cases.

The Constitutional Court of the Republic of Lithuania, which is outside this four-tier court system, decides on actions to establish constitutionality and the compatibility of norms of international treaties ratified by Lithuania with acts of Parliament.

The Lithuanian Bar Association is a centralized organization and does not have regional sections. The managing body of the Bar Association is the Council (Lietuvos advokatų taryba) elected by the General Assembly of Lawyers (Lietuvos Respublikos advokatų susirinkimas) for a three-year period. The Council has regular
meetings, usually once per month. The Secretariat of the Council, with a full-time staff of six, provides administrative support in the management of the Bar Association. The total number of lawyers in the Republic of Lithuania as of 15 September 2002 was 1,245, of which 973 were advocates (Advokatai, įrašyti į praktikuojančių advokatų sąrašą) and 272 are apprentices of lawyers.

At the end of 1994, the Parliament (Seimas) approved the “Outline of Reform of the Legal System,”¹ a document that set up a plan for achieving the most important objectives in reforming the national legal system, with an emphasis on its conforming to the standards of the Council of Europe and the European Union. A 1998 amendment of the Outline of Reform of the Legal System² includes a provision in the Code of Civil Procedure by which the state guarantees legal assistance to the indigent. This amendment also requires that the government support the establishment of public institutions that help provide these legal services.

On 14 May 1993, the Republic of Lithuania signed the European Convention for the Protection of Human Rights and Fundamental Freedoms (ratified by the Seimas of the Republic of Lithuania in 1995). Article 6, paragraph 3 (c), of the Convention guarantees the right of every person charged with a criminal offense to defend himself or herself and to be defended by personally chosen defense counsel or, if he or she does not have sufficient means to pay for a defense counsel, to be entitled to free legal assistance if the interests of justice so require.

Despite the ongoing transformation of the judicial sector, the legal aid system remained unchanged in Lithuania during the first decade of independence. Historically, legal aid was associated only with the criminal process, where the state formally assumed the responsibility to guarantee mandatory legal representation in some cases. However, this system of procedural guarantees was not supported by sufficient financial resources. Nor was there necessary institutional support to administer the provision of free legal aid as a national program or to ensure that legal aid met the necessary quality standards and adequately protected the interests and rights of individuals against the state. Legal aid in criminal cases was provided by private lawyers selected from a list prepared by the Lithuanian Bar Association in coordination with law firms. The legal aid system in effect after independence represented the traditional approach at that time: each member of the Bar Association was required to take on a certain number of ex officio criminal cases each year. This system failed to take into account limiting factors such as insufficient funding, poor training, different specialities within the law, and limited institutional coordination and support.

In 1999 a working group under the aegis of the Ministry of Justice was established to draft a new law on free legal aid.

The Law on State-Guaranteed Legal Aid was adopted in March 2000 and entered into effect on 1 January 2001.³ This made Lithuania the first country in the region to set up a comprehensive regulatory framework to guarantee free legal aid for indigent
people, regardless of their nationality, in criminal, civil, and administrative cases. Under the Law on State-Guaranteed Legal Aid, people who meet certain eligibility criteria are entitled to receive state-guaranteed legal assistance, which is defined as legal information, legal advice, defense, and representation in proceedings.\footnote{4}

In 2002, the Parliament adopted a new Code of Criminal Procedure (to enter into force on 1 May 2003)\footnote{5} and a new Code of Civil Procedure\footnote{6} (entering into force on 1 January 2003). The two new procedural laws incorporated the new Legal Aid Law and provided further detail on the delivery of state-guaranteed legal aid in criminal and civil cases.

In 1999, contemporaneous with the government’s efforts to establish a regulatory framework relating to legal aid, the Constitutional and Legal Policy Institute (COLPI), based in Budapest, together with the Soros Foundation—the Open Society Fund—Lithuania (OSF)—launched an institution-building project with the aim of establishing a pilot public attorneys office in Lithuania in order to improve the quality of legal aid in criminal ex officio mandatory defense cases.

2. **Criminal law: Effective access to the judicial system for the indigent in criminal cases**

2.1 **Right to counsel**

2.1.1 Constitutional guarantees of the right to counsel and the right to legal aid

The Constitution of the Republic of Lithuania guarantees to every person suspected of committing a crime or formally accused of committing a crime the right to defense from the moment of his or her detention or from the first interrogation.\footnote{7} Although there are no decisions of the Constitutional Court or any other authoritative sources interpreting this provision, the predominant understanding among the legal community in Lithuania is that the provision imposes a positive obligation on the state to take active measures to guarantee the right to defense to everyone.\footnote{8}

2.1.2 Right to counsel in criminal proceedings

According to the Code of Criminal Procedure (Lietuvos Respublikos baudžiamojo proceso kodeksas),\footnote{9} the right to defense is one of the guiding principles of criminal proceedings. This principle is defined as a system of rights of the defendant\footnote{10} to which he or she is entitled in the criminal proceedings, and which he or she exercises in order to reject the indictment or mitigate criminal liability.
According to Article 52 of the Code of Criminal Procedure, the defendant has the right to know what crime he or she has been charged with and to provide explanations. This right implies that the relevant proceeding authorities (investigator, prosecutor, or the police) should explain to the accused precisely and comprehensively the substance of the charges, including but not limited to all factual circumstances, legal aspects of the incriminating activity and responsibility, etc. The right to provide explanations is usually granted during the interrogation of the accused. The accused has the right to give any explanations while exercising the right to defense. This also implies that the accused has the right to remain silent (the principle of *nemo tenetur seipsum accusare*). He or she has the right to give any explanations orally or in writing at any stage of proceedings. Defense counsel is allowed to attend the first interrogation, which cannot take place in the absence of defense counsel.

The Code of Criminal Procedure also guarantees a number of other rights related to the right to defense, such as the right to present evidence, to make motions, to read the entire case file upon completion of the preliminary investigation, to have a defense lawyer, to appeal the procedural actions of the proceeding authorities, and so on. The defendant has the right (and also the obligation) to participate in the trial proceedings.

Violations of some rights of the defendant by the relevant proceeding authorities may result in serious infringements of the procedural law. The Code of Criminal Procedure defines the term “serious infringement of the procedural law” as a violation that deprives or restricts the rights of the participants in the proceedings, prevents a court from trying a case comprehensively, or affects the lawfulness of the sentence. In addition, the Code of Criminal Procedure provides for a number of situations where the court of appeal should repeal the sentence on the grounds of serious infringements of procedural law. These situations can be divided into three main categories: violations of rights of the defendant, lack of jurisdiction, and other serious procedural violations (such as when the minutes of a court session are missing from the case file).

According to the Code of Criminal Procedure, the court of appeal should repeal the sentence and send the case back for retrial if any of the following has occurred: a violation of the right to a defense lawyer, a violation of the right to speak in one’s native language or to use of an interpreter, failure to communicate the initial charge to the defendant, or failure to allow the defendant to read the case file upon completion of the preliminary investigation. Although the Code of Criminal Procedure requires that the sentence be repealed if the right of the defendant to have a defense lawyer has been violated, this provision applies only in cases when the participation of defense counsel is mandatory (see section 2.2.1). Violation of the right to have a defense counsel includes cases in which a lawyer was not been appointed at all and
cases where the defense counsel was absent from certain procedural activities.

2.1.3 Right to counsel and right to legal aid in non-criminal proceedings when deprivation of liberty is at stake

The proceedings for placement of minors in special schools, for placement of people with psychiatric diseases in special psychiatric hospitals, and for temporary restriction of foreigners in connection with violations of immigration laws, as well as the procedure for temporary restriction of liberty of drug users and persons suffering from similar addictions, are the same as in general administrative cases. According to the Law on State-Guaranteed Legal Aid, people who meet the eligibility requirements are entitled to receive state-guaranteed legal aid in these proceedings (see section 2.2.2).^{14}

2.2 Right to legal aid: Eligibility criteria for granting legal aid in criminal cases

Until recently, the Code of Criminal Procedure did not recognize a specific right to free legal aid. However, in certain categories of cases, participation of defense counsel was mandatory. If the defendant in these cases did not retain a lawyer, the proceeding authorities were obliged to appoint an *ex officio* attorney, the costs for which were covered by the state.

After the adoption of the Law on State-Guaranteed Legal Aid, the Code of Criminal Procedure was amended to include a reference to the right of defendants to legal aid, as determined by that law (see section 2.2.2).

2.2.1 Substantive criteria

According to Article 56 of the Code of Criminal Procedure, participation of defense counsel in criminal proceedings is mandatory if:

- the defendant is a minor (a person between fourteen and eighteen years old at the moment the crime was committed);
- the defendant is blind, deaf, or cannot avail himself or herself of the right to defense due to physical or mental disability;
- the defendant does not know the language used in the proceedings;
- the potential sentence is life imprisonment;
- there are conflicts among the legal interests of several defendants, and at least one of them has a defender;^{15}
- the state prosecutor is participating in the case;
- the interests of justice require it, in other cases.

According to the Code of Criminal Procedure, the participation of a state prosecutor in criminal proceedings is mandato-
ry in all criminal cases, except for some categories of cases involving infliction of bodily injuries, such as hitting and severe torturing (Article 117 of the Code of Criminal Procedure), intentional minor health impairment (Article 116), and others.

The court practice of applying the grounds for mandatory legal representation varies depending on the situation. While the courts are consistently appointing defense lawyers on the ground of mandatory defense, appointments of ex officio lawyers when this is required by the interests of justice are virtually nonexistent.

The new Code of Criminal Procedure provides for similar grounds for mandatory defense. While participation of the state prosecutor will no longer be a ground for mandatory legal representation, there are three additional grounds for mandatory defense: trial in absentia, cases involving detention of the defendant; and proceedings for extradition or for transfer of the case to the International Criminal Court. In situations not mentioned above, defense counsel will be present in a court trial when the defendant so requests.

The proceeding authorities may decide to appoint a defense counsel in cases not mentioned above if they consider that the interests of the defendant are not properly represented without the assistance of a defense counsel. In practice, however, such appointments are rare.

In cases where mandatory defense counsel applies, as mentioned above, when the defendant or his or her family does not retain a defense lawyer, the proceeding authority is obliged to appoint a defense counsel.

2.2.2 Financial criteria

The Code of Criminal Procedure provides that state-guaranteed legal aid is granted to defendants on the basis of their applications to the proceeding authorities, provided that they meet the criteria defined by the Law on State-Guaranteed Legal Aid.

While the Code of Criminal Procedure sets the substantive conditions for receiving legal aid, the Law on State-Guaranteed Legal Aid establishes the financial criteria. The following people are eligible for state-guaranteed legal assistance in ex officio criminal cases: people whose annual income and property are within the limits established by the government of the Republic of Lithuania, and other people in cases provided for in laws of the Republic of Lithuania and international agreements. Legal assistance is not to be provided to people entitled to insurance benefits for legal expenses.

The Law on State-Guaranteed Legal Aid provides for a list of documents that the defendant must present in order to prove eligibility for receiving state-guaranteed legal assistance. However, the proceeding authorities have the right to request additional written evidence of the property status of the person or of family members.

The state covers the expenses for legal
aid according to the applicant’s property and income. Five different levels of coverage are established: first level, 100 percent; second level, 95 percent; third level, 80 percent; fourth level, 65 percent; and fifth level, 50 percent. If the level of a person’s property and/or income changes during the proceedings, the level of coverage will be adjusted accordingly. The maximum amount of total costs per case to be covered by the state is to be determined by the government.\textsuperscript{22}

A government resolution\textsuperscript{23} of 22 January 2001 provides the specific requirements for the different levels of coverage for state-guaranteed legal aid in criminal cases. The resolution also determines the maximum cost per case to be covered by the state.\textsuperscript{24} The maximum amount covered by the state in criminal cases is equivalent to one minimum monthly salary,\textsuperscript{25} which as of 1 September 2002 amounted to 430 litas.

The law also establishes grounds for termination (by a decision of the authorized institution)\textsuperscript{26} or ceasing (when the grounds disappear without a decision of the authorized institution)\textsuperscript{27} of legal aid. When it is determined that the provision of legal aid is no longer deemed necessary, the state can recover the costs for legal aid in accordance with a special procedure established by law.

**Post-conviction reimbursement**

According to both the existing Code of Criminal Procedure and the new one, if the defendant is found guilty, the court, during the sentence phase, may adopt a ruling on the costs and expenses of the procedure and can order the defendant to pay all court costs except for the costs of an interpreter’s services. The judge will assess all circumstances for eligibility for legal aid, including, but not limited to, eligibility criteria of the legal aid act.

According to the new Code of Criminal Procedure, in cases where the defendant was represented by an \textit{ex officio} appointed lawyer and is found guilty, the court determines the amount that the defendant has to pay for the services of the \textit{ex officio} appointed lawyer. However, the court can take into consideration the financial situation of the defendant and may decide to waive this obligation of the accused, either fully or partially. In that case, the costs for the \textit{ex officio} appointed lawyer are recovered in accordance with the Law on State-Guaranteed Legal Aid\textsuperscript{28} depending on the different coverage levels.

The defendant is required to pay the costs of the judicial proceedings when found guilty, even in cases of suspended sentence.\textsuperscript{29} He or she also may be sentenced to recover the costs associated with legal aid services provided to the civil plaintiff and the victim of the crime.\textsuperscript{30}

\textbf{2.2.3 Other eligibility questions}

**Legal aid for non-citizens**

The Law on State-Guaranteed Legal Aid applies to foreign citizens and stateless per-
sons permanently residing in Lithuania, unless otherwise provided by the laws of Lithuania and international agreements.

2.2.4 Legal aid for victims of crimes

Under the Law on State-Guaranteed Legal Aid and the Code of Criminal Procedure, eligible victims of crimes are entitled to receive legal aid. The grounds and procedure for receiving legal aid are defined by the Law on State-Guaranteed Legal Aid and are the same as those that apply to defendants.

The new Code of Criminal Procedure explicitly provides for the right to legal aid for juvenile victims of crime, in accordance with a procedure determined by the Law on State-Guaranteed Legal Aid.

2.3 Other cases

There are no other means of obtaining free legal representation for defendants who do not meet the eligibility criteria described above.

2.4 Procedure for granting legal aid

The provisions of the Code of Criminal Procedure establish that a defense counsel is allowed to participate in a case at the request of the suspect or the accused from the moment of detention or the first interrogation.

Under the Code of Criminal Procedure and the Law on State-Guaranteed Legal Aid, the relevant proceeding authority (interrogator, investigator, prosecutor, judge, or court dealing with the case) makes the decision to assign defense counsel and to grant state-guaranteed legal aid.

The request or refusal of the accused to have a defender is recorded in the minutes of the interrogation and is signed by the accused and the investigator (or interrogator).

The right to act as defense counsel is limited to the legal profession, i.e., members of the Lithuanian Bar Association, who are included in the List of Practicing Lawyers, which is published by the Ministry of Justice in the Official Gazette. Apprentices to lawyers can provide state-guaranteed legal assistance if representing the rights and the interests of victims of crime or civil plaintiffs in criminal proceedings. Under the new Code of Criminal Procedure, apprentices will be allowed to represent defendants in criminal proceedings if they have been assigned by a lawyer and with the consent of the defendant, except in cases of major or grave crime. The defendant may have more than one defense counsel.

According to the Code of Criminal Procedure, the defense counsel may be contacted by the defendant, the defendant’s family, or other authorized individuals. At the request of the defendant, the relevant proceeding authority has to ensure the par-
ticipation of the defense counsel in the proceedings. If the selected defense counsel cannot participate in the proceedings for more than five days, the relevant proceeding authority has the right to advise the defendant to contact another counsel, or the authority may appoint another defender from among the qualified lawyers.

In the cases of mandatory defense, if the defendant has not contacted a defense counsel, the proceeding authority must appoint a defense counsel.

According to the Code of Criminal Procedure, in addition to the decision to appoint defense counsel, the proceeding authorities may decide to relieve the defendant of the obligation to pay for legal assistance. In these cases the services of the lawyer are paid for by the state.

Under the new Code of Criminal Procedure, the proceeding authorities are obliged to explain to the suspect or accused his or her right to have a defense counsel from the moment of detention or first interrogation and to provide him or her with the opportunity to exercise this right. The request of the accused to have defense counsel appointed is recorded in the minutes.

If the defense counsel chosen by the defendant cannot take part in the proceedings for more than three days successively, or cannot appear within six hours to take part in the first interrogation or in the court hearing on the lawfulness of detention, the proceeding authority can propose to the defendant to invite another defense counsel; in the event of failure to do so, they must appoint defense counsel ex officio. In cases of initial interrogation and hearings on the lawfulness of the detention, the proceeding authority must appoint a defense counsel who is on duty, even if this is against the will of the defendant.

According to the Law on the Bar of the Republic of Lithuania, the Ministry of Justice should remunerate the appointed defense counsels from the state budget funds. The Law on the Bar authorizes the government or another institution authorized by it to set up the amount and the procedure for remuneration. The government, the Ministry of Justice, or the Lithuanian Bar Association is entitled to designate a law firm that shall provide legal aid to disadvantaged persons in civil cases, as well as provide legal assistance in criminal cases according to the assignment of the investigator, prosecutor, or court.

2.5 Scope of Legal Aid

The Law on State-Guaranteed Legal Aid defines the legal defense services provided in criminal proceedings as procedural actions regulated by the law and exercised in defending the rights and interests of the defendant in criminal proceedings. Therefore, legal aid is provided for all legal activities performed throughout the criminal proceedings (participating in interrogations, consulting with the defendant, filing motions, collecting evidence, reading the case files and taking notes, etc.). (For remuneration of legal aid defense counsels, see section 6.4.)
State-guaranteed legal aid is granted for any stage of the criminal proceedings, or for the proceedings as a whole. Accordingly, legal aid defense counsel may be appointed at any stage of the criminal proceedings, for that stage only or for the whole of the proceedings.

2.6 Application of the legal aid norms in practice

For application of legal aid norms in practice, see section 5.5.

2.7 Quality of free legal representation and evaluation

There is no mechanism in place to secure the quality of the *ex officio* legal representation in criminal cases, nor is there a mechanism to monitor the legal actions taken by the lawyer.

However, if defendants are not satisfied with their legal aid lawyer’s performance, they are entitled to file a disciplinary complaint with the Council of the Bar Association or the Ministry of Justice.\(^\text{46}\) The procedure is the same, because complaints filed with the Ministry of Justice will be transferred to the Bar Association.

Professional misconduct of the lawyer is defined as “indecent, dishonest fulfillment of a professional duty, as well as failure to observe the generally accepted moral norms and respect such customs.”\(^\text{47}\)

The Court of Honor for Lawyers, the body authorized to decide on disciplinary complaints against lawyers, consists of five members. Its mandate is determined by the Law on the Bar, the Statute of the Bar of Lithuania, and the Work Regulations of the Court of Honor, which it alone approves by a two-thirds majority of votes.

A disciplinary case cannot be initiated if more than three months have expired from the moment when the institutions that have the right to initiate a disciplinary case (the Council of the Bar Association or the Ministry of Justice), according to the Law on the Bar, discovered the violation, or six months from the moment the violation was committed. The period of expiration shall not include the time during which the lawyer was ill or away or the investigation could not be performed due to other valid reasons as determined by the Council or the Ministry of Justice.

The Court of Honor for Lawyers may impose any of the following penalties: reproof, reprimand, reprimand with a public announcement thereof, suspension from professional practice for a period of up to one year, or expulsion from the List of Practicing Lawyers and initiation of the annulment of recognition of the person as a lawyer.

Information about the number of disciplinary complaints filed annually under this procedure is not available.

There is no system in place to evaluate the functioning of the legal aid system in criminal cases. The Lithuanian Association for Human Rights conducted the only survey on this topic three years ago.\(^\text{48}\)
3. CIVIL LAW: EFFECTIVE ACCESS TO THE JUDICIAL SYSTEM FOR THE INDIGENT IN CIVIL CASES

3.1 NORMATIVE BASIS OF THE RIGHT TO ACCESS TO COURTS IN CIVIL CASES

The Constitution of the Republic of Lithuania does not proclaim any specific right to access to court in civil cases, nor does it require the state to facilitate the access to court for citizens with insufficient financial means, through, for example, free legal representation in civil cases.

The Code of Civil Procedure (Lietuvos Respublikos civilinio proceso kodeksas) provides for the possibility to grant state-guaranteed legal aid to certain categories of people enumerated in the Law on State-Guaranteed Legal Aid. The decision to grant legal aid is made by the court and may be pronounced at any stage of civil proceedings.\(^4\) Refusal to grant legal aid or a decision to discontinue the provision of legal aid can be appealed before the Court of Appeal by submitting a separate appeal of the decision of the court of first instance.

According to the new Code of Civil Procedure, state-guaranteed legal aid costs are covered in accordance with the following rules:\(^5\) (1) if the petitioner was released from court costs, these costs are recovered from the defendant in proportion to the size of demands of the claim satisfied; (2) if the petitioner’s claim was rejected, the court costs are paid to the state by the petitioner if he or she was not released from payment of litigation costs; (3) if the claim was granted in part and the defendant is released from payment of court costs, the court costs are paid to the state by the petitioner in proportion to the part of the claim by the petitioner if he or she was not released from payment; (4) if both parties are released from payment for litigation costs, the court costs are covered by the state budget. This applies to both lawyers’ fees and court costs.

Except for the provisions of the Code of Civil Procedure and the Law on State-Guaranteed Legal Aid, current Lithuanian law—labor law, family law, and the Law on the Bar—does not contain other norms providing for free legal representation.

3.2 CIVIL CASES FOR WHICH LEGAL REPRESENTATION IS MANDATORY

There are no cases for which legal representation is mandatory.

3.3 ELIGIBILITY CRITERIA FOR GRANTING LEGAL AID IN CIVIL CASES

3.3.1 Substantive criteria

According to the Code of Civil Procedure, any person can receive legal aid in civil cases, provided that the person meets the eligibility requirements of the Law on State-Guaranteed Legal Aid. The availability of
legal aid does not depend on the type of civil case.

3.3.2 Financial criteria

The financial criteria for availability of legal aid in civil cases are the same as those in criminal cases (see section 2.2.2).

A government resolution of 22 January 2001 provides the specific amounts for the different levels of coverage for state-guaranteed legal aid in civil cases and determines the maximum cost per case to be covered by the state. The maximum amount covered by the state in civil cases is the equivalent of 0.5 times the minimum monthly salary; as of 1 September 2002, this sum was 215 litas.

3.3.3 Other eligibility questions

Legal aid for non-citizens

According to the Law on State-Guaranteed Legal Aid, legal aid is also available to foreign citizens and stateless people permanently residing in Lithuania, unless the laws of the Republic of Lithuania and international treaties provide otherwise.

Legal aid for asylum seekers and refugees

Under the Law on Refugee Status (Lietuvos Respublikos įstatymas "Dėl įvairių Lietuvos Respublikoje statuso"), asylum seekers have the right to receive state-guaranteed legal aid. Although this law obliges the government to establish a procedure for providing legal aid in such cases, however, such a procedure is not established yet.

Legal aid for asylum seekers, refugees, and foreigners who lodged their applications to stay temporarily in Lithuania is provided by lawyers and apprentices of lawyers who work in cooperation with the Legal Assistance Project for Asylum Seekers and Refugees under the Lithuanian Red Cross. The Project provides the following legal service for free (effective November 1997): legal advice to asylum seekers staying in the Foreigners Registration Centers in Pabrade and in Rukla, through weekly visits to the center; legal advice to asylum seekers in the Lithuanian Red Cross, border crossing points, migration services; drafting of appeals and representation of interests of asylum seekers in the refugee status determination procedure; drafting of appeals and representation of interests of asylum seekers in the appeal stage of the refugee status determination procedure; legal advice to foreigners who file applications for temporary residence permits, as well as representation of those foreigners before the Migration Department, courts, and other institutions.

3.4 Procedure for granting legal aid

According to the earlier Code of Civil Procedure, the Law on State-Guaranteed Legal Aid, and the new Code of Civil
Procedure, the decision to grant state-guaranteed legal aid is made by the judge presiding over the case. As stated above, the decision to grant or to refuse state-guaranteed legal aid is subject to appeal before the Court of Appeal.

According to the aforementioned laws, state-guaranteed legal aid in civil cases is provided by lawyers and apprentices of lawyers. Neither the Code of Civil Procedure nor any other legal act defines the procedure for selection of lawyers in civil cases. The new Code of Civil Procedure does not regulate this matter either. In practice, the judge presiding over the case assigns a lawyer from a list of lawyers prepared by the regional coordinators appointed by the Council of the Bar Association, as explained below (see section 5.2).

3.5 Scope of legal aid

Under the Law on State-Guaranteed Legal Aid, representation in civil proceedings is defined as representation in procedural actions regulated by the law and exercised in defense of the rights and interests of the parties in civil proceedings. Normally, legal aid is provided in proceedings before all instances until the decision is final.

The law does not expressly say anything about availability of legal aid for the poor in proceedings for execution of judgments. However, it is likely to be interpreted that state-guaranteed legal aid is available in such proceedings, as the execution of judgments is to be construed as a part of the civil proceedings.

According to the new Code of Civil Procedure, it is also possible to receive legal aid for initial advice (see section 2.5).

Costs relating to experts, witnesses, and translators are covered under the provisions of both the earlier and the new Code of Civil Procedure.

3.6 Quality of free legal representation

There is no mechanism in place to ensure or evaluate the quality of ex officio legal representation in civil cases, nor is there a means to monitor the legal actions taken by the lawyer.

The defendant can file a disciplinary complaint if he or she is not satisfied with the legal aid lawyer’s performance (see section 2.7).

There is no information available about surveys, studies, or other data collected by state institutions, non-governmental organizations, or research entities on the quality of legal representation for the indigent in the last five years. There are no systems in place to evaluate the functioning of the legal aid system in civil cases.

3.7 Application of the right to legal aid in practice

Unfortunately, no official data exist in relation to the application of the legal aid
norms concerning civil law in practice. There are no surveys or studies conducted by private organizations either. The Ministry of Justice does not collect information in this respect. In practice, application for legal aid in civil cases are relatively rare.

3.8 Other barriers to effective access to courts in civil cases

Court fees
Court filing fees are determined on the basis of the type of action: proprietary claims involve a 5 percent tax of the total amount claimed, whereas non-proprietary claims are determined depending on the type of the claim. For example, the court fee for claims relating to compensation of moral damage is 100 litas, the court fee regarding precontractual disputes is 300 litas, etc.

In proprietary claims, a stamp duty may constitute a significant burden on the parties. However, the Code of Civil Procedure provides for a possibility of a waiver of court fees on a number of grounds, including indigence. The procedure for obtaining a waiver of court fees is established by the government in accordance with the resolution “Concerning the Recognition of Natural Persons as Socially Needy.”

According to this procedure, the court or the judge presiding over the case decides on the application for waiver on the basis of the financial situation of the applicant and may relieve him or her at least partially of stamp duty. Request for relief from stamp duty must be supported by evidence. The new Code of Civil Procedure also provides for the possibility of waiver of court fees in a similar procedure.

If a person has been recognized by the government as indigent, he or she is relieved from the following costs: for payment of compensation for a guardian, for payment for work of the lawyer and apprentice of lawyer, for state-guaranteed legal aid.

Accessibility
The courts are located within a reasonable distance from every inhabited place. The Lithuanian Bar Association is centralized, meaning that there is only one bar association, located in the capital city of Vilnius. Individual lawyers are based throughout the country. However, they are not reimbursed for their travel expenses related to work on a legal aid case. Reimbursement of expenses for travel to and from the courthouse is available only for witnesses, forensic experts, and interpreters.

Vulnerable groups
There are no other special regulations to facilitate the access to courts of groups who might be in a more difficult situation regarding their access to justice. The state does not provide special training or seminars for sensitizing the judges and lawyers to the social and cultural specificities of these groups.
3.9 Alternative dispute resolution (ADR) and similar schemes

Under the current law, there is no alternative dispute resolution or similar scheme for solving civil disputes, except the commercial arbitration procedure for disputes between corporations.

4. Public law: Effective access to the judicial system for the indigent in administrative and constitutional cases and cases before international tribunals

4.1 Normative basis

There are no constitutional guarantees to the right to access to court or free legal representation in administrative cases. There is no possibility to file an individual petition with the Constitutional Court.

The Law on State-Guaranteed Legal Aid provides for the possibility of granting legal aid in administrative disputes to people who meet the eligibility requirements.68

Primary legal aid

Under the Law on State-Guaranteed Legal Aid, indigent people are likewise entitled to primary legal assistance. The law defines the primary legal aid as legal assistance and legal advice provided by a lawyer or apprentice of a lawyer in the form of one-hour primary legal counseling upon referral of the local government executive institution (the mayor or the person authorized by the mayor). The refusal of the local government executive institution to grant primary legal assistance may be appealed before the district administrative court.

Legal information is defined as information about the legal system, laws and by-laws, and provision of legal assistance. Legal advice is defined by the law as advice on legal issues and preparation of legal documents. Primary legal assistance is provided by lawyers and apprentices of lawyers. People whose annual income and property fall within the level determined by the Law on State-Guaranteed Legal Aid are eligible for primary legal assistance.

Terms and conditions of provision and reimbursement of primary legal assistance rendered by lawyers, apprentice of lawyers and local government executive institutions are established by agreements concluded between lawyers and local government executive institutions. A standard form of agreement is approved by the Ministry of Justice.

4.2 Eligibility criteria

There are no specific eligibility requirements based on the type of administrative complaints and cases for which legal aid is sought. The only eligibility criteria concern the financial situation of the applicants. These criteria are the same as in criminal or civil cases (see section 2.2.2).
The aforementioned government resolution of 22 January 2001 specified the levels of eligibility for people to receive state-guaranteed legal aid in administrative cases and determined the maximum amount of legal aid costs to be reimbursed.\textsuperscript{69} According to this resolution, the maximum amount of legal aid costs to be covered by the state in administrative cases is 0.4 times the minimum monthly salary,\textsuperscript{70} which as of 1 September 2002 equaled 172 litas.

4.3 Procedure for Appointment

According to the Law on State-Guaranteed Legal Aid, anyone wishing to receive legal aid in administrative cases has to file an application with the judge dealing with the case. This decision is subject to appeal and constitutes a separate ground for appeal.

Legal aid in administrative proceedings is provided by lawyers and apprentices of lawyers. There is no specific procedure for appointment of lawyers in administrative cases.

4.4 Alternative (Non-State) Mechanisms

Several non-governmental organizations provide free legal assistance in administrative cases: the Lithuanian Association for Human Rights, the Legal Assistance Center of the Law Academy, and the Kaunas Legal Assistance Center. The Legal Clinic of Vilnius University also runs an administrative law program and deals with a limited number of administrative complaints.

5. Organization of the System for Provision of Legal Aid

5.1 Special State Body Authorized to Administer the Legal Aid System

According to the regulations of the Ministry of Justice, the Ministry is authorized \textit{inter alia} “to ensure protection of human rights and freedoms and to create and enforce a national legal assistance system.”\textsuperscript{71} The Department of Institutions of the Ministry of Justice has a mandate to administer the legal aid system.\textsuperscript{72} However, the specific powers of this department have not been defined by a legal document yet. Therefore, the Ministry of Justice has only a general mandate to participate in drafting the legal aid budget and in the management of the legal aid system.

5.2 Role of the Bar Association in the Administration of the Legal Aid System

The role of the Lithuanian Bar Association in the administration of the legal aid system was marginal for a long period of time.

The situation improved when the government’s resolution of 22 January 2001
entitled the Ministry of Justice to contract the Bar Association for public procurement of services related to coordination and organization of state-guaranteed legal aid, by granting up to 3 percent of the public funds allocated for state-guaranteed legal aid. On 1 February 2001, the Ministry of Justice and the Bar Association signed the Contract for Procurement of Services, under which the Bar Association assumed the responsibility for coordinating and organizing procurement of state-guaranteed legal aid throughout the country; the Ministry of Justice undertook to pay for said services the sum of 146,000 litas. Subsequently, the Bar Association appointed thirteen lawyers (twelve regional coordinators and a central one) to coordinate and organize procurement of state-guaranteed legal aid, assigning to each regional coordinator a specific region and legal institutions where rendering of state-guaranteed legal aid was supposed to be coordinated.

The coordinators were supposed to: prepare a list of lawyers working with state-guaranteed legal aid cases and submit said list to law enforcement institutions and courts, enabling them to contact the ex officio lawyer to render state-guaranteed legal aid; prepare a list of lawyers “on duty” for weekends and official holidays; find ex officio lawyers in emergency situations; and ensure general communication and cooperation with law enforcement agencies to optimize procurement of state-guaranteed legal aid in the given region. The coordinators received 1,000 litas as a monthly honorarium for the coordination services rendered.

A similar agreement between the Bar Association and the Ministry of Justice was signed on 9 April 2002 for that year. The amount provided for the Bar Association to coordinate, organize, and control procurement of state-guaranteed legal aid is 144,000 litas.

The Bar Association does not have the express power to appoint legal aid lawyers. The powers of the Bar Association in securing good-quality free legal representation are exercised through disciplinary procedures. The Bar Association does not conduct surveys or any other evaluations on the quality of the legal services provided in legal aid cases.

5.3 Role of the Courts

As described above, the court has the authority to appoint ex officio lawyers in criminal cases when participation of defense counsel is mandatory, and to authorize payments for legal services provided in legal aid cases in all stages of the proceedings and for all types of proceedings: criminal, civil, and administrative cases. However, the court does not have any powers to monitor or evaluate the quality of legal representation in these cases.
5.4 Role of the Prosecution and the Police

As described above, the police and the prosecution are authorized to appoint *ex officio* lawyers in mandatory defense cases and to certify that the lawyer has provided state-guaranteed legal aid in criminal cases for a specific period of time.

5.5 State Models of Organization of the Provision of Legal Aid

There are different state models of organization of the provision of legal aid in the country, as free legal aid is granted by:

- *ex officio* appointed private lawyers (this model is the most common);
- public defenders working in public attorneys offices established in Šiauliai and Vilnius as pilot projects;
- private lawyers, working in association with a non-governmental organization (the Lithuanian Red Cross), who were contracted after a bidding procedure (contracting model);
- legal aid advice centers (such as the Legal Assistance Center in Vilnius and Kaunas), where law students and lawyers provide legal advice in some civil and administrative cases, including legal representation;
- a university-based legal clinic (the Legal Clinic of Vilnius University).

5.5.1 Legal Aid Rendered by *Ex Officio* Appointed Private Lawyers

Prior to the establishment of the public attorneys offices, the provision of legal representation to criminal defendants relied solely on an *ex officio* model, in which lawyers were appointed at each stage of the criminal proceedings for cases requiring the presence of a defense counsel.

Although the lawyers are paid for the *ex officio* cases, the pay is minimal, and it is often delayed for several months due to government budget shortfalls.77

In some cities, where the number of practicing lawyers exceeds what the market for legal work can sustain, some lawyers have come to depend on *ex officio* appointments for a guaranteed minimum income. In other cities, such as Vilnius and Kaunas, many private attorneys reportedly are busy and prefer not to be bothered with such cases.

Several years ago, all practicing attorneys were obliged to take *ex officio* criminal cases. This made private lawyers, to a large extent, view mandatory defense as a burden imposed by the government.

5.5.2 Legal Aid Rendered by Public Attorneys

**Administrative structure**

In December 1999 and October 2001, respectively, the Ministry of Justice, the Lithuanian Bar Association, and the Open
Society Fund–Lithuania signed the founding agreements of the Šiauliai and Vilnius Public Attorneys Offices (PAOs).

The PAO lawyers are paid an hourly fee on a par with that paid to all ex officio lawyers, plus an additional payment provided by COLPI and OSF that increases their earnings by approximately 50 percent (up to the fixed monthly net honorarium of 3,000 litas per office attorney and 3,600 litas per head of the office). The attorneys are also provided with free medical insurance, civil liability insurance, membership fees to the Bar, in-service training, and four weeks of vacation.

The legal status of public attorneys offices is as a non-governmental organization established under the Law on Public Institutions (Lietuvos Respublikos viešųjų įstaigų įstatymas). Establishment costs were covered by COLPI and OSF.

The Šiauliai Public Attorneys Office (SPAO) has been operating since 1 April 2000. In the two-year period from 1 April 2000 to 1 April 2002, attorneys of the SPAO completed 4,069 assignments from investigators, prosecutors, and/or judges in criminal ex officio mandatory defense cases (an average of about 2,034 assignments per year). On average, each attorney completed 33 assignments per month.

The establishment costs of the SPAO were 76,989 litas (the equivalent of 19,247 USD). Operational costs for the first year of the project (from 1 April 2000 to 1 April 2001) totaled 285,760 litas (71,440 USD), with an indirect contribution from the Ministry of Justice of 27,023 litas (6,755 USD), or 9.45 percent of the total; for the second year, operating costs totaled 260,223 litas (65,055 USD), with an indirect contribution from the Ministry of Justice of 76,859 litas (19,214 USD), or 29.53 percent of the total.

The funds channeled by the Ministry of Justice as compensation for legal services provided by SPAO attorneys in the second year (a sum of 76,859 litas) constituted 22.4 percent of the costs of legal services provided in Šiauliai by all attorneys within twelve months (a sum of 343,100 litas, as described in Table 1).

Table 1. Payment for state-guaranteed legal aid provided by lawyers in Šiauliai for 2001

<table>
<thead>
<tr>
<th>Title of Court</th>
<th>Actual costs incurred (litas)</th>
<th>Total funding provided (litas)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Šiauliai City District Court</td>
<td>186,100</td>
<td>196,900</td>
</tr>
<tr>
<td>Šiauliai Region District Court</td>
<td>60,800</td>
<td>64,800</td>
</tr>
<tr>
<td>Šiauliai Regional Court</td>
<td>96,200</td>
<td>102,300</td>
</tr>
<tr>
<td>Total</td>
<td>343,100</td>
<td>364,000</td>
</tr>
</tbody>
</table>
Šiauliai Public Attorneys Office

Structure and Procedures: It was unclear at the outset whether the SPAO would mesh with a criminal justice system rooted in Soviet-era tradition, which did not place a premium on rights of plaintiffs and defendants to competent legal representation. Nor was it clear that the courts and agencies involved in the justice system would welcome a unified cadre of specialized public attorneys as an alternative to the one-on-one relations they have with individual ex officio lawyers, who take cases on request.

The SPAO has all but eliminated the burden on the judiciary, prosecution and police investigators described above. In so doing, the five SPAO lawyers have improved the functioning of the criminal justice system. It is not surprising that representatives of these agencies unanimously called for increasing the number of lawyers in the office and the number of cases they could handle.

In addition to its own caseload, the SPAO coordinated assignments of ex officio lawyers. Where a defense lawyer is absent, the SPAO substitutes for him or her; where a defense lawyer failed to appear, the SPAO assumed the burden that previously weighed down the judges, investigators, and prosecutors, calling lawyers and urging them to stand up on cases in various stages of their prosecution and trial.

SPAO lawyers’ caseloads require an average of thirty to thirty-five appearances per month, roughly two or three appearances on a case per lawyer per day. The SPAO counts appearances on a case either in court or in investigative and prosecutor interviews. The director of the SPAO handles a reduced caseload to allow time for administrative duties.

The SPAO lawyers work in a vertical representation system. Once cases are acquired by the SPAO, the office stays with the client until the case is finally closed, including appellate review stages. Accordingly, clients benefit from consistent representation by one lawyer, rather than having a new lawyer for every stage, as happens often with ex officio lawyers. As a rule, each SPAO lawyer keeps track of his or her caseload, and makes almost all of his or her appearances on it. On occasion, if one SPAO lawyer is engaged in trial, and is also expected in another court or agency, another SPAO lawyer takes care of the second appearance or assignment.

The SPAO attorneys meet with some regularity for collegial discussion of cases they are handling. The head of the PDO keeps a weekly schedule showing each attorney’s planned appearances for that week.

SPAO midterm evaluation: Since the SPAO is the first of its kind in the region of Central Eastern Europe, its director’s primary focus was to get the initiative under way and to integrate it into the daily functioning of the criminal justice system in Šiauliai, rather than management and coordination. Moreover, the office opened without established criteria by which it would be evaluated during the course of its pilot period. Thus,
any evaluation must hold the office to standards of which its head or staff attorneys had no previous notice.

Each attorney in the SPAO was an experienced independent private litigator before joining the office. At the outset of the SPAO operation, there was no perceivable shift toward a joint practice. One sensed that to a great extent they were still independent lawyers who happened to share a physical space. There was no indication that this was because they could not or wished not to work collaboratively. The SPAO did not have a sense of itself as a unit, and this fact impeded coordination between the attorneys and implementation of office-wide quality standards.

While the SPAO has made great strides in handling a significant share of all indigent defendants’ cases, they could likely handle a larger caseload if the lawyers coordinated among themselves more conscientiously, and limited the number of appearances and interrogations that they cover on an “on-call” basis. The “on-call” system applied not only to SPAO cases, but also to cases to which ex officio lawyers have been assigned, but for which they failed to appear in court or for agency questioning of the defendant. As a result, lawyers picked up trial-ready cases in court with little or no opportunity to prepare them, at the same time disrupting work hours allotted to preparation of ongoing SPAO cases. Similarly, responding to spur-of-the-moment calls to police stations and prosecutors’ offices made for a frenetic and trying workday.

In the course of the first year of operations of the SPAO, office files reflected the hurried atmosphere in which the SPAO lawyers operated. An examination of a random sampling of case files showed the files to be haphazardly kept, notes inconsistent, and very few motions made of any kind. The office did not routinely record the results of cases before they were closed. There was no central file-keeping method that tracks the duration of cases or motions made on behalf of clients.

To eliminate shortcomings in operations of the SPAO, COLPI and OSF organized a four-day training for lawyers, with a focus on office management, coordination, and quality control, in June 2001. The training resulted in the introduction of a number of office procedures:

A. A system of “teaming” cases: Given the office lawyers’ former practice of appearing on each other’s cases—including trial-ready cases—it helps if they represent clients in teams. In each “teamed” case, one attorney is designated as having primary responsibility for the case, with a second attorney providing backup. Teams thoroughly conference case strategy and theories. Thus, if a judge refuses to adjourn a trial-ready SPAO case, the backup attorney is prepared to handle the case without detriment to the client, rather than ad-libbing a defense on the spot.

B. Coordination of appearances in court and at interrogations: With improved teaming and scheduling, one attorney with
an interrogation scheduled with the prosecutor or investigator is able to handle interrogations in the same building (or nearby) for other SPAO attorneys. Similarly, an attorney scheduled for a court appearance plans to stand up on other SPAO attorneys’ court cases, except at stages requiring specific knowledge that only the primary attorney has (e.g., trial, complicated motions).

C. Drafting and filing of written motions for the defendant’s release from pretrial detention: As arguments for release of defendants are standard and predictable, a form motion listing all possible arguments and all possible evidence to support them, which attorneys check and fill in on each case, was drafted and introduced in the work of the SPAO.

D. Making and recording of results of applications for release of defendants from pretrial detention: The SPAO has begun to move for release of defendants from detention in all cases in which they can make a colorable argument (i.e., except where the defendant is accused of a violent crime, or exhibits behavior likely to cause serious risk of harm to the defendant or society). Results are routinely tallied. Such practice can yield important information concerning the overuse of detention in Lithuania, as well as whether the courts’ judgment would likely differ from that of investigators and/or prosecutors.

E. Submission of written motions or a sub-

poena for testimony of expert and factual witnesses in all appropriate cases: A standard form motion has been introduced leaving blanks for types of expert witnesses (e.g., fingerprint, mental health, forensic/ballistics). A separate standard form motion is being used for fact witnesses, with blanks for names of individual witnesses, and the basis for the admission of their testimony.

F. Submission of motions confirming content of testimony in court (where appropriate): Where the minutes of court proceedings diverge from actual testimony or text of court proceedings, attorneys submit motions to amend the minutes as attested to by the filing attorney.

G. Drafting and submission of motions for dismissal of charges, admission of mitigating evidence, and requests for reduction of charges and for alternative sentences: The attorneys have begun filing such motions in writing when they deem their argument to be colorable and advisable.

H. Reduction of the number of cases picked up in court due to the failure of ex officio lawyers to appear: While the SPAO attorneys initially responded to all requests from law enforcement and courts to appear on a case, despite little or no notice, the SPAO negotiated to decline appointment on these cases unless a reasonably short delay in order to find the assigned ex officio case proves futile. It is crucial to a quality differential that SPAO lawyers not acquire cases for which they have no time to prepare.
I. Elimination of all impromptu non-urgent interrogations of clients by prosecutors and investigators: Prosecution and investigation interrogations are not time-sensitive, with the exception of those that take place during the first seventy-two hours after a defendant's arrest. SPAO attorneys negotiated to coordinate with law enforcement and to schedule such meetings in accordance with attorney availability.

J. Scheduling of at least one office day per week for each attorney: This procedure allows each lawyer to plan on one day per week without running to court, prosecutors, or police investigators.

K. Annotation of all case files after each court appearance: Once the attorney notes next appearances, due dates for motions and answers, and possible resolutions under consideration, an office assistant can enter them in the computer.

The SPAO has done a remarkable job of integrating into the criminal justice system in Šiauliai, an accomplishment that is all the more outstanding as the office lawyers were wholly unfamiliar with the model they managed to create. They undoubtedly have made a positive mark on the criminal justice system in Šiauliai. If the courts and other involved agencies have their say, the SPAO will be around for a long time to come.

By all indications, the SPAO has become an integral player within the criminal justice system. Interviews with judges, prosecutors, and police investigators in Šiauliai revealed that they cannot imagine a return to the old system without the SPAO. To the contrary, they are eager to see the office expand.

**Vilnius Public Attorneys Office**

The Vilnius Public Attorneys Office was opened on 26 April 2002. After the opening, VPAO lawyers were provided by COLPI with an orientation session in order to understand the mission and goals of the office, discuss and introduce office procedures similar to those that exist in Šiauliai, design standard motion forms in templates, and familiarize themselves with, and put into operation, a concept of teaming on cases. In addition, a computer case-tracking program was installed in the office to help the lawyers organize their work better and share information with their colleagues.

**Future prospects for the public attorneys offices**

A cost analysis of the SPAO shows at first glance that public attorneys offices are more expensive to run than the *ex officio* appointment system. However, this may not be prohibitive to its continued existence, or expansion of the public defender system. Nor is a first glance necessarily accurate.

Representatives of the courts, prosecutor, and police investigators all noted a significant loss in their time and labor effectiveness in their daily routine before the SPAO came into existence.

The Ministry of Justice and the Department of Courts also spend significant
amounts of time and money managing the \textit{ex officio} system. Payment of \textit{ex officio} lawyers requires the examination of hundreds of applications for payment from each of more than 900 \textit{ex officio} lawyers, each of whom invoices the government for hourly pay.

It is difficult to imagine that this does not cost the government huge sums of money, although these expenditures have not been separated out from the government’s overall expenses to allow a calculation of the cost of running an \textit{ex officio} system.

Therefore, it is hoped that public attorneys offices are to serve as adequate institutional alternatives for the government to ensure that state guaranteed legal assistance is provided to indigent people as stipulated in the Law on State-Guaranteed Legal Aid.

5.5.3 \textit{Legal aid rendered by private lawyers contracted after a bidding procedure}

The Lithuanian Red Cross signed a cooperation agreement with the Ministry of the Interior on 21 January 1999, which was renewed on 26 March 2001. This agreement regulated issues related to the rendering of free legal aid to asylum seekers. However, the funding of said legal aid was not regulated. Initially, the costs related to legal aid were covered by the United Nations High Commissioner for Refugees (UNHCR), International Red Cross Federation (IRCF), European Union (EU), and other international organizations and funds.

On 17 August 2001, however, the Lithuanian Red Cross and the Ministry of the Interior signed a protocol regarding payment for legal services in accordance with the “Recommendations on the Size and Procedure of Computation of Remuneration for the Legal Assistance Provided.”

On March 2002, the Ministry of the Interior announced the public tender through open procedure for procurement of legal services to asylum seekers under the Law on Public Procurement. As there were only two offers (one of lawyers of the Lithuanian Red Cross and one of lawyers from one private law firm), the tender did not take place, and the decision was taken to select a legal service provider through the negotiated procedure. This resulted in the choosing of lawyers of the Lithuanian Red Cross. Currently the terms and conditions of the contract for procurement of legal services to asylum seekers for a three-year period are under negotiations.

5.5.4 \textit{Legal aid rendered by law students and lawyers of legal aid advice centers}

Legal assistance centers in Vilnius and Kaunas provide legal advice and legal representation in some civil and administrative cases. Students provide legal information and counseling, draft legal documents, represent socially vulnerable people before state institutions and courts. They are supervised by experienced lawyers. Formally both centers are public institutions, but estab-
lishment of both centers was mainly supported by private funds (essentially by the Open Society Fund—Lithuania). Despite formal state commitments to support operations of these centers, the future of both centers with regard to financial sustainability and operational viability is uncertain.

5.5.5 Law Students of University-Based Legal Clinic

The Legal Clinic of Vilnius University is a public institution established with the financial support of the Open Society Fund. The Vilnius municipality provided premises for the Legal Clinic.

5.6 Evaluation and Training

The relevant authorities do not evaluate the effectiveness of the legal aid system, nor do they assess the needs of the existing system. Neither do the lawyers’ associations and non-governmental organizations working in this field.

No specific steps are taken to ensure that the members of the legal profession are aware of the needs of the indigent within society. The state, as well as the NGO sector, provides no special training for lawyers or encourages them in other ways to assist indigent people more effectively.


6.1 Determination of the Legal Aid Budget

According to the Law on State-Guaranteed Legal Aid, the costs of the legal assistance provided in these cases is financed by the budget of the state. The specific sum and the procedure for remuneration of the legal aid lawyer is established by the government resolution on the “Order and Payment Rates for State-Guaranteed Legal Aid Provided by a Lawyer and Apprentice of a Lawyer.” This resolution takes into account the “Recommendations on the Size and Procedure of Computation of Remuneration for the Legal Assistance Provided,” approved by the Ministry of Justice and the Lithuanian Bar Council.
6.2 Budgetary Information

Table 2. State funds for state-guaranteed legal aid

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>State budget</td>
<td>6,760,832</td>
<td>6,851,088</td>
<td>7,414,456</td>
<td>10,003,411</td>
</tr>
<tr>
<td>Amount allocated for courts (except the Supreme Court)</td>
<td>99,816 (1.47% of the state budget)</td>
<td>106,219 (1.55% of the state budget)</td>
<td>95,928 (1.55% of the state budget)</td>
<td>N/A</td>
</tr>
<tr>
<td>Projected funds for legal aid in the state budget</td>
<td>2,535</td>
<td>2,750</td>
<td>5,055</td>
<td>4,800</td>
</tr>
<tr>
<td>Received funds</td>
<td>2,081</td>
<td>2,750</td>
<td>5,032</td>
<td>N/A</td>
</tr>
<tr>
<td>Actual expenditures</td>
<td>2,163</td>
<td>3,166</td>
<td>4,990.94</td>
<td>N/A</td>
</tr>
<tr>
<td>Percentage of the state budget allocated for state-guaranteed legal aid</td>
<td><strong>0.0374</strong></td>
<td><strong>0.0401</strong></td>
<td><strong>0.0681</strong></td>
<td><strong>0.0479</strong></td>
</tr>
</tbody>
</table>

Source: Ministry of Justice, Vilnius, 31 May 2002

Pursuant to the Law on State-Guaranteed Legal Aid, primary legal assistance is financed from the budget of the local government. The Ministry of Finance is supposed to disburse funds to cover actual costs of municipalities in connection with primary legal aid rendered by lawyers and apprentices of lawyers. In practice, the Ministry of Finance manages the funding for primary legal aid. There is no clear written procedure for transferring funds to municipalities, and in practice they advance the payments for primary legal aid and are later reimbursed by the Ministry.

The funds allocated for primary legal aid in 2001 amounted to a sum of 500,000 litas, while actual expenditures were 3,171 litas. There is no specific budget line for primary legal aid for the year 2002. This implies that no funds are available for primary legal aid. Because of the low level of spending, a decision was made not to introduce a separate budget line.

Among the reasons for the inefficient use of funds for primary legal aid are the following: complicated procedure for receiving primary legal aid for a relatively inexpensive consultation (limited to one hour, or 50–100 litas); lack of awareness and information; lack of interest from the Lithuanian Bar Association; lack of clear administration (in fact, it is not clear what is in charge of this primary legal aid: the Ministry of Justice, which manages the legal aid; the Ministry of the Interior, which is in charge of local governance issues; or the municipalities).
6.3 Number of cases supported by the state legal aid budget

There is no data about the number of criminal cases supported per year by the amount allocated for criminal legal aid. There is no data about the number of civil cases supported per year by the amount allocated for civil legal aid.

6.4 Lawyers’ fees

Fees of legal aid lawyers are awarded on a per-hour basis, based on the time spent preparing and conducting the case in accordance with the governmental resolution on the “Order and Payment Rates for State-Guaranteed Legal Aid Provided by a Lawyer and Apprentice of a Lawyer.” The fees are determined on the basis of the minimal monthly salary approved by the government, which, as of 1 September 2002, is 430 litas. The apprentices are paid 80 percent of the determined rates.

Table 3. Payments for lawyers for state-guaranteed legal aid

<table>
<thead>
<tr>
<th>No.</th>
<th>Type of legal aid provided</th>
<th>Coefficient</th>
<th>Amount in litas</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Participation in interrogation and investigation for one full working day (i.e., 8 hours)</td>
<td>0.25</td>
<td>107.5</td>
</tr>
<tr>
<td>2</td>
<td>Participation in proceedings of criminal, civil, and administrative cases in first-instance, appeal-instance, or cassation-instance courts for one full working day (i.e., 8 hours)</td>
<td>0.3</td>
<td>129</td>
</tr>
<tr>
<td>3</td>
<td>(Reading of) case file prior to defense or representation in court proceedings (per one volume of the case)</td>
<td>0.07</td>
<td>30.1</td>
</tr>
<tr>
<td>4</td>
<td>Preparation of documents (drafting of motions for appeal on behalf of victims in criminal case; drafting of claim, application, or appeal in civil case; drafting of appeal (application) in administrative case)</td>
<td>0.15</td>
<td>64.5</td>
</tr>
<tr>
<td>5</td>
<td>Preparation of documents (drafting of appeal or cassation complaint)</td>
<td>0.18</td>
<td>77.4</td>
</tr>
<tr>
<td>6</td>
<td>Preparation of documents (drafting of other documents related to defense or representation in court proceedings)</td>
<td>0.05</td>
<td>21.5</td>
</tr>
<tr>
<td>7</td>
<td>Appearance for rendering of legal aid when legal aid is not provided due to reasons not depending on lawyer (when representation or defense is renounced, or when investigation action or processing of case is adjourned)</td>
<td>0.05</td>
<td>21.5</td>
</tr>
<tr>
<td>8</td>
<td>One-day breaks between court sessions in a case (the payment is paid for at most 3 working days) if lawyer or apprentice of a lawyer did not participate in another case during that break</td>
<td>0.05</td>
<td>21.5</td>
</tr>
<tr>
<td>9</td>
<td>For being on duty during free days if the lawyer did not provide legal aid in the course of this time</td>
<td>0.12</td>
<td>51.6</td>
</tr>
<tr>
<td>10</td>
<td>Appearance in detention center to meet with suspect, the accused, or the convicted person</td>
<td>0.05</td>
<td>21.5</td>
</tr>
</tbody>
</table>
When the duration of legal aid rendered by a lawyer is less than eight hours, the payment is reduced to the number of hours actually spent providing the service.

If a lawyer or apprentice of a lawyer has to travel to another town in connection with the rendering of legal aid, he or she is paid for one full working day of legal aid.

In reality, *ex officio* lawyers receive 14–16 litas per hour, which many consider insufficient.

The minimum lawyer's rate for private lawyers is 20–30 litas per hour, the average lawyer's rate is 50–200 litas per hour (maximum rate, 400–800 litas per hour), and the average net salary in the country is 1,088 litas.

### 6.5 Support for non-state initiatives

Legal advice centers run by non-governmental organizations (such as, for instance, the Legal Assistance Center of the Law Academy, the Kaunas Legal Assistance Center, and others) do not receive any direct funding by the state, despite the fact that under the Law on State-Guaranteed Legal Aid, such type of organizations can receive public funding. The law further authorizes these organizations to provide legal assistance (including legal information, legal advice, and representation) and/or to coordinate state-guaranteed legal assistance in accordance with a procedure established by these institutions in coordination with the Ministry of Justice. However, there is no such procedure yet.

Under the Law on State-Guaranteed Legal Aid, state and municipal nonresidential premises and other assets, on loan-for-use grounds, may be transferred for temporary use to public institutions providing legal assistance. However, this provision has not yet been enforced. The legal advice centers do not receive any tax relief from the state.

### 7. Data collection

No data regarding the management of the legal aid system is collected except for data on public expenditures in the *ex officio* cases.

The following information regarding the management of the legal aid system should be collected: the total number of cases in which state-guaranteed legal aid is provided, the costs per legal aid case, the total number of beneficiaries of state-guaranteed legal aid, and the total number of beneficiaries of primary legal aid.

### 8. Legislative developments

The new Code of Criminal Procedure will enter into force on 1 May 2003 and the Code of Civil Procedure will enter into force on 1 January 2003.

### 9. Recommendations

The author of this report recommends that the relevant governmental institution take the following measures:
1. Enhance the administrative capacity of the state to effectively manage the legal aid system, by taking the following steps: develop data collection tools relating to effective management of the legal aid system, introduce lists of lawyers providing guaranteed legal aid, certify the lawyers dealing with state-guaranteed legal aid, and prepare and implement continuous training programs for ex officio lawyers.

2. Introduce financial and legal monitoring procedures relating to the performance of private lawyers dealing with ex officio cases.

3. Improve communication and cooperation procedures between lawyer-coordinators (responsible for coordination of assignments for private lawyers) and private lawyers dealing with ex officio cases.

4. Address the problems at various official levels by ultimately aiming to increase public funding for legal aid.

5. Establish an administrative body (e.g., legal aid board) with specific functions, powers, and budgetary resources to manage the legal system effectively. This body should have a broad representational basis consisting of representatives from the Ministry of Justice, Lithuanian Bar Association, parliamentary committee on law, association of municipalities, legal aid centers, and non-governmental organizations.

6. Optimize the rendering of primary legal aid by continuously disseminating information at the municipal level about the availability of legal aid, monitoring procurement of primary legal aid, and taking other necessary measures.

In addition, specific legislation should be adopted in order to:

1. regulate the status of public attorneys in terms of professional guarantees (independence, membership in the bar, confidentiality, etc.), social guarantees (fixed pay, paid vacations, etc.), and status of public attorneys' offices as institutions supported by the state on a continuous basis;

2. regulate the establishment, composition, functions, structure, and areas of responsibilities of the legal aid board or analogous administrative structure empowered to manage the legal aid system;

3. introduce quality-control measures and procedures with regard to the rendering of state-guaranteed legal aid.
Notes


4 Article 14, paragraph 1, sub-paragraph 1, of the Law on State-Guaranteed Legal Aid.


8 Initially, the name of the legal aid draft law was “Law on Legal Aid.” Later, the word “guaranteed” was added to the name of this act to indicate a specific state obligation to provide legal aid.

9 Article 17 of the Code of Criminal Procedure.

10 For the purposes of this report, the term “accused” is used to refer to the person subject to criminal proceedings at the pretrial stage, and “defendant” to the person at the trial stage and stage of appeal. The term “defendant” also will be used in cases where a particular procedural norm applies to all stages of criminal proceedings.

11 This provision was referred to by the Supreme Court of Lithuania in the criminal case of 12 May 1998, “Courts’ Practice,” 11 June 1998, no. 9.


13 Article 382, paragraph 1, of the Code of Criminal Procedure.

14 Articles 3 and 14 of the Law on State-Guaranteed Legal Aid.

15 This provision was referred to by the Supreme Court of Lithuania while trying a criminal case on 12 November 1996, “Courts’ Practice,” 16 January 1997, No. 6; “Courts’ Practice,” 16 January 1997, No. 5.

16 This provision was referred to by the Supreme Court of Lithuania while trying a criminal case, No. 2K-511/1999, on 28 September 1999, “Courts’ Practice,” 8 March 2000, No. 12.

17 Article 51, paragraph 1, Code of Criminal Procedure.

18 Article 4, paragraph 1, of the Law on State-Guaranteed Legal Aid.

19 Article 56, paragraph 1, sub-paragraph 2, of the Code of Criminal Procedure of 1961.

20 Documents attesting to persons’ eligibility to receive state-guaranteed legal assistance are as follows: (i) property and income declaration forms filled in prior to applying for state-guaranteed legal assistance. In addition, the law requires applicant to submit property and income declarations every year if the provision of legal assistance lasts longer than one year; (ii) certificates certifying that the person received social benefits or is at a state-supported full-time care institution; (iii) other written evidence. Article 5, paragraph 1, of the Law on State-Guaranteed Legal Aid. These documents should be presented altogether.

21 Article 5, paragraph 2, of the Law on State-Guaranteed Legal Aid.

22 Article 6, paragraph 3, of the Law on State-Guaranteed Legal Aid.

23 Resolution of the Government of the Republic of Lithuania “Concerning the Levels of the Person’s Property and Income to Receive State-Guaranteed Legal Aid and Concerning the Maximum Expenses Relating to State-Guaranteed Legal Aid,” Official Gazette no. 8, 22 January 2001; see http://www3.lrs.lt/cgi-bin/preps2?
The following levels of the person’s property and income to receive state-guaranteed legal aid are established:

<table>
<thead>
<tr>
<th>Levels</th>
<th>Criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>First level</td>
<td>When the value of property of the person does not exceed the value of property determined by the government regulation and his or her annual income does not exceed the amount of twelve minimal monthly salaries deducting income tax and social insurance tax.</td>
</tr>
<tr>
<td>Second level</td>
<td>When the value of property of the person does not exceed 1.05 times the value of property determined by the government regulation and his or her annual income does not exceed the amount of 12.6 minimal monthly salaries deducting income tax and social insurance tax.</td>
</tr>
<tr>
<td>Third level</td>
<td>When the value of property of the person does not exceed 1.2 times the value of property determined by the government regulation and his or her annual income does not exceed the amount of 14.4 minimal monthly salaries deducting income tax and social insurance tax.</td>
</tr>
<tr>
<td>Fourth level</td>
<td>When the value of property of the person does not exceed 1.35 times the value of property determined by the government regulation and his or her annual income does not exceed the amount of 16.2 minimal monthly salaries deducting income tax and social insurance tax.</td>
</tr>
<tr>
<td>Fifth level</td>
<td>When the value of property of the person does not exceed 1.5 times the value of property determined by the government regulation and his or her annual income does not exceed the amount of 18 minimal monthly salaries deducting income tax and social insurance tax.</td>
</tr>
</tbody>
</table>

Article 2 of the Resolution of the Government of the Republic of Lithuania “Concerning the Levels of the Person’s Property and Income to Receive State-Guaranteed Legal Aid and Concerning the Maximum Expenses Relating to State-Guaranteed Legal Aid.”

State-guaranteed legal aid is to be terminated if: (i) it transpires that the person who is receiving state-guaranteed legal aid is not eligible to receive it; (ii) the person does not pay to the state budget the part of the fee for state legal aid he or she is obliged to pay; (iii) the person submits deliberately misleading information about the essence of his or her case, or his or her property and income. Article 7, paragraph 1, of the Law on State-Guaranteed Legal Aid.

documents proving the person’s right to state-guaranteed legal aid have not been submitted; (iii) the court rules that it is not expedient to provide state-guaranteed legal aid to the person, rights of persons or interests protected by laws are not expressly violated, and defense or representation in proceedings does not have prospects. Article 7, paragraph 2, of the Law on State-Guaranteed Legal Aid.

Article 106, paragraph 3, of the Code of Criminal Procedure.

Articles 123, paragraph 2, and 105, paragraph 2, of the Code of Criminal Procedure.


Article 56, paragraph 1, sub-paragraph 2, of the Code of Criminal Procedure of 1961.

Article 14, paragraph 1, sub-paragraph 2, of the Law on State-Guaranteed Legal Aid.
33. Article 106, paragraph 5, of the Code of Criminal Procedure.
34. Article 53, paragraph 1, of the Code of Criminal Procedure of 1961.
35. Article 56, paragraph 3, of the Code of Criminal Procedure of 1961 and Article 13, paragraph 1, of the Law on State-Guaranteed Legal Aid.
36. The interrogator usually is the person who performs mainly operational (in Russian, “operativnoye”) and search functions. Under Article 134 of the Code of Criminal Procedure, interrogation is carried out, depending on the type of crime, by the police, state security establishments, the Special Investigation Service, the Financial Crimes Investigation Service to the Ministry of the Interior, the military police, heads of the penitentiary establishments, pretrial detention establishments, establishments of social psychological rehabilitation, state fire protection agencies, or custom offices.
38. Pursuant to the new Code of Criminal Procedure, “major crime” is defined as intentional crime punishable by deprivation of liberty the upper limit of which exceeds six years but is less than ten years. “Grave crime” (the law says “extremely major crime”) is an intentional crime that is punishable by deprivation of liberty the upper limit of which exceeds ten years.
41. Article 50, paragraph 1, of the Code of Criminal Procedure.
42. Article 50, paragraph 4, of the Code of Criminal Procedure.
43. Article 21, paragraph 4, of the Law on the Bar of the Republic of Lithuania.
44. Article 46 of the Law on the Bar of the Republic of Lithuania.
45. Article 3, paragraph 7, of the Law on State-Guaranteed Legal Aid.
47. Paragraph 1, sub-paragraph 5, of the Code of Professional Ethics of Lawyers.
48. Survey conducted by the Lithuanian Association for Human Rights.
51. Resolution of the Government of the Republic of Lithuania “Concerning the Levels of the Person’s Property and Income to Receive State-Guaranteed Legal Aid and Concerning the Maximum Expenses Relating to State-Guaranteed Legal Aid.”
52. Ibid.
54. Article 30, paragraph 1, sub-paragraph 4, of the Law on Refugee Status in the Republic of Lithuania.
55. Information was provided by Ms. Migle Čirbaitytė, lawyer and coordinator of the Legal Assistance Project for Asylum Seekers and Refugees under the Lithuanian Red Cross, Vilnius, 10 July 2002.
56. Ibid.
57. Article 42-1, paragraph 1, of the Code of Civil Procedure of 1964.
58. Article 13, paragraph 1, of the Law on State-Guaranteed Legal Aid.
60. Article 3, paragraph 7, of the Law on State-Guaranteed Legal Aid.
61. Article 104 of the Code of Civil Procedure of 1964. Under the new Code of Civil Procedure, there are the following court filing fees: proprietary claims, if the amount to be adjudicated is less than 100,000 litas, 3
percent of the claimed amount, but not less than 50 litas; if the amount to be adjudicated is more than 100,000 litas but less than 300,000 litas, 3,000 litas plus 2 percent of the claimed amount that exceeds 100,000 litas; if the amount to be adjudicated is more than 300,000 litas, 7,000 litas plus 1 percent of the claimed amount that exceeds 300,000 litas.

62 Article 102, paragraph 1, of the Code of Civil Procedure of 1964.
63 Article 102, paragraph 1, sub-paragraph 39, of the Code of Civil Procedure of 1964.
65 Article 102, paragraph 2, of the Code of Civil Procedure of 1964.
66 Articles 83, paragraph 4, and 88, paragraph 1, sub-paragraph 5–7, of the Code of Civil Procedure.
68 Articles 3 and 14 of the Law on State-Guaranteed Legal Aid.
69 Resolution of the Government of the Republic of Lithuania “Concerning the Levels of the Person’s Property and Income to Receive State-Guaranteed Legal Aid and Concerning the Maximum Expenses Relating to State-Guaranteed Legal Aid.”
70 Article 3 of the Resolution of the Government of the Republic of Lithuania “Concerning the Levels of the Person’s Property and Income to Receive State-Guaranteed Legal Aid and Concerning the Maximum Expenses Relating to State-Guaranteed Legal Aid.”
72 Organizational charter of the Ministry of Justice; see http://www.min.tm.lt/english/ministry/ (accessed 5 July 2002).
74 At the time this research took place, one euro equaled approximately 3.4528 litas.
76 Information was provided by Ms. Audrone Bugeleviciene, deputy president of the Lithuanian Bar Association, Vilnius, 10 June 2002.
77 See Annex Nos. 1 and 2, where the column “Amount due as of...” shows delays in payments for lawyers for legal aid provided.
78 See Annex Nos. 4 and 6.
80 See Annex Nos. 4 and 5.
81 See Annex No. 8.
82 Four litas were equivalent to one U.S. dollar until 1 February 2002.
83 See Annex Nos. 4 and 5.
84 See Annex Nos. 4 and 5.
85 See also Annex Nos. 6 and 7.
86 This portion of subsection 5.5.2 is reprinted here from “Šiauliu Public Attorneys Office Mid-term Evaluation,” copyright 2001, Valerie A. Wattenberg, consultant for the Constitutional and Legal Policy Institute of the Open Society Institute—Budapest, as amended subsequent to June 2001 training. All rights reserved.
87 See Annex No. 8.
89 Law on Public Procurement of the Republic of Lithuania, No. 1-1491, 13 August 1996 (as amended by No.

90 Section IV of the Law on Public Procurement of the Republic of Lithuania.

91 Information was provided by Ms. Miglė Bernotienė, lawyer and coordinator of the Legal Assistance Project for Asylum Seekers and Refugees under the Lithuanian Red Cross, Vilnius, 10 July 2002.

92 See note 73.

93 Article 12, paragraph 2, of the Law on State-Guaranteed Legal Aid.

94 This amount includes the following components: indebtedness to the lawyers for the year 2000, 498,763 litas; legal aid costs incurred in the course of 2001, 4,318,963 litas; 146,000 litas paid to the Lithuanian Bar Association for coordination of assignments of *ex officio* cases to private lawyers; 3,600 litas for production of standard forms for lawyers to fill in to get payment for the provided state-guaranteed legal aid.

95 Information was provided by Ms. Miglė Bernotienė, head of the Division for the Policy of Local Governance, the Department of Public Administration, under the Ministry of the Interior, Vilnius, 5 July 2002.

96 See Annex No. 3.

97 Information was provided by Ms. Miglė Bernotienė, head of the Division for the Policy of Local Governance, the Department of Public Administration, under the Ministry of the Interior, Vilnius, 5 July 2002.

98 The total number of applications for primary legal aid for the year 2001 was eighty-five, the total number of referrals for primary legal aid for the year 2001 was fifty-three, and the number of beneficiaries who received primary legal aid was thirty-three.

99 Information was provided by Ms. Miglė Bernotienė, head of the Division for the Policy of Local Governance, the Department of Public Administration, under the Ministry of the Interior, Vilnius, 5 July 2002.

100 Ibid.

101 See note 73.

102 Percent of the minimum monthly salary.
## ANNEX NO. 1
Payment for state-guaranteed legal aid provided by lawyers for the period 1 January 2001–31 December 2001 (in litas)

<table>
<thead>
<tr>
<th>Number</th>
<th>Title of Court</th>
<th>Amount due as of 1 Jan. 2001</th>
<th>Actual costs incurred</th>
<th>Funding provided</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Vilnius City I District Court</td>
<td>-51,447.02</td>
<td>302,429.50</td>
<td>316,220.66</td>
</tr>
<tr>
<td>2</td>
<td>Vilnius City II District Court</td>
<td>-14,300</td>
<td>167,800</td>
<td>156,100</td>
</tr>
<tr>
<td>3</td>
<td>Vilnius City III District Court</td>
<td>-23,098.14</td>
<td>139,300</td>
<td>142,900</td>
</tr>
<tr>
<td>4</td>
<td>Vilnius City IV District Court</td>
<td>-4,270.86</td>
<td>51,085</td>
<td>47,400</td>
</tr>
<tr>
<td>5</td>
<td>Kaunas City District Court</td>
<td>-67,400</td>
<td>394,100</td>
<td>414,828</td>
</tr>
<tr>
<td>6</td>
<td>Klaipėda City District Court</td>
<td>-26,000</td>
<td>204,700</td>
<td>205,900</td>
</tr>
<tr>
<td>7</td>
<td>Šiauliai City District Court</td>
<td>-18,112.22</td>
<td>186,100</td>
<td>196,900</td>
</tr>
<tr>
<td>8</td>
<td>Panevėžys City District Court</td>
<td>-14,800</td>
<td>205,300</td>
<td>211,694.60</td>
</tr>
<tr>
<td>9</td>
<td>Druskininkai City District Court</td>
<td>-4,700</td>
<td>33,700</td>
<td>30,700</td>
</tr>
<tr>
<td>10</td>
<td>Palanga City District Court</td>
<td>-1,044.43</td>
<td>17,600</td>
<td>17,700</td>
</tr>
<tr>
<td>11</td>
<td>Visaginas City District Court</td>
<td>-3,600</td>
<td>23,969.9</td>
<td>27,409.57</td>
</tr>
<tr>
<td>12</td>
<td>Akmenė Region District Court</td>
<td>-1,900</td>
<td>24,100</td>
<td>26,000</td>
</tr>
<tr>
<td>13</td>
<td>Alytus Region District Court</td>
<td>-11,034.51</td>
<td>118,100</td>
<td>124,400</td>
</tr>
<tr>
<td>14</td>
<td>Anykščiai Region District Court</td>
<td>-7,000</td>
<td>58,300</td>
<td>56,200</td>
</tr>
<tr>
<td>15</td>
<td>Biržai Region District Court</td>
<td>-2,239.61</td>
<td>35,349</td>
<td>31,000</td>
</tr>
<tr>
<td>16</td>
<td>Ignalina Region District Court</td>
<td>-1,443.92</td>
<td>19,836.98</td>
<td>19,800</td>
</tr>
<tr>
<td>17</td>
<td>Jonava Region District Court</td>
<td>-6,800</td>
<td>81,700</td>
<td>76,800</td>
</tr>
<tr>
<td>18</td>
<td>Joniškis Region District Court</td>
<td>-1,600</td>
<td>48,400</td>
<td>38,800</td>
</tr>
<tr>
<td>19</td>
<td>Jurbarko Region District Court</td>
<td>-5,700</td>
<td>33,300</td>
<td>33,630</td>
</tr>
<tr>
<td>20</td>
<td>Kaisiadorys Region District Court</td>
<td>-2,402</td>
<td>27,600</td>
<td>27,700</td>
</tr>
<tr>
<td>21</td>
<td>Kauno Region District Court</td>
<td>-14,800</td>
<td>75,700</td>
<td>76,600</td>
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<tr>
<td>22</td>
<td>Kėdainiai Region District Court</td>
<td>-11,283.66</td>
<td>52,000</td>
<td>59,500</td>
</tr>
<tr>
<td>23</td>
<td>Kelmė Region District Court</td>
<td>-50</td>
<td>28,900</td>
<td>25,800</td>
</tr>
<tr>
<td>24</td>
<td>Klaipėda Region District Court</td>
<td>-7,620</td>
<td>35,600</td>
<td>33,300</td>
</tr>
<tr>
<td>25</td>
<td>Kretina Region District Court</td>
<td>-2,888.49</td>
<td>23,300</td>
<td>25,700</td>
</tr>
<tr>
<td>26</td>
<td>Kupiškis Region District Court</td>
<td>-4,030.37</td>
<td>38,100</td>
<td>39,100</td>
</tr>
<tr>
<td>27</td>
<td>Lazdijai Region District Court</td>
<td>-3,442.49</td>
<td>36,800</td>
<td>34,800</td>
</tr>
<tr>
<td>28</td>
<td>Marijampolė Region District Court</td>
<td>-2,997.35</td>
<td>64,100</td>
<td>53,300</td>
</tr>
<tr>
<td>No.</td>
<td>Court Name</td>
<td>Revenue</td>
<td>Expense</td>
<td>Net Profit/Loss</td>
</tr>
<tr>
<td>-----</td>
<td>-----------------------------------</td>
<td>---------</td>
<td>---------</td>
<td>-----------------</td>
</tr>
<tr>
<td>29</td>
<td>Mažeikiai Region District Court</td>
<td>-2,400</td>
<td>22,310</td>
<td>24,209.02</td>
</tr>
<tr>
<td>30</td>
<td>Molėtai Region District Court</td>
<td>-1,200</td>
<td>25,800</td>
<td>24,007.60</td>
</tr>
<tr>
<td>31</td>
<td>Pakruojis Region District Court</td>
<td>-1,750</td>
<td>31,350</td>
<td>29,400</td>
</tr>
<tr>
<td>32</td>
<td>Pasvalys Region District Court</td>
<td>-2,400</td>
<td>62,700</td>
<td>51,200</td>
</tr>
<tr>
<td>33</td>
<td>Plungė Region District Court</td>
<td>-1,824</td>
<td>30,600</td>
<td>26,100</td>
</tr>
<tr>
<td>34</td>
<td>Prienai Region District Court</td>
<td>-220</td>
<td>16,900</td>
<td>15,680</td>
</tr>
<tr>
<td>35</td>
<td>Radviliškis Region District Court</td>
<td>-3,000</td>
<td>53,200</td>
<td>44,200</td>
</tr>
<tr>
<td>36</td>
<td>Raseiniai Region District Court</td>
<td>-2,067</td>
<td>21,300</td>
<td>21,700</td>
</tr>
<tr>
<td>37</td>
<td>Rokiškis Region District Court</td>
<td>-3,400</td>
<td>49,490</td>
<td>52,890</td>
</tr>
<tr>
<td>38</td>
<td>Skuodas Region District Court</td>
<td>-1,423.38</td>
<td>16,877</td>
<td>18,300</td>
</tr>
<tr>
<td>39</td>
<td>Šalčininkai Region District Court</td>
<td>-7,914.8</td>
<td>51,500</td>
<td>56,600</td>
</tr>
<tr>
<td>40</td>
<td>Šakiai Region District Court</td>
<td>-630</td>
<td>19,900</td>
<td>20,300</td>
</tr>
<tr>
<td>41</td>
<td>Šiauliai Region District Court</td>
<td>-7,700</td>
<td>60,800</td>
<td>64,500</td>
</tr>
<tr>
<td>42</td>
<td>Šilalė Region District Court</td>
<td>-1,165.44</td>
<td>10,846.84</td>
<td>11,100</td>
</tr>
<tr>
<td>43</td>
<td>Šilutė Region District Court</td>
<td>-8,200</td>
<td>90,200</td>
<td>78,200</td>
</tr>
<tr>
<td>44</td>
<td>Širvintos Region District Court</td>
<td>-3,523</td>
<td>21,177</td>
<td>24,600</td>
</tr>
<tr>
<td>45</td>
<td>Švenčionys Region District Court</td>
<td>-3,135.65</td>
<td>30,484.68</td>
<td>30,350.79</td>
</tr>
<tr>
<td>46</td>
<td>Tauragė Region District Court</td>
<td>-2,015.51</td>
<td>34,100</td>
<td>28,300</td>
</tr>
<tr>
<td>47</td>
<td>Telšiai Region District Court</td>
<td>-3,452.18</td>
<td>52,200</td>
<td>51,748</td>
</tr>
<tr>
<td>48</td>
<td>Trakai Region District Court</td>
<td>-7,285</td>
<td>23,800</td>
<td>29,500</td>
</tr>
<tr>
<td>49</td>
<td>Ukmergė Region District Court</td>
<td>-7,742</td>
<td>64,100</td>
<td>61,358</td>
</tr>
<tr>
<td>50</td>
<td>Utena Region District Court</td>
<td>-2,300</td>
<td>49,800</td>
<td>47,500</td>
</tr>
<tr>
<td>51</td>
<td>Varėna Region District Court</td>
<td>-4,816</td>
<td>47,118</td>
<td>51,934</td>
</tr>
<tr>
<td>52</td>
<td>Vilnius Region District Court</td>
<td>-25,560.54</td>
<td>211,439.46</td>
<td>231,979.96</td>
</tr>
<tr>
<td>53</td>
<td>Vilnius Regional Court</td>
<td>-1,157.35</td>
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<td>23,832.51</td>
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<tr>
<td>54</td>
<td>Zarasai Region District Court</td>
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<tr>
<td>55</td>
<td>Vilnius Regional Court</td>
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<td>147,848.86</td>
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<tr>
<td>56</td>
<td>Kaunas Regional Court</td>
<td>-15,306.52</td>
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<td>117,693.52</td>
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<tr>
<td>57</td>
<td>Klaipėda Regional Court</td>
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<td>76,300</td>
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</tr>
<tr>
<td>58</td>
<td>Šiauliai Regional Court</td>
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<td>96,200</td>
<td>86,900</td>
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<tr>
<td>59</td>
<td>Panevėžys Regional Court</td>
<td>-4,703</td>
<td>77,100</td>
<td>72,397</td>
</tr>
<tr>
<td>60</td>
<td>Court of Appeal of Lithuania</td>
<td>-6,931.24</td>
<td>83,960</td>
<td>77,028.76</td>
</tr>
</tbody>
</table>

Total: -498,763.28, 4,318,963.06, 4,361,252
Annex No. 2
Payment for state-guaranteed legal aid provided by lawyers for the period 1 January 2002–31 March 2002 (in litas)

<table>
<thead>
<tr>
<th>No.</th>
<th>Title of Court</th>
<th>Amount due as of 1 Jan. 2001</th>
<th>Actual costs incurred</th>
<th>Funding provided</th>
</tr>
</thead>
<tbody>
<tr>
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Annex No. 3

Information about primary legal aid provided by attorneys-at-law and apprentices and paid by municipalities for the period
1 January 2002 – 1 February 2002

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ANNEX NO. 4
Expenditure report of Šiauliai Public Attorneys Office:
1 January 2000–1 April 2001, in litas*
**Annex No. 5**
Contributions of Ministry of Justice and OSF/COLPI
for Šiauliai Public Attorneys Office: 1 January 2000–1 April 2001, in litas

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*Note: Expenditure report covers a 15-month period: 3 months of establishment of PAO (Jan. 2000–March 2000) and 12 months of operations (April 2000–March 2001);
Establishment costs: 76,989 litas (the equivalent of 19,247.25 USD);
Project costs for 12 months (1 April 2000–1 April 2001): 285,760.88 litas (71,440.22 USD)
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1.1.–3.4. Contribution of OSF/COLPI  
4.1.–4.5. Contribution of Ministry of Justice
Annex No. 7
Contributions of Ministry of Justice and OSF/COLPI for Šiauliai Public Attorneys Office: 1 April 2001–1 April 2002, in litas

|                | Ministry of Justice |          | Open Society Fund/COLPI |          | Consolidated costs |          |          |          |          |          |          |          |          |          |          |          |
|----------------|---------------------|----------|-------------------------|----------|--------------------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|
|                | 7,600.50            | 7,436.40 | 6,977.60                | 4,053    | 5,868.40           | 8,000.90 | 6,576    | 5,685    | 6,126    | 4,601    | 7,652.60 | 76,859.00|          |          |          |
|                | 15,442              | 15,986   | 14,144                  | 18,757   | 15,690             | 14,167   | 12,026   | 13,702   | 12,806   | 18,753   | 14,980   | 183,363  |          |          |          |

Annex No. 8
Šiauliai Public Attorneys Office performance report for the period
1 April 2000–1 May 2002

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Access to Justice Country Report: Poland

Lukasz Bojarski
Polish Helsinki Foundation for Human Rights

Executive Summary

The current legislative framework in Poland does not provide sufficient protection of the right to legal aid for the indigent.

In criminal cases, indigent defendants can receive legal aid if their case falls within the scope of cases for which defense is mandatory. If defense is not mandatory, defendants can receive legal aid on their motion based on indigence. Although there are a number of types of cases for which defense is mandatory, individuals charged with crimes for which the lower sentencing limits are less than three years of imprisonment are not eligible for mandatory defense. This excludes many individuals, who are at risk of imprisonment ranging from less than three to ten or even twelve years, from the guarantee of mandatory defense. As a result, many people do not have a defense counsel during a trial even if it results in conviction and a sentence of imprisonment.

Another problematic aspect in criminal cases is the question of access to defense counsel (with or without legal aid) in the stage of preliminary investigation. Empirical information reveals that in many cases a defendant’s first contact with defense counsel has taken place at the end of the preliminary investigation, at the action of final acquaintance with the investigation files (when this procedural action is mandatory), or even at the first court hearing.

The lack of clear means test is also problematic. There are no clear criteria as to when a person should be granted legal aid, and no explicit duty for the court to provide detailed grounds for its decision, which, together with the lack of possibility to appeal (in criminal cases), leaves this provision discretionary. The absence of a detailed description of the manner in which an indigent person should “adequately demonstrate” his or her inability to bear the costs of defense results in a limitation of access to legal aid. This is true for both criminal and civil cases. In the latter instance, clear financial criteria (means test)
as a condition to apply for legal aid are missing in the procedure for granting a waiver of court fees (costs).

The quality of the legal aid representation is often not satisfactory. The Helsinki Foundation for Human Rights receives complaints about the actions of attorneys, with most clients complaining of *ex officio* defense counsel and attorneys. There are no standards of professional conduct related to *ex officio* cases. There is also no system of quality control. All responsibility lies with professional bodies that are widely criticized for not fulfilling this task properly. The state, while having some possibilities of initiating legal action (for instance, disciplinary procedures against lawyer), does not use its power in this respect.

Statistical data related to legal aid is not collected by the Ministry of Justice, the courts, or actors or associations in the legal professions. Although the amount spent for legal aid increased significantly in the last year, this is primarily a result of an increase in lawyers’ fees. It is not clear whether there has been an increase in the number of legal aid cases. State institutions do not collect data about the number of cases for which legal aid is granted, and data collected by lawyer’s associations is not reliable.

The comparison between the number of lawyers and the number of cases brought to Polish courts, as well as the number of people sentenced, reveals an obvious shortage of lawyers and an enormous need for legal services, including legal aid. The number of cases received by courts has been increasing consistently: from 2,740,000 cases in 1991 to 8,392,000 in 2001. In the same period, the number of attorneys and legal advisers has risen only slightly; there are close to 5,500 practicing attorneys who may appear in all kind of cases and about 7,000 legal advisers who may represent natural persons (i.e., individual clients), excluding criminal and family cases.

Attorneys indicated the following problems with the current *ex officio* system:

- too many *ex officio* cases per attorney (although, on the other hand, legal advisers are willing to conduct such cases);
- dramatic delays in payment for *ex officio* cases (sometimes almost two years);
- unsatisfactory fees for *ex officio* cases based on minimum amounts, with no differentiation in payments according to time spent on a case, its complexity, or details of the lawyer’s costs.

1. Introduction

The population of Poland is approximately 39 million people. The judicial system in Poland is made up of courts of three instances. It is composed of 299 district courts, 41 regional courts, and 10 appellate courts, as well as the Supreme Court. Administrative decisions are controlled by a separate system of administrative courts. This currently comprises the Chief Administrative Court and its ten local branches.
Starting in 2004, there will be regional administrative courts, with the Chief Administrative Court serving as the court of second instance. Legislation is examined by the Constitutional Tribunal to determine its compliance with the Constitution. There are also military courts.

Lawyers in Poland have the exclusive right (with few exceptions) to provide legal services and advice. There are about 7,200 attorneys in Poland (called advocates—advokaci), of whom about 5,300 are professionally active (2001 data). Attorneys may provide legal services in all types of cases. There are also more than 20,200 legal advisers (radcy prawni), 16,700 of whom are professionally active (2001 data). Legal advisers may provide legal services in all cases except criminal and family cases. But only about 7,000 legal advisers may work with individual clients—natural persons. The rest work in the business sector and public administration. Legal advisers, unlike attorneys, may be employed on a labor contract. However, those who are employed through such a contract may not represent natural persons.

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 separate, independent legal professions. Both make decisions on admitting new members (who are selected through an entrance examination, complete the three-and-a-half-year apprenticeship training, and pass final exams, organized by the professions themselves), adopt rules of professional ethics, consider complaints against lawyers, and conduct disciplinary procedures.

Legal aid for the indigent, through the ex officio system, is provided by both attorneys and legal advisers. In practice, legal aid in Poland includes only legal representation. In criminal and family cases, only attorneys are entitled to appear before the court. In other cases, such as civil, labor, and commercial cases, legal advisers may appear as well. In fact, legal advisers take only one percent of ex officio cases. In criminal cases, attorneys are appointed by the court chairman from an alphabetical court list of all attorneys. In other cases, when granting legal aid, judges send the decision to the Council of the Bar or Legal Advisers, and it is that Council that will appoint the particular lawyer.

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).

The problem of access to and quality of legal aid has not received a lot of attention in Poland. Government bodies, research institutes, and the legal professions had not conducted surveys concerning this problem. The Helsinki Foundation for Human Rights (HFHR) decided to conduct a monitoring program of access to legal aid in Poland and to start public debate on the topic. Within the project, we have undertaken several activities, among them the following:
Review of law

Poland does not have one unified legal act concerning legal aid. Instead, these problems are regulated in many separate legal acts. For research purposes, we selected more than one hundred legal acts of various types. Provisions concerning widely understood legal aid were found in seventy-nine of them. We have prepared a registry of these regulations.

Analysis of statistical data

Although direct data concerning various aspects of access to legal aid is almost nonexistent, collection of indirect data allowed us to analyze certain information. We have attached particular importance to, for example, determination by the state of its expenditures for legal aid and the number of cases in which _ex officio_ legal aid was granted.

Empirical survey through interviews with 809 respondents, based on a questionnaire

Part of this survey was conducted in courts, through interviews:

- with parties not represented by an attorney or legal adviser, to determine the reasons for lack of representation;
- with parties having an attorney or legal adviser (private or _ex officio_), to focus on their manner of obtaining legal assistance, evaluation of the quality of a lawyer's work, costs, and other concerns between the lawyer and the client.

In addition, part of this survey was conducted in prisons, through interviews:

- with imprisoned persons not represented by counsel in trials that resulted in imprisonment, to determine the reasons for lack of representation and whether these individuals were aware of their right to legal aid;
- with imprisoned persons having a defender (private, _ex officio_) in trials that resulted in imprisonment, to determine their manner of obtaining legal aid, and to conduct an evaluation of the quality of a defender's work, costs, and other relations between the lawyer and the client.

Interviews based on a questionnaire

Other interviews, using a questionnaire, were conducted to examine opinions of attorneys, legal advisers, and public prosecutors concerning the legal aid system, its problems, and proposed changes. This examination has been carried out as a pilot survey.

A similar survey was conducted of non-governmental organizations that provide citizens with legal advice and assistance. This survey has focused on the type of assistance granted and manners for granting it, competencies of persons providing assistance, institutional conditions, problems, and proposed changes. This has also been in the form of a pilot survey.
Judicial interviews
Interviews with also conducted with presidents of district and regional courts, and “focus groups” held with judges, to examine their opinions concerning the present system of legal aid and proposed changes.

Case studies
Based on cases received by the HFHR’s “Public Interest Law Actions” section, we have developed, *inter alia*, case studies describing negative examples of the functioning of *ex officio* legal aid, to illustrate its main problems, as well as examples of disciplinary proceedings for cases of misconduct by *ex officio* attorneys.

Problem studies
Problem studies were also developed, including a focus on the following:

- interpretation and application of Article 78, section 1, of the Code of Criminal Procedure—the problem of “adequate demonstration” by a defendant requesting an appointment of defense counsel, “that he or she is not able to bear costs of defense without detriment to support and maintenance for himself or herself and family.”
- serious restrictions in access to the profession of advocates and legal advisers, as one of the reasons for the lack of legal aid and its poor quality, along with possible solutions, including the need to broaden the number of practicing lawyers.
- restrictions on access to legal aid for persons who want to sue an attorney for damages caused by the deficient performance by that attorney.
- civil liability insurance for attorneys and legal advisers for damages caused by their services (malpractice insurance).

The HFHR’s work clearly indicates that there are many problems requiring attention in the area of access to legal aid.

2. Criminal law: Effective access to the judicial system for the indigent in criminal cases

2.1 Right to counsel

2.1.1 Constitutional guarantees of the right to counsel and the right to legal aid

Each and every defendant in a criminal proceeding has a constitutional right to defense in all stages of such proceeding. In particular, such person may hire a defense counsel of his or her choice or have one appointed *ex officio* according to principles specified by the law.3

2.1.2 Right to counsel in criminal proceedings

Every accused person has the right to defense, including the right to be assisted by a defense counsel, and should be instruct-
ed of this right.4 As a rule, the right to defense is granted in all stages of a criminal proceeding. Only an attorney may appear in criminal proceedings in the capacity of defense counsel.5 A deviation from this rule is the possibility of defense in a petty crime case by a legal adviser authorized to represent a natural person.6 The defendant may choose a defense counsel (attorney) at his or her discretion.7

Arrest

In the case of arrest, the arrested person may, upon demand, contact and personally consult with one attorney.8 The agency performing the arrest may reserve the right to be present during the conversation.

With respect to the arrested person, if he or she has not been interrogated and does not yet enjoy the right to defense or to be assisted by a defense counsel, the agency is not obliged to secure that person’s contact with an attorney—even if conditions for future mandatory defense are present.

By law, however, the arresting authority is obliged to instruct the person as to his or her right to contact an attorney and to consult with the attorney personally.9 The arrested person must also be informed of the grounds for arrest.

Arrested persons have the right to file a petition against the arrest within seven days, thereby demanding examination of its justification and the means by which it was executed.10 If the arrest was not ordered by the court, the complaint or petition is handed over to the district court and examined immediately.

If, in the meantime, a defense counsel can be hired or appointed, he or she may draw up the complaint against the arrest and submit it to the court.

However, the actual use of legal advice during and immediately after the arrest is rare in practice. For legal advice to be granted in such circumstances, the person concerned must get help from others, and must know how to contact a lawyer (available twenty-four hours a day, Sundays and holidays included) who could come to the site of detention and talk directly with the arrested person. Few of those arrested seem to be able to actually contact the attorney. The rest are utterly incapable of exercising the right specified in Article 245, section 1, of the Code of Criminal Procedure.

In the case of juveniles, the prosecutor is obliged, under section 111, point 2, of the Rules,11 to immediately approach the president of the court with a motion for appointment of ex officio counsel, unless the case file includes information that the suspect (or suspect’s guardian) has already hired an attorney.

Detention

With respect to an arrested person suspected of a crime, it is possible to apply preventive measures, the most severe of which is pretrial detention imposed for a specified period of time or conditionally until bail can be paid.12

The decision to detain a person during preparatory proceedings is made by the court on a motion by the prosecutor. Before imposition of this measure, the court is
obliged to hear the suspect. This obligation does not apply to public prosecutors who moves for imposition of pretrial detention. Thus, the motion for detention and the motion for appointment of *ex officio* defense counsel even in mandatory defense cases are not always submitted simultaneously in every case. In addition, it rarely happens that the motion for appointment of *ex officio* counsel for an indigent suspect is actually submitted before the date of the hearing concerning the imposition of detention.

The decision to impose pretrial detention is made at a hearing conducted by a single judge. The appointed defense counsel may take part in the hearing if he or she is present. Under Article 249, section 3, of the Code of Criminal Procedure, notification of the defense counsel about the date of the hearing “is not obligatory.” However, if the suspect asks for notification, the court either notifies the defense counsel or refuses the motion. The court might refuse the motion if, in the court’s opinion, such notification would result in a delay preventing a decision to impose detention within twenty-four hours of the suspect being placed at the court’s disposal. The time runs from the hour when the prosecutor made the motion to the court.

Therefore, the defense counsel’s appearance is possible only as a result of his or her own initiative or upon an explicit request of the suspect.

On the other hand, provisions of section 360 of the Internal Rules of Procedure of Common Courts of Law impose on the judge the duty to notify not only the prosecutor but also the defense counsel, if he or she has already been appointed and has reported participation in judicial actions, about the hearing concerning pretrial detention.

It follows, therefore, that access to legal advice by individuals deprived of liberty is limited during the first stage of proceedings. In the case of mandatory defense, that access depends on how promptly the prosecutor lodges the appropriate motion for appointment of the defense counsel. In the case of *ex officio* defense requested by the detainee, it depends on whether that person is informed about the possibility of applying for *ex officio* defense counsel. Also important is the amount of time before the defense counsel can be appointed, and before the counsel, once appointed, actually undertakes actions aimed at personally contacting the detainee.

Even if the appropriate motions are filed without delay (the prosecutor makes the motion for appointment of *ex officio* defense counsel, or the duly instructed suspect draws up his or her application adequately demonstrating an inability to bear the costs of defense), the counsel appointed by the court may not undertake actions immediately. The court has to notify the appointed counsel, in writing, of the professional duty of his or her appointment. Appointed counsel must receive the letter of appointment (which may not take place immediately, as the letter is sent by post, not to mention a possible vacation or sick leave of the lawyer). The court also provides particulars of the appointed defense counsel to
the prosecutor, who can thus duly notify the
defense counsel of procedural actions that
require his or her participation.

From information provided by pro-
secutors and by individuals addressing the
HFHR with requests for help, we have
learned that in many cases the suspect’s
first personal contact with his or her defense
counsel takes place after preparatory pro-
ceedings are concluded, and during the
action of the final review of the case files
with the suspect before the indictment is
presented to the court—an action in which
the defense counsel’s participation is oblig-
atory in mandatory defense cases specified
in Article 79 of the Code of Criminal Pro-
cedure. In other cases, information indi-
cates, a suspect’s first contact with defense
counsel often takes place only during the
first court hearing.

**Trial**

From the beginning of the trial stage, the
defendant has the right to defense in all
stages of the procedure, including hearings
in court of first and second instance, the fil-
ing of an appeal, the filing of a cassation,
and hearings before the Supreme Court.

In certain instances, exercising the defen-
dant’s rights requires the participation of an
attorney. For example, to file an appeal of
the judgment of a regional court as a court
of first instance, the defendant must be
represented by an attorney. The filing of a
cassation must also be performed by an
attorney.

In the above-mentioned stages, exercis-
ing the indigent person’s right to defense
deps on the appointment of an *ex officio*
defender by the court.

If the defendant did not have an attorney
before the court of first instance, he or
she may submit a motion for appointment
of an *ex officio* attorney for filing an appeal
and for representation in the court of sec-
ond instance. In theory, if the defendant has
been granted an *ex officio* attorney in the
court of first instance, the same attorney
continues to represent him or her through
all appeals, until the final judgment is deliv-
ered.

However, in cases of *ex officio* defense,
the defendant is often represented by a dif-
ferent attorney. The courts of second
instance, especially appellate courts, may
be located very far from the first attorney’s
place of residence. Therefore, it often hap-
pens that the court appoints a different
attorney only for appearance before the
court of second instance, even though the
appeal was filed by the first attorney. The
presence of an attorney at hearings in the
court of second instance enables the court
to conduct the hearing in the absence of the
defendant if he or she remains under pre-
trial detention. The court makes the deci-
sion whether to bring the defendant to the
hearing.

In practice, it happens that:

- the defendant does not know his or her
  attorney who was appointed to par-
ticipate in the appellate hearing and
may not have had contact with the attorney in person;
• the defendant does not take part in the hearing;
• the attorney that represents the defendant is not the author of the appeal. The attorney’s preparation for the hearing means reading the case files (if the attorney treats his or her duties seriously). Often, the newly appointed attorney’s participation in the appellate hearing is purely formal and is limited to a statement that the attorney “sustains the statements in the appeal.”

The judgment of the court of second instance is legally valid. The cassation submitted to the Supreme Court is an extraordinary measure and is permitted only in exceptional situations—e.g., gross violation of the law. The cassation must be filed by an attorney. The indigent defendant must submit a motion for appointment of an ex officio attorney for preparing and filing the cassation.

The attorney appointed is not obliged to file a cassation, but if the attorney declines to do so, he or she must inform both the court and the client about the decision. Filing a manifestly frivolous cassation is a violation of rules of professional ethics.

In practice, however, the court does not appoint an attorney to examine the possible grounds for cassation. The indigent defendant may therefore be deprived of the opportunity to utilize such a measure. In addition, appointed attorneys often refuse to file a cassation, arguing that there are no grounds for it. It is hard to verify the truth of these statements, because it is very unusual that after such a refusal the court would appoint a second attorney to examine these grounds again.

2.1.3 Right to counsel and right to legal aid in non-criminal proceedings when deprivation of liberty is at stake

Minors
Article 20 of the Act on Procedure in Minors’ Cases provides that within the scope of granting legal representation to minors, the Code of Criminal Procedure is applied mutatis mutandis. In the court’s clarifying proceedings or child care proceedings, a minor must have a counsel if his or her interests conflict with the interest of the minor’s parents or guardians.17

In case of indictment for criminal conduct, a minor must always be represented by a counsel before the court, as well as during earlier stages if he or she was placed in a minors’ shelter.18 Participation of counsel in the hearings is always mandatory.19 If the court finds that a minor suffers from mental disorders, is mentally handicapped, or is addicted to alcohol or other agents, the decision to place the minor in a psychiatric hospital, caretaking center, or social welfare house must be issued with participation of a counsel.20

Mentally disabled
In proceedings before the “caretaking
court” in cases based on the Act on Protection of Mental Health, the court may appoint a counsel for the person even without his or her motion, if such a person is not able to file the motion and the court finds the participation of a counsel to be necessary. 21

Convicted persons
In civil proceedings, the prison inmate does not have any special rights. He or she may hire an attorney or request the appointment of ex officio counsel like any other party. 22 There are no special provisions on legal aid or legal advice in cases of complaints by prison inmates against prison administration.

Foreigners violating immigration laws
A foreigner appearing before the court that decides placements in “pre-deportation arrest” or “guarded foreigners centers” seems not to have the right to legal aid. Although in theory the general rules of the Code of Criminal Procedure apply to cases involving foreigners, information received from lawyers working with foreigners indicates that the right to ex officio counsel is not applied to such cases.

Drunk persons
In the case of drunk persons who have been detained in “sobering centers,” there is no right to defense or to judicial review of the legitimacy of the detention. Such a review may take place after the release, on the motion of the person detained.

Alcoholics
Article 26.2 of the Act on Education in Sobriety and Combating Alcoholism of 26 October 1982 provides for a decision on enforced treatment. The decision is made by a district court where the rules of the Code of Civil Procedure on non-dispute proceedings apply; therefore, the person whom the decision concerns has the right to legal aid just as in civil matters (see section 3).

Drug addicts
According to Article 17 of the Act of 24 April 1997 on Combating Drug Addiction, enforced treatment is possible only in cases involving minors. In these cases, the procedures provided in the Act on Procedure in Minors’ Cases are applicable (see “Minors,” above).

2.2 Right to legal aid: Eligibility criteria for granting legal aid in criminal cases

2.2.1 Substantive criteria
In general, there are three possibilities for receiving ex officio legal aid:

• where mandatory defense is applicable (if person does not have a lawyer, the president of the court will assign one);
• on the motion (demand) of the accused; in these cases, assignment of the lawyer is at the discretion of the judge and there is no possibility to appeal that decision;
where the court decides *ex officio* that the person needs defense counsel, “if
the court finds it necessary due to circumstances hampering the defense”; 
this is a new provision (adopted in the Code of Criminal Procedure in 1997),
and while there is not enough jurisprudence on it yet to make an assessment,
some say that it is not often used.

In several instances, the defendant is required to have a defense counsel whether or not he or she wants one. This mandatory defense applies in the following situations:

- if the defendant is a juvenile;
- if the defendant is deaf, blind, or mute;
- if the defendant does not speak Polish;
- if there are reasonable doubts as to the defendant's sanity;
- if the court finds it necessary in view of circumstances that may hamper the defense;
- if the proceeding is pending in the first instance before a regional court, and the defendant is charged with a felony (acts punished with the statutory penalty of at least three years’ imprisonment) or is deprived of liberty (detained or serving a term for another offense).

In such instances, having ascertained that the defendant does not have a defense counsel of his or her choice, the president of the court will appoint an *ex officio* counsel.

As noted above, Polish law provides that the defendant must have a defense counsel (mandatory defense) if, for example, he or she has been charged with a felony (that is, an offense involving the statutory penalty of imprisonment for at least three years).

Defendants charged with less serious criminal offenses (where the minimum statutory penalty is less than three years of imprisonment) do not have the right to mandatory defense. Polish criminal law, however, sets out many less serious criminal offenses that involve a maximum statutory penalty of, for example, five, ten, or even twelve years of imprisonment. Thus, a person can be lawfully sentenced to a long prison term (of up to twelve years) without defense counsel.

Some situations involve “obligatory assistance” by an attorney when access to a court depends on access to a lawyer. The Code of Criminal Procedure provides for obligatory assistance in the following cases:

- private indictment;
- appeal to the Court of Appeal of a judgment passed in the first instance by a regional court;
- cassation filed before the Supreme Court;
- motion for reinstitution of procedure.
2.2.2 Financial criteria

If the defendant does not have sufficient means to hire a defense counsel of his or her choice, he or she may apply to the court for appointment of an *ex officio* defense counsel. Under Article 78, section 1, of the Code of Criminal Procedure, the applicant is obliged to “adequately demonstrate” his or her inability to pay the attorney’s fees. In theory, as soon as the defendant demonstrates this fact, the president of the court shall appoint an *ex officio* defense counsel.31

Article 78, section 1, of the Code of Criminal Procedure provides that “[a] defendant who does not have a defense counsel of his or her own choice may demand to have an *ex officio* defense counsel appointed, provided that he or she adequately demonstrates that he or she cannot bear the costs of defense without detriment to support and maintenance for himself/herself and family.”

The requirements to be met by the defendant applying for *ex officio* defense counsel have not been stated with sufficient precision. As a result, it is unclear exactly what evidence can be treated as reliable (e.g., official certificates from the tax office or local social welfare center, the applicant’s own statement, etc.). The present regulations make it possible for the court to refuse legal aid without clearly stating the grounds on which the decision is based—and, it should be stressed, there is no possibility to appeal that decision.

Letters written by the HFHR asking for information about court practices resulted in the following responses:

- The vice president of one of the district courts has reported that decisions on whether to grant defense counsel are made individually in specific cases based on specific circumstances. This, in his opinion, made it impossible to quote any generally applicable criteria. He stated only that applicants are obliged to document the circumstances they refer to in the application.

- The chairman of the Criminal Division of another district court asserted that when he is handling an application for *ex officio* defense, the applicants are called upon to provide certificates stating their own and their family’s income. The chairman further stated that the court takes cognizance of established facts concerning the applicant’s family and financial situation based on the case files. When appointing *ex officio* counsel, the basic criteria are the applicant’s income as well as that of his or her family (parents, spouse or unmarried partner, and grandparents).

It is not known precisely how the person applying for legal aid should document the application. This allows the court to make arbitrary decisions. Moreover, although by law the president of the court makes decisions granting legal aid, often
he or she transfers this power, and the decision is instead made by the chairman or chairwoman of the Criminal Division or, in what seems be a problematic situation, by the presiding judge.

Costs of *ex officio* counsel are covered by the Treasury. However, if the defendant is found guilty, he or she may be charged with the costs of *ex officio* counsel. If the defendant was granted *ex officio* attorney due to lack of funds, the court charges the Treasury with the costs. In situations of mandatory defense, if the defendant was granted an *ex officio* attorney, the court may charge the convicted defendant with the costs. This happens in practice rarely; however, the actual scope of the phenomenon is not known.

2.2.3 Other eligibility questions

If a given criminal case is subject to the jurisdiction of Polish courts, the procedural rules of the Code of Criminal Procedure are applied in the same way to both citizens and non-citizens.

There are no special rules applied to minorities, women, or other groups of disadvantaged people. There is, however, a new provision (adopted in 1997) that enables the trial judge to appoint *ex officio* defense “if the court finds it necessary due to circumstances hampering the defense”—in which case the participation of an attorney becomes mandatory.² In commentaries to the Code of Criminal Procedure,³ these circumstances are understood to include difficulties in communication with the defendant or instances in which, due to helplessness or overall condition, the defendant is not able to defend himself or herself adequately without the assistance of an attorney. However, it always depends on the opinion of the court whether given circumstances hamper the defense, and if so, whether it hampers it to such an extent that participation of an attorney becomes necessary.

2.2.4 Legal aid for victims of crimes

The principles of legal aid on a motion also apply to other people who appear in the case as parties to proceedings, such as an auxiliary or private prosecutor or claimant in criminal proceedings. Thus, if the victim decides to become a party and not just the witness in the trial, he or she may apply for legal aid.

However, this right of the victim is not clearly and directly stated in the law. One needs advanced legal knowledge and skills to interpret the relevant provisions. In addition, the Charter of the Victims Rights (a compilation of existing rights of the victims), created to assist victims, does not clearly state a right to legal aid.

In practice, it happens very seldom that the victim of the crime is represented by an *ex officio* lawyer.
2.3 Other cases

The minister of justice and the general prosecutor have the power to file a cassation in favor of the defendant against every legally valid court judgment or decision. Cassation might be also filed by the ombudsman (see section 5.5).

2.4 Procedure for granting legal aid

Under Article 16, section 1, of the Code of Criminal Procedure, if the agency in charge of proceedings is obliged to instruct participants as to their rights (as well as duties), then the absence of such instruction or its erroneous content may not have negative procedural effects for the person concerned. According to section 2 of that article, information should be provided as need arises, even in situations where the law does not explicitly provide the relevant duty.

The suspect is to be instructed, before the first interrogation, of his or her right to defense and to be assisted by a defense counsel, in addition to other rights, by the agency in charge of pretrial proceedings.

Under the provision of Article 300 of the Code of Criminal Procedure, the instruction is drawn up in writing and provided to the suspect, who must acknowledge its receipt with his or her signature.

The standardized forms of the records of the interrogation mention both the legal grounds and the contents of the right or duty concerned. However, they fail to indicate in a detailed and self-evident manner how the “right to be assisted by a defense counsel” can be exercised in practice, or how a person deprived of liberty can give a lawyer the power of attorney in the case. Nor is a suspect who is ignorant of legal provisions provided with written information about the possibility of applying to the court for appointment of ex officio defense counsel at this stage of proceedings.

From the regulations, the prosecutor has special powers and responsibilities in the area of deciding whether the suspect is capable of bearing the costs of defense. If the prosecutor develops the opinion that a person cannot bear the costs of proceedings, he or she is obliged to instruct that person as to the right to demand appointment of ex officio counsel.36

This arrangement means that at the prosecutor’s discretion, specific categories of suspects will—or will not—be informed about the conditions, procedure, and right to avail oneself of the opportunity to request legal aid, under Article 78, section 1, of the Code of Criminal Procedure. It seems unjustified to relate the provision of information about a person’s rights to the circumstances of a specific case. The knowledge of those circumstances is gathered over a period of time and supplemented gradually in the course of investigation or inquiry. Yet, while taking down a person’s personal data during the first interrogation, the prosecuting agencies are acquiring information about his or her
income, financial status, and number of dependants, as well as other data that make appropriate conclusions possible.

As to the procedure for appointing ex officio defender on demand of the indigent client, section 350, point 1, of the Internal Rules of Procedure of Common Courts of Law provides that “if the defendant who applies for appointment of an ex officio defense counsel in his or her case fails to adequately demonstrate his or her inability to cover the costs of defense, chairman of the court division shall set a time limit for supplementation of the application. If the time limit expires without effects or there are doubts as to the manner in which the defendant has demonstrated his or her inability to cover the costs of defense, the case shall be brought before the court for the application to be examined as to the merits.”

As Code of Criminal Procedure—Commentary, edited by P. Hofmariński et al., states: “If the application is insufficiently documented, the president of the court should call upon the defendant to supplement that application with evidence (documents) reflecting his/her current material and family situation.”

From the practice of the HFHR, however, it appear that courts often do not apply that provision and simply refuse appointing ex officio defense counsel without too much explanations as to the grounds of such a decision (see section 2.6 for some concrete examples). It is unclear what can be done if the court violates this provision. Refusal to appoint ex officio defense counsel cannot be appealed. The limitations on the right to defense may, of course, be mentioned in the person’s appeal of the sentence. However, individuals affected by the above provision are those who have been deprived of legal aid by the court. The chances are slim that such people would be able to raise the appropriate objections even if they lodge an appeal.

Although provisions speak of appointment of the ex officio attorney by the president of the court, such decisions are in fact taken not only by the chairmen of court criminal sections but also by judges who decide in specific cases. This raises concern over the question of judicial impartiality. As a rule, the applicant does not appear before the judge who makes the decision and is informed of it by court secretariat. However, when the decision is made by the presiding judge, the applicant in fact appears before him or her.

As a rule, the attorney is chosen from the court list of all attorneys, and the appointments are made in numerical order. In practice, however, there are departures from this rule, and judges appoint the attorney according to their choice. In general, the applicant does not have influence over the choice of the attorney, although a defendant’s request for the appointment of a specific attorney may be respected by the court.

In practice, defense counsel may also be appointed ad hoc when there is an urgent need and that counsel is in court at the
moment. In such cases, the right to defense is certainly not respected—attorneys appointed ad hoc have no time to prepare for their duties in the case.

2.6 Application of the legal aid norms in practice

As noted above, the current regulations requiring an “adequate demonstration” of lack of means due to indigence are overly vague. The Code of Criminal Procedure contains no detailed requirements to state reasons for a decision concerning legal aid. However, the Supreme Court has, in several of its judgments, stated generally that decisions issued by courts should be provided with comprehensive grounds. However, no explicit duty of the court to provide detailed grounds for its decision follows from the discussed provision.

In the case of Mr. Arkadiusz Ś., the court merely stated that “the defendant failed to document his financial situation”; in another case, that defendant “failed to demonstrate adequately.”

In the case of Mr. Jarosław P., the grounds for the district court’s decision read as follows: “No prerequisites would justify the appointment of ex officio counsel for the defendant. The defendant states that he did have a source of income before his detention, having worked casually; therefore, he was in the position to hire a counsel.”

In the case of Mr. Leszek W., both the defendant and his wife were unemployed. The court, however, refused to appoint an ex officio defense counsel, stating that the defendant could bear the costs of his defense as the recipient of a permanent allowance of 401 PLN (about 100 euros) per month.
The discussed provision states that the *ex officio* counsel should be provided to the defendant who “adequately demonstrates” that he or she “is not” (present tense) in the position to bear the costs of defense. Yet in practice, in appraising the applicants’ situation, courts refer to their previous lifestyle and spending habits rather than analyzing the current situation—even though applicants’ financial standing may have changed dramatically in the meantime, often as a result of detention.

In the case of Mr. Robert O., a part of the reasoning reads: “The application does not deserve to be approved. The defendant’s personal situation is not exceptional to the extent justifying the appointment of an *ex officio* defense counsel. Criminal proceedings in his case were instituted as early as January 2001. Thus the defendant himself or his family should have been prepared for the need to secure the means required to hire a defense counsel. . . . [U]ntil his detention, the defendant owned the company X; this means that he had a regular source of income which he did not dispose of until his detention. In the Court’s opinion, the defendant himself or his family had enough time to save adequate funds for this purpose. This would have provided him with resources designed to cover the costs of his defense.”

In other cases, the courts have similarly tended to evaluate not the defendants’ current financial situation but their resources from before the detention.

Despite the fact that detailed court statistics are kept, data about the number of defendants who are not represented in judicial proceedings is not gathered. The same is true for data about persons convicted and sentenced to unconditional imprisonment without participation of a defense counsel in their case. With relevant data not available, the actual scale of the phenomenon can hardly be estimated.

However, on the basis of available data, one can find that in most criminal cases, defendants do not have attorneys and are convicted without professional legal representation. It is certain that many individuals are sentenced to imprisonment without representation, though the actual percentage of such cases is not known.

**First-instance convictions without a lawyer**

The number of people convicted in criminal cases by district and regional courts of first instance totaled 250,000 (and the number tried was 300,000) in the year 2000. Data collected by the National Council of the Bar reveals that attorneys handled 88,897 criminal cases (total private and *ex officio*) in the year 2000. This number, however, does not fully correspond to reality. Assuming that only 60 percent of attorneys provided information about all the cases they were involved with, it can be estimated that attorneys handled criminal cases for about 148,000 clients; even if the information provided by the National Council of the Bar is from 70 percent of the corporation’s members, that would indicate that attorneys conducted criminal cases for about 127,000 people.
In 2001, the number of people convicted in the first instance clearly increased, to 340,000 (from among 393,000 who were tried). In the same year, a significantly higher number of attorneys—although we do not know for certain what the percentage of attorneys was—reported dealing with 122,000 criminal cases.

Therefore, at least half of the people convicted in the first instance (and an even smaller proportion of those tried) did not have an attorney’s assistance in these cases.

As a consequence of described deficiencies of statistics kept by the corporation, a more precise determination of the number of people convicted without an attorney seems impossible. The number (or percentage) of people penalized with imprisonment who were deprived of a defender’s assistance is not known either; however, it was not any problem to identify them for survey purposes, as they represent a large group of inmates in Polish prisons.

2.7 Quality of Free Legal Representation

There are no studies or data related to the quality of legal aid, and there is no system of evaluation of the legal aid system. There are no special mechanisms to determine the quality of the legal representation in ex officio cases or to monitor the legal steps taken by the lawyer. There are no standards of conduct related to ex officio cases, and there is also no system of quality control. All responsibility lies with professional bodies (of disciplinary procedure), which have been widely criticized as not fulfilling this task properly. The state, though legally capable of doing so, does not use its power in this respect.

The Helsinki Foundation for Human Rights receives complaints about different kinds of attorney conduct, with most clients complaining about ex officio lawyers.

The HFHR often receives complaints after the complaint was lodged with the disciplinary board but then was insufficiently explained or even ignored, the applicant believes; in some instances, the complainant received no answer at all.

As follows from the experiences of the HFHR, the quality of legal services and the oversight of the profession constitute a subject that hardly enjoys any interest at all. No surveys are conducted in this area. The professional corporations may settle disciplinary cases at their absolute discretion, which sometimes leads to overlooking the unprofessional conduct of the lawyers.

The judges we interviewed were generally of the opinion that it made no sense for them to lodge complaints with local councils of the Bar, as the councils tend to ignore them. A president of one of the regional courts told us that he tried to persuade judges of his court that the lawyers’ professional bodies should be informed about professional transgressions of their members even if there is no actual response to such complaints. In most cases, however, the judges consider such actions pointless.

In procedures before ordinary courts, in
cases of infringement of procedural duties by attorneys or legal advisers that cause delays in the proceedings (such as unjustified absence during hearings, or non-performance of orders from the court within a set time), the president of the court should notify the chairperson of the local council of the Bar or Council of Legal Advisers.\textsuperscript{43} However, such notification does not oblige the bodies of legal profession to take any action against the lawyer.

Generally, judges do not discipline lawyers who do not fulfill their obligations. The only recourse for unsatisfied clients includes a motion to the court for a change of lawyer, or a disciplinary complaint to a professional body. The decision of the judge whether to replace the lawyer is discretionary, and approvals do not happen often. The disciplinary procedure is also often ineffective. As the procedure is still secret (this is also true for disciplinary hearings), there is no means of ensuring transparency and accountability to civil society or the media regarding the process. The disciplinary procedure, in fact, is widely criticized for its ineffectiveness.

In one of the cases brought to the HFHR, a defendant confined to pretrial detention approached the Foundation, complaining about the conduct of his ex officio defense counsel. Throughout the criminal proceedings, the lawyer never contacted the defendant, failed to answer his phone calls and letters, and did not even once bother to appear in person at any of the six court hearings. We suggested that the man complain to the Regional Council of the Bar. He did so, describing his case and asking about the institution of ex officio defense in view of the fact that his counsel did nothing in his case.

In response, he received a short letter from the dean of the Regional Council of the Bar, summarizing the Council’s opinion in two paragraphs. The letter began with this statement:

Responding to your letter . . . I would suggest that you should address your question [“what is ex officio defense for?”] directly at the legislators, as it has been they who, in provisions on criminal procedure, burdened lawyers with that undoubtedly toilsome [difficult] duty.

In the second paragraph of the letter, the Regional Council of the Bar does admit, though not directly, that the lawyer concerned failed to handle the defense properly. Thus, the dean informs the defendant:

“Today, I talked to your ex officio defense counsel . . . ; having read your letter, he promised to pay you a visit at the remand prison to discuss issues related to your defense in the proceedings.”

The groups interviewed by the HFHR in courts and penitentiaries were asked about the course of their cooperation with their legal representative and the aspects, if any, with which they were satisfied.
Respondents’ opinions on cooperation with their attorney  
(both criminal and civil cases)

<table>
<thead>
<tr>
<th></th>
<th>Parties in courts</th>
<th></th>
<th>Defendants in penitentiaries</th>
<th></th>
<th>Total represented (courts and prisons)</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Hired</td>
<td>Ex officio</td>
<td>Hired</td>
<td>Ex officio</td>
<td>Hired</td>
<td>Ex officio</td>
</tr>
<tr>
<td>“Satisfied” or “rather satisfied”</td>
<td>80%</td>
<td>55%</td>
<td>45%</td>
<td>45%</td>
<td>70%</td>
<td>50%</td>
</tr>
<tr>
<td>“Dissatisfied” or “rather dissatisfied”</td>
<td>15%</td>
<td>35%</td>
<td>50%</td>
<td>50%</td>
<td>25%</td>
<td>40%</td>
</tr>
<tr>
<td>“Difficult to say”</td>
<td>5%</td>
<td>10%</td>
<td>5%</td>
<td>5%</td>
<td>5%</td>
<td>10%</td>
</tr>
<tr>
<td>Total persons</td>
<td>131</td>
<td>111</td>
<td>55</td>
<td>73</td>
<td>186</td>
<td>184</td>
</tr>
</tbody>
</table>

The opinions of the prison inmates about hired versus *ex officio* defense counsels are much the same: regarding time spent and ultimate judgments, respondents rate the two types of defense similarly.

In the case of the group interviewed in court, whose cases were still pending, the level of satisfaction with cooperation by an *ex officio* lawyer was lower.

There is also a noticeable difference between the reasons for satisfaction with a hired attorney versus an *ex officio* one (respondents could indicate up to three reasons).

The three most cited reasons for satisfaction with a hired attorney were:

- “Tries hard/shows commitment” (chosen by 20 percent),
- “Is well acquainted with my case and the case file” (15 percent),
- “Tells me what is going on in the case” (15 percent).

The three most often cited reasons for satisfaction with an *ex officio* attorney were:

- “Comes to hearings” (chosen by 25 percent),
- “Is nice/polite” (15 percent),
- “Is well acquainted with my case and the case file” (15 percent).

Can it be concluded that the clients have different expectations of the *ex officio* attorney, and that the very fact of the *ex officio* attorney’s presence at hearings is worthy of praise?

In addition, attorneys interviewed by the HFHR were asked to compare the quality of their colleagues’ work in private and *ex officio* cases, according to several criteria. This created a psychologically difficult situation, yet more than half of the attorneys interviewed stated that in terms of the number of meetings with a client, the quality of work in *ex officio* cases is inferior to
work in private cases. One-fourth of the attorneys considered that quality lower in terms of procedural activity, frequency of substitutions, and other professional actions. Regarding the reading of the case files, one-third of respondents were of the opinion that attorneys’ activity is lower in quality in *ex officio* cases.

Those who approach the Foundation by letter are at a loss as to what to do in situations of faulty cooperation by their attorneys, especially *ex officio* lawyers. We decided to test the respondents’ knowledge as to the possibilities available in addressing the situation of a dishonest lawyer. The entire sample of 809 persons was interviewed. We asked whether the respondents were aware of the existence of written principles of the legal professions, so-called codes of professional ethics. Precisely half of the respondents had heard about the special rules of professional ethics; almost 40 percent were able to quote specific examples. It is worth noting that this knowledge in many cases (30 percent) had been derived from the media.

Asked whether they knew that lawyers and legal advisers had to take out obligatory malpractice insurance, and that damages can be obtained from that insurance if the lawyer is negligent in his or her duties and thereby causes harm to the client, somewhat less than 15 percent answered in the affirmative.

Asked if they knew what to do if the lawyer fails in his or her duties, only 40 percent said yes. Those who did usually said that the lawyer should be replaced (40 percent), slightly less than 30 percent were aware of the possibility of complaining to agencies of the Bar, and 5 percent were aware of the possibility of lodging a civil claim against the lawyer.

The respondents who had legal representation in the case (370 persons) were also asked whether they had inquired about the lawyer's actions and checked what he or she was actually doing. Only 40 percent of respondents had made such inquiries to their lawyer.

Among those who did not ask the lawyer about his or her actions in their case (60 percent of respondents), the following proportions stated that this was because the lawyer told them everything without their asking:

- courts (represented by hired lawyers), 25 percent;
- courts (represented by *ex officio* lawyers), 5 percent;
- penitentiaries (represented by hired lawyers), 10 percent;
- penitentiaries (represented by *ex officio* lawyers), 0 percent.

The following proportions of those who did not ask the lawyer about his or her actions cited their trust in the lawyer's honesty as the reason:

- courts (represented by hired lawyers), 50 percent;
- courts (represented by *ex officio* lawyers), 35 percent.

This demonstrates that relations are better between clients and lawyers of their own choosing.
3. CIVIL LAW: EFFECTIVE ACCESS TO THE JUDICIAL SYSTEM FOR THE INDIGENT IN CIVIL CASES

3.1 Normative Basis of the Right to Access to Courts in Civil Cases

The Constitution of the Republic of Poland enshrines the right to a hearing in court, but does not contain any provisions on legal aid, in civil cases.44

3.2 Civil Cases for Which Legal Representation is Mandatory

The Code of Civil Procedure does not provide mandatory representation in any kind of cases. The only legal action that must be performed by an attorney or legal adviser in civil cases is filing a cassation.45

3.3 Eligibility Criteria for Granting Legal Aid in Civil Cases

3.3.1 Substantive Criteria

Article 212 of the Code of Civil Procedure requires that: “The judge presiding... gives instructions and advice to the parties if necessary, and according to circumstances draws their attention to the usefulness of hiring a legal representative.” However, the Code of Civil Procedure does not include an explicit duty of the court to inform the parties about the possibility of applying for an *ex officio* lawyer. The *ex officio* attorney may be granted only to individuals who have been exempted from court costs in whole or in part.

Exempted by law from court costs are plaintiffs in affiliation proceedings or alimony claims, and employees in cases arising under labor and social insurance law.46 Other parties must apply to the court in order to be exempted from court costs (see section 3.3.2).

The party who has been exempted from court costs on his or her own motion, or granted the statutory exemption of the costs in whole or in part, may apply to have an *ex officio* lawyer.47 Depending on the type of civil case involved, this function can be performed by an attorney or a legal adviser.48 The application should be in writing or announced for the record in the court where the case is pending or will be instituted.49

The court—in fact, most often the presiding judge—shall grant the motion if it finds the participation of a lawyer or legal adviser to be needed in the case. The law does not clarify what criteria should be applied to evaluate “need” of professional representation in the case.

According to the commentaries and jurisprudence, those criteria include legal or factual complexity of the case as assessed by the court, and the helplessness of the applicant. The “need” to involve an attorney may also stem from principles of an adversarial trial system when one party is assisted by an attorney and the other is not.
3.3.2 Financial criteria

Under Article 113, section 1, of the Code of Civil Procedure, the application for exemption from court costs (what conditions the eventual granting of an *ex officio* attorney) may be lodged by natural persons who simultaneously submit a written statement indicating that they are unable to bear these costs without causing detriment to their own or their family’s necessary subsistence. The application for exemption from court costs is itself exempt from the court fee.50

A person who applies for exemption from court costs is obliged to submit a statement containing detailed data about his or her family situation, property, and income. The court determines whether the statement is sufficient to grant an exemption. The court may order an investigation if it has doubts as to the applicant’s financial situation. Although the provision of Article 113, section 1, of the Code of Civil Procedure mentions only the duty to submit the statement, the reading of section 127 of the Internal Rules of Procedure of Common Courts of Law indicates that the person who applies for exemption is obliged to adequately document his or her financial and family situation, and thus to provide not only the statement but also evidence in support of its truth.

Under section 127 of these rules, the clause related to dismissal of the application, the chairman of a court division may set a deadline for submission of documents concerning the person’s financial and family situation. Paragraph 127, point 2, regulates the details of the investigation mentioned in Article 116, section 1, of the Code of Civil Procedure, stating that in the course of actions aimed at establishing the facts concerning the applicant’s personal and material circumstances, the court approaches the competent state or social organizational units with requests for relevant information.

The court may refuse exemption from court costs if the party’s claim or defense is found to be glaringly unjustified.51

Unlike the problem with the interpretation of “adequate demonstration” of a person’s inability to bear the costs of defense in criminal cases, provisions regulating exemption from court costs that leads to the appointment of *ex officio* representation in civil cases have been written in much greater detail. There are instructions as to the requirement of submitting information about a person’s family situation, property, and income.

3.3.3 Other eligibility questions

**Legal aid for foreigners**

Legal aid is available both to Polish citizens and to foreigners—there are no provisions on the different status of foreigners in the procedure.

**Legal aid for those with particular difficulties**

In the commentaries to Article 117, section 1, of the Code of Civil Procedure, it
is said that participation of *ex officio* lawyers may be justified if the party is helpless or imprisoned, or if the case is legally and factually complicated. Indeed, in one of its judgments, the Supreme Court stated that a court may consider the difficulties of a party in communication with the court as a motion for appointment of *ex officio* lawyer. However, in each case it depends on the opinion of the court; it is always left to the judge’s discretion.

3.4 Procedure for Granting Legal Aid

Upon granting the application, the court issues an order of appointment of *ex officio* counsel, advocate, or legal adviser. Under Article 118 of the Code of Civil Procedure, the issue of such decision is tantamount to a grant of the power of attorney in the proceedings.

Next, according to law, the court is supposed to send its order to the competent Regional Council of the Bar or Regional Council of Legal Advisers for appointment of a particular lawyer to conduct the case *ex officio*. The Council duly appoints a specific lawyer or legal adviser.

A refusal to exempt a person from court costs as well as a refusal to assign *ex officio* lawyer can be appealed.

Exemption from court fees can, in principle, be granted at all stages of proceedings, including the appeal or the motion for cassation. If the application is lodged for the first time in appeal or cassation proceedings, the court may hand it over to the first-instance court for examination.

The exemption from court costs granted to a party at the stage of examination of a civil case, or an exemption granted by law, is also valid for execution proceedings. In such cases, the “execution documents” should include an appropriate clause informing about a valid exemption from court costs.

The exemption from court costs may be withdrawn at any time. The grounds for this decision of the court, as well as its effects, are specified in Article 120, sections 1, 2, and 3, of the Code of Civil Procedure. If there were, in fact, no original grounds for exemption, or these grounds have ceased to exist, the court may withdraw its decision to appoint an *ex officio* attorney, as well as possibly order payment of the fees. Or, if the grounds for exemption no longer exist, the court may burden the party with part of the costs only.

One point of concern is the way the *ex officio* lawyer may obtain his or her fee after the trial. This process is actually much easier if the lawyer loses the case. “In a civil case where the costs of proceedings have been imposed on the opponent of the party assisted by an *ex officio* lawyer, the costs referred to in section 21 are granted by the court provided that impossibility of execution of those costs can be established.” However, if the party represented by the *ex officio* attorney loses the case, the lawyer’s or legal counsel’s remuneration is paid directly from the state Treasury, under a motion for the grant of costs of unpaid legal aid.
3.5 Scope of Legal Aid

In practice, legal aid in civil cases includes representation before a court. Exemption from court costs may refer to costs of experts or translations.

Article 2 of the Act on Court Costs in Civil Cases\(^{58}\) includes court fees and repayment of expenses among the court costs.

A person may apply for appointment of an \textit{ex officio} attorney in litigious and non-litigious proceedings, as well as in a motion for securing the evidence or the claim. Thus, the lawyer can be appointed even before the claim is actually filed.

However, the appointment of a party’s \textit{ex officio} lawyer should not be interpreted as that party’s duty to actually file the claim. Rather, the attorney is appointed to provide the party with adequate legal advice. An unjustified claim or remedy would expose the client to costs and might be seen as actions to that client’s detriment. Under Article 121 of the Code of Civil Procedure, exemption from the court costs and appointment of an \textit{ex officio} attorney or legal adviser do not release the client from the duty to refund the opponent’s costs if warranted.

\textit{Ex officio} legal aid includes all stages of court proceedings, from the first to the last instance.

\textit{Ex officio} counsel can also be appointed to a “legal entity” if that entity has previously been exempted from court costs, having adequately demonstrated a lack of means to cover such costs.\(^{59}\)

It should be also noted that participants in proceedings who appear without a lawyer or legal counsel may expect to receive from the court the necessary advice and information about procedural actions and the legal effects of both actions and non-action. This principle, expressed in Article 5 of the Code of Civil Procedure, applies to the whole of the proceedings.

Article 327 of the Code of Civil Procedure also specifies the duty to instruct the party present when the judgment is announced about the procedure and time limit for appealing the judgment and, in the case of parties deprived of liberty, to officially deliver to them a copy of that judgment together with appropriate instructions.

Moreover, the Internal Rules of Procedure of Common Courts of Law contain numerous provisions that impose on judges the duty to inform and instruct parties who appear without appointed attorneys or legal advisers.\(^{60}\)

The court also instructs parties who appear without counsel in divorce proceedings and in cases for maintenance (alimony).\(^{61}\) The court may also institute \textit{ex officio} proceedings for establishing care.\(^{62}\) If circumstances of the case indicate the need for regulation of family problems other than those concerned in the proceedings, the judge may notify the competent prosecutor, a youth guidance center, or a non-governmental organization authorized to act before courts about the need for institution of such proceedings.

A claim under labor and social insurance law can be filed by the person con-
cerned or, on that person’s motion, by a non-governmental organization referred to in Article 61 of the Code of Civil Procedure, or by a labor inspector under Article 63 of the Code of Civil Procedure. An employee who files his or her claims under labor law or social insurance law does not pay court fees. Rather, the expenses are temporarily borne by the Treasury. A person who acts in such case without a lawyer or legal adviser may file his or her claim, complaint, or appeal orally for the record.65

Members of vulnerable groups may also use the following alternatives: activities of the ombudsman, prosecutor’s offices, or regional centers for family assistance (see section 5.5).

3.6 Quality of Free Legal Representation

See section 2.7.

3.7 Application of the Right to Legal Aid in Practice

Legal aid in civil cases is very narrow in its scope. According to data given by the Bar and Legal Advisers, legal aid was granted in only about 13,000 non-criminal cases, out of more than 4 million civil cases brought to courts per year, not to mention family, labor, social security, and commercial cases (another 2.8 million). Thus, legal aid is granted in about 0.18 percent of the non-criminal cases.64

Some judges report that they feel uncomfortable deciding to grant or to refuse legal aid. On the one hand, they realize the need; on the other hand, they are well aware of the courts’ financial constraints. The presidents of courts admit that they repeatedly warn judges to be extremely careful about appointing ex officio attorneys and experts. According to one president of a district court, the effects are already noticeable in his district: the number of exemptions from costs has gone down and the incidence of partial exemptions (as opposed to full exemptions) is much higher than before.

Sometimes the situation becomes absurd. According to one judge, the president of a district court summoned all of the court’s judges and presented them with alternative solutions: either they grant ex officio lawyers and hear cases in chilly courtrooms, wearing coats over their gowns during the winter; or the court purchases coal to heat the courtrooms—in which case each of the judges might be able to grant legal aid in only one case per month.

The old statement of the Supreme Court65 still remains topical: a party who intends to lodge a claim should be prepared for specific necessary expenses, and should save funds for this purpose by reducing the expenditure on current needs. “It is only in situations when such saving would result in an explicit detriment to the party’s and his or her family’s necessary subsistence that grounds for exemption can be found to exist.” For more than forty years now, Polish courts have cited this
judgment when refusing to grant an exemption from court costs.

According to law, the court, after deciding on legal aid, should send its order to the Regional Council of the Bar for appointment of a particular lawyer. In reality, what was revealed in the HFHR’s research is that many judges decide themselves on a particular lawyer in such cases, informing him or her directly about the appointment and without including the Council in the decision. Judges’ explanation of this unlawful practice is that once they have decided to grant legal aid, they want to ensure that the party has diligent and competent representation. Leaving the decision to the Council, these judges say, would put a party in a risk of collaboration with an incompetent lawyer.

The *ex officio* attorney may be granted only to individuals who have been exempted from court costs, in whole or in part. A person who applies for exemption from court costs is required to submit a statement containing detailed data about his or her family situation, property, and income. However, the civil procedure lacks a uniform “means test” that would facilitate the procedure and make it more objective. The need for such a test is beyond all doubt. The courts do develop appropriate forms for their own use. However, these forms are not standardized, and different courts have developed a variety of different tests.

Judges have also reported that the task of handling applications for exemption of court costs and the appointment of an *ex officio* lawyer consumes much of their time, requires extensive correspondence to establish the applicant’s exact financial situation, and distracts them from their primary role as adjudicators.

The court grants the *ex officio* lawyer if it finds the participation of a lawyer necessary in the case. It is the judge presiding over the case who decides to grant *ex officio* counsel—and a judge’s impartiality in this issue may be questioned (in realizing the need of a party while at the same time being aware of the court’s own financial difficulties).

What seems most controversial is the regulation from which it follows that a lost case shortens the road to remuneration for the *ex officio* attorney. If the case is won, the attorney must handle the execution of the remuneration on his or her own.

**3.8 Other Barriers to Effective Access to Courts in Civil Cases**

According to the Act on Court Costs in Civil Cases, court costs include filing fees and office fees. The amount of the filing fees are determined by the Decree of the Minister of Justice on Amounts of Filing Fees in Civil Cases. The filing fee may be fixed, may be a percentage, or may be set as a part of the claim. The percentage fee depends on the value of the dispute and may vary from 30 PLN to 100,000 PLN.

Existing court costs, especially in civil and commercial cases, are considered to be very high and may block access to the court (a standard fee is 8 percent of the
value of the claim). Currently, work is in progress on new regulations to lower court costs.

Nevertheless, the number of civil cases brought to Polish courts each year shows that many parties can afford the costs and that, if necessary, the procedure for exemption of court costs helps them.

District courts and Bar Associations are located so as to be reasonably accessible to everyone.

Reimbursement of travel expenses may be available for certain witnesses. Parties cover these costs themselves.

3.9 Alternative dispute resolution (ADR) and similar schemes

Article 697 of the Code of Civil Procedure provides that parties may submit pecuniary disputes, except alimones and those arising from labor contracts, to arbitration. According to Article 695, such a court may be standing or appointed for the particular case. In fact, arbitration courts work in two sectors—consumer protection and business.

ADR is not in common use.

4. Public law: Effective access to the judicial system for the indigent in administrative and constitutional cases and cases before international tribunals

4.1 Normative basis and eligibility criteria

There is no legal aid granted for appearance before international tribunals.

In cases of individual constitutional complaints, indigent persons may apply to the district court for an ex officio lawyer. Relevant rules of the Code of Civil Procedure are applicable.

In administrative cases, the right to free legal aid appears only during court procedure before the Chief Administrative Court. There is no scheme for receiving legal aid during the first two administrative instances before organs of public administration.

In administrative cases before the Chief Administrative Court, rules of the Code of Civil Procedure are applicable mutatis mutandis until 1 January 2004, with the appointment of ex officio lawyer depending on an exemption from court costs and on an opinion of the court as to the need.

The new Act on Procedure before Administrative Courts (in effect beginning 1 January 2004) provides that the “right to assistance” (complete or partial) may be granted to parties. The act does not make appointment of an ex officio lawyer condi-
tional on the court’s opinion on whether it is necessary. Rather, it provides, in Article 247, only that a party does not have the right to assistance if his or her complaint is manifestly unfounded. Under Article 246, section 1, it also provides that persons entitled to the complete right to assistance are those who demonstrate that they cannot bear any costs of the proceedings; persons entitled to a partial right to assistance are those who demonstrate that they cannot bear all the costs of the proceedings.

4.2 Procedure for Appointment

According to Article 258 of the new Act on Procedure before Administrative Courts, the decision to grant or refuse assistance is made by the court (judge) or court registrars in camera. However, under Article 259, such a decision may be appealed before the provincial administrative court.

In both the present rules (based on the Code of Civil Procedure) and Article 253 of the new act, after the order of the court, the individual representative is appointed by a local Council of the Bar or local Council of Legal Advisers or the National Council of Tax Advisers or the National Council of Patent Agents.

4.3 Alternative (non-state) mechanisms

Occasionally, particular non-governmental organizations help to prepare complaints to international tribunals and the Constitutional Tribunal or participate in administrative proceedings on behalf of clients.

5. Organization of the System for Provision of Legal Aid

5.1 Special state body authorized to administer the legal aid system

There is no separate institution managing the system of legal aid. All decisions on granting legal aid are made by particular courts. In criminal cases, lawyers are appointed by courts; in civil cases, lawyers are appointed by local Councils of the Bar and Legal Advisers.

The Ministry of Justice:

- has certain supervisory powers over the Bar and Legal Advisers (for instance, challenging in Supreme Court any unlawful resolution of the professional body, initiating through the motion a professional body disciplinary procedure against the lawyer);[69]
- issues detailed regulations on disciplinary procedures against attorneys and legal advisers;[70]
- sets, by decree, fees for activities of lawyers before courts, which are the basis for decisions on lawyers’ fees and costs in ex officio cases.[71]
5.2 Role of the Bar Association in the Administration of the Legal Aid System

Bar and Legal Advisers associations do not administer the system of legal aid. They do not evaluate the effectiveness of the system or the quality of free legal representation. However, they do take a stand and voice their concern about serious delays in payments for *ex officio* representation.

Local bar councils and councils of legal advisers are responsible for the training of apprentices. Their duties include the monitoring of lawyers’ compliance with rules of professional ethics. They are entitled to conduct disciplinary procedures against their members and apprentices.72

According to Article 117, section 1, of the Code of Civil Procedure, local bar councils and councils of legal advisers appoint particular lawyers in civil cases after legal aid is granted by the court.

In May 2002, the National Council of the Bar established a working group for drafting projects for the reform of the system of legal aid. No results of its work were to be made public until April 2003.

Neither the Act on the Bar nor the Act on Legal Advisers contains provisions requiring these associations to provide free legal assistance to indigent persons.

Neither attorneys nor legal advisers are obliged to take *pro bono* cases.

5.3 Role of the Courts

As stated above, courts decide whether to grant free legal aid in particular cases, decide on the fees paid to the lawyers, and have some power in quality evaluation (notification of the lawyers’ professional bodies).

5.4 Role of the Prosecution and the Police

Neither the police nor the prosecution has any powers in the administration of legal aid.

5.5 State Models of Organization of the Provision of Legal Aid

The model of legal aid in Poland is based on *ex officio* appointments granted by courts and do cover representation before the court almost exclusively. There are no staff lawyers or contracting systems. There is no general state scheme of granting pretrial legal advice.

Apart from the system of *ex officio* representation by attorneys and legal advisers, there are some auxiliary forms of legal aid provided by the Ombudsman’s Office, public prosecutors, Poviats’ centers for family assistance, and Poviat’s consumer rights spokesmen.
Ombudsman

For violations of rights and liberties described in the Constitution and other legal acts, citizens and foreigners may approach the ombudsman. A motion to the ombudsman is free of charge and does not demand any special form. The only necessary contents are personal data (name and surname) and the address of the applicant.

The ombudsman may inform the applicant about legal measures to which the applicant is entitled. If the ombudsman finds a violation of constitutional rights and liberties, he or she may take the case himself or herself or pass it on to relevant organs. If, after examining the case, the ombudsman finds no violations, he or she informs the applicant of the findings.

If the ombudsman recognizes a need for action on the problem, he or she may undertake legal action on behalf of the individual or group of persons. The ombudsman may demand the filing of a civil claim and take part in it, in which case the Code of Civil Procedure regulations on the participation of a public prosecutor are applicable. The ombudsman may also demand other proceedings, whether administrative, criminal, or disciplinary. If an offense is found, the ombudsman may submit a motion for punishment. The ombudsman is also entitled to file cassations, extraordinary appeals from judgments of the Chief Administrative Court, and complaints to the Constitutional Tribunal in individual cases.

In 2001, the staff of the Ombudsman’s Office saw a total of 3,610 clients and conducted 12,138 telephone conversations giving explanations and advice. In that year, 40,156 new individual cases were examined. Proceedings were completed in 15,295 of the cases taken up by the ombudsman. A satisfactory solution was obtained in 26 percent of those completed cases. The term “satisfactory solution” means that an individual problem was solved in accordance with the applicant’s expectations.

Public prosecutor

The prosecutor may demand institution of proceedings in every case. He or she may institute an action or file a motion if this action aims to remedy a faulty state of affairs that threatens the rule of law or is dictated by the need to protect a social interest or the citizen’s right. The prosecutor may also join pending proceedings.

The provisions also permit the prosecutor’s participation in the case; the prosecutor is bound by the time limits set for the parties. The prosecutor’s legitimization under substantive and procedural law to take part in a civil case comes from Article 7 of the Code of Civil Procedure and from Article 3, section 1, point 2, of the Prosecutor’s Office Act.

The table below shows the prosecutors’ exercise of their due powers in civil proceedings. The data cover the first six months of consecutive years.
The prosecutor’s involvement in civil, economic, and social insurance cases: District, regional, and appeal offices

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<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>The prosecutor instituted civil action</td>
<td>1,745</td>
<td>1,754</td>
<td>1,714</td>
</tr>
<tr>
<td>Motions for institution of non-litigious proceedings submitted</td>
<td>3,290</td>
<td>3,698</td>
<td>3,652</td>
</tr>
<tr>
<td>Concerning family relations</td>
<td>1,041</td>
<td>1,127</td>
<td>1,165</td>
</tr>
<tr>
<td>For legal incapacitation</td>
<td>432</td>
<td>511</td>
<td>560</td>
</tr>
<tr>
<td>To the court for institution of proceedings against excessive drinkers</td>
<td>1,791</td>
<td>2,042</td>
<td>1,894</td>
</tr>
<tr>
<td>Number of civil cases examined with the prosecutor’s participation</td>
<td>8,725</td>
<td>9,641</td>
<td>9,629</td>
</tr>
<tr>
<td>Number of actions instituted by the prosecutor and examined by the court</td>
<td>1,459</td>
<td>1,481</td>
<td>1,480</td>
</tr>
<tr>
<td>Including actions admitted:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Absolute numbers</td>
<td>1,380</td>
<td>1,415</td>
<td>1,397</td>
</tr>
<tr>
<td>Proportions</td>
<td>94.6%</td>
<td>95.5%</td>
<td>94.4%</td>
</tr>
<tr>
<td>Number of the prosecutor’s motions examined by the court in non-litigious proceedings</td>
<td>2,724</td>
<td>2,910</td>
<td>2,906</td>
</tr>
<tr>
<td>Including motions granted in whole or in part:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Absolute numbers</td>
<td>2,498</td>
<td>2,666</td>
<td>2,612</td>
</tr>
<tr>
<td>Proportions</td>
<td>91.7%</td>
<td>91.6%</td>
<td>89.9%</td>
</tr>
</tbody>
</table>

Poviats’ family assistance centers

According to Article 10a of the Social Welfare Act, social welfare duties performed by Poviats’ family assistance centers include providing information about relevant rights to individuals and families, and providing assistance in taking care of official matters and other important living issues. Persons mentioned in Article 3 of the act are entitled to such assistance. They include: the poor, orphans, homeless, disabled, persons with chronic diseases, and former prisoners. Among those entitled are also incomplete families and those with many children, alcoholics and drug addicts, and victims of natural or environment pollution disasters.

In order to receive legal advice, one does not have to meet the income criteria required for other benefits. Each citizen and permanent resident or refugee may apply for legal advice. The heads of Poviats’ family assistance centers may file lawsuits in alimony cases and may submit motions to relevant organs for establishing the level of disability. In court proceed-
ings, the head of a center has the status of a public prosecutor. Social welfare assistance and legal assistance can be provided on request of an interested individual or _ex officio_.

Unfortunately, there is no data showing the scope of legal assistance provided by the centers. What data shows is the main task of the centers—financial and material humanitarian help granted by the centers. However, it also lists “specialized advice” (including psychological and legal) provided in 2000 to 134,000 families, as well as help in dealing with official and other matters provided to 280,000 families.79

**Poviat’s**80 consumer rights spokesmen

Poviat’s consumer rights spokesmen are public administration organs established to provide legal advice on consumer protection issues. Their competencies include: providing free legal advice and information about consumer rights, and initiating and taking part in court proceedings in the name of consumers.

In 2001, Poviat’s consumer rights spokesmen gave advice, information, and explanations in 64,000 cases. They initiated court proceedings in 865 cases.81

**Non-governmental organizations**

There are many specialized non-governmental organizations that, apart from other activities, provide free legal information, advice, and sometimes representation.

**Citizen Advice Bureaus**82

The services of the twenty-eight local Citizen Advice Bureaus include a very broad range of issues, from labor law through divorces, legacies, and social welfare benefits, to refugees’ rights, consumer protection, and patients’ rights. Their services are free of charge and there is no means test; everybody may receive advice. Citizen Advice Bureau advisers do not provide any “ready-to-use” solutions; everybody chooses his or her own path once equipped with the information necessary for a self-reliant and efficient manner of solving the problem. Advice is not given by lawyers, and it is not defined as legal advice but rather as citizens’ advice and information.

**University law clinics**

There are about fifteen privately funded university law clinics, where law students provide advice to the indigent. Clinic work is divided into sections supervised by the faculty teachers and practitioners, e.g., sections of civil law, administrative law, labor law, criminal law, refugee law, and women’s rights. In addition, students work with prisoners. Work of the students includes: written opinions, written statements, applications, appeals, claims, complaints and interventions.83

**Other assistance**

Women’s organizations provide some forms of legal assistance, mainly for victims of domestic violence and unemployed women. The Women’s Rights Center is the biggest organization of this kind, having six...
branches in different parts of the country. Several non-governmental organizations provide assistance to victims of crimes, and they usually provide some form of legal aid as well.

The largest consumer NGO is the Federation of Consumers, which has about fifty local branches providing legal advice in consumer cases.

Legal advice is usually also provided by trade unions, which employ legal advisers to provide advice for trade union members in labor cases.

In addition, local media in many cases hold free consultations with lawyers on a regular basis.

It cannot be determined if aid by NGOs is adequate, because there have been no surveys on this, and the NGOs themselves do not evaluate their activities in this field. Recently, an alliance of NGOs providing free legal advice was established in order to improve the standards of their services to avoid duplication of efforts, and to share their experience and resources. However, it is hard to predict whether this initiative will prove effective.

The organizational and personnel structure of NGOs varies significantly. For example, Citizen Advice Bureaux are a network of organizations with common principles and standards. They have their coordinating body, Union of Citizen Advice Bureaux.

Individuals involved in the activities of university legal clinics have established the Legal Clinics Foundation, which is meant to assist the clinics in their development and fund-raising, as well as prepare and promote standards of conduct.

**Sources of funding**

Most NGOs providing legal advice are privately funded through donations. Some receive state funds (consumer protection organizations), and some are supported financially by local authorities. (Citizen Advice Bureaux are partly funded in this way.) In general, public funding for NGOs is not significant.

There are no mechanisms securing the sustainability of funding. Public administration—both the central government and local authorities—is not obliged to devote any part of its budgets to NGOs. Currently, work is in progress on a draft Act on Public Interest Activities and Volunteer Work; one of the provisions of the act includes the possibility for a citizen to use 1 percent of his or her income tax to fund an organization that is recognized as a “public interest organization.”

### 5.6 Evaluation and training

Neither the Ministry of Justice nor any other state institutions have conducted research on the effectiveness of the present system of legal aid.

Evaluation by NGOs is usually incidental. This usually includes only specific cases about which they receive complaints.

No steps are taken to ensure that members of the legal profession are aware of the needs of the indigent within society. Lawyers are neither supported nor trained.
in recognizing the needs of the indigent. The only such case we noticed is when the National Bar Association called attorneys, especially those from the Regional Bar Council in Lublin, to provide free legal aid to victims and families of victims of a Polish coach crash that happened in Hungary on 1 July 2002.

Young lawyers and apprentices are neither obliged nor encouraged in any way to work _pro bono_, and they do it only on their individual initiative. _Pro bono_ work has not been a matter of public debate.

6. **Financial aspects of ensuring effective access to justice for the indigent**

6.1 **Determination of the legal aid budget**

There is no separate legal aid fund, and there is no separate budget line for legal aid. There is no institution that plans expenditures for legal aid.

Although expenses for free legal aid are being monitored, appropriate amounts to cover them are not being planned for in the state budget. Outstanding payments every year (sometimes several years old) in taking care of fees to lawyers are a clear proof of this.

The most recent legislation on the judiciary changed the budgetary procedure. Particular courts’ draft budgets are prepared by the courts themselves and are then passed to the National Council of the Judiciary. This Council issues an opinion on them and submits each ordinary court’s draft budget to the Ministry of Justice, which sends it to the Parliament.

During preparation of a budget, particular units (courts) plan future expenses based on the expenses incurred in the preceding year. However, the costs of free legal aid are not separated as a category but are instead included in the paragraph “costs of proceedings before courts and public prosecutor’s offices,” which also includes, among others, fees for opinions issued by medical schools, observation in a hospital, field sessions of a court, costs of transportation of a defendant, witnesses, experts, delivery of summons and other writs, and announcements in the press and on radio and television.

The first proposal of a wider approach to the issue of legal aid in Poland was a draft law prepared during work on the reform of administrative courts by a team of the Chief Administrative Court. However, the postulate to create a court’s separate legal aid fund has been lost at the finish of parliamentary work.

6.2 **Budgetary information**

“Costs of free legal aid” include the costs of such aid provided by _ex officio_ attorneys and legal advisers paid for with state budget funds. This sum includes expenditures from the courts and prosecution office budgets paid in a given financial year and due budgetary obligations to be paid.
Expenditures of the administration of justice for free legal aid, in PLN$^{85}$

<table>
<thead>
<tr>
<th>Year</th>
<th>1997</th>
<th>1998</th>
<th>1999</th>
<th>2000</th>
<th>2001</th>
<th>2002 (to 30 Sept.)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Expenditures</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>7,051,128</td>
<td>10,350,485</td>
<td>23,508,803</td>
<td>31,939,162</td>
<td>22,366,695</td>
<td>57,164,656</td>
</tr>
<tr>
<td></td>
<td>Obligations</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>4,776</td>
<td>200,860</td>
<td>84,907</td>
<td>6,370,624</td>
<td>32,210,370</td>
<td>16,860,937</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>7,055,904</td>
<td>10,551,345</td>
<td>23,593,710</td>
<td>38,309,786</td>
<td>54,577,065</td>
<td>74,025,593</td>
</tr>
</tbody>
</table>

Such data does not indicate, however:

- what amounts apply to criminal, civil, or other cases;
- which portion is paid to attorneys and which to legal advisers;
- the number of cases for which legal aid was granted, and whether and how such numbers increased with the increasing expenditures;
- when the obligations indicated in that row of the table were incurred; therefore, for calculation purposes, we shall treat as government expenditures the total expenditures and obligations in a given year.

The below table presents the increase of expenditures for free legal aid in relation to all state budgetary expenditures. The picture is not completely correct, however, as one has to take into consideration an error resulting from carrying over the “obligations” in consecutive years. For comparative purposes, expenditures for the general budget line “ordinary courts” are presented.

Legal aid expenditures in relation to all state budgetary expenditures, in PLN$^{86}$

<table>
<thead>
<tr>
<th>Year</th>
<th>Total budgetary expenditures</th>
<th>Expenses for “Ordinary Courts”</th>
<th>Percent of expenditures in total budget</th>
<th>Expenditures for free legal aid</th>
<th>Percent of expenditures in total budget</th>
</tr>
</thead>
<tbody>
<tr>
<td>1999</td>
<td>142,099,762,000</td>
<td>1,706,659,000</td>
<td>1.20%</td>
<td>23,594,000</td>
<td>0.016%</td>
</tr>
<tr>
<td>2000</td>
<td>156,309,815,000</td>
<td>2,112,097,000</td>
<td>1.35%</td>
<td>38,310,000</td>
<td>0.024%</td>
</tr>
<tr>
<td>2001</td>
<td>181,604,087,000</td>
<td>2,351,970,000</td>
<td>1.29%</td>
<td>54,577,065</td>
<td>0.030%</td>
</tr>
<tr>
<td>2002</td>
<td>185,101,632,000</td>
<td>2,560,317,000</td>
<td>1.38%</td>
<td>74,025,593</td>
<td>0.053%</td>
</tr>
</tbody>
</table>

* Since only expenditures for free legal aid until 30 September are known, for purposes of calculation we accept 75 percent of the total state budgetary expenditures in 2002.
The fact that there have been significant outstanding payments—unpaid obligations of the state Treasury for ex officio cases—makes it difficult to determine the amount of expenditures and obligations of the state for legal aid in a given year (regardless of when they are paid). The below table shows an attempt at determination of the amount of adjudicated fees in a given year, and it seems to be rather accurate.87

The amount of adjudicated fees for ex officio cases in a given year, in millions of PLN88

<table>
<thead>
<tr>
<th>Year</th>
<th>1999</th>
<th>2000</th>
<th>2001</th>
<th>2002 (to 30 Sept.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>The sum of adjudicated fees, in millions of PLN</td>
<td>23.4</td>
<td>38.2</td>
<td>48.2</td>
<td>41.8</td>
</tr>
<tr>
<td>% of the total state expenditures</td>
<td>0.016%</td>
<td>0.024%</td>
<td>0.026%</td>
<td>0.030%</td>
</tr>
</tbody>
</table>

This table, closer to the truth, indicates that both in absolute numbers and with respect to the entire state budget, there has been an increase of expenditures for free legal aid, though not as significant as the previous table would indicate. The increase of expenditures resulted mostly from a significant increase in number of attorneys and legal advisers’ fees for ex officio cases,89 although based on information from the National Council of the Bar, we may assume that the number of ex officio cases has also increased (see section 6.3). Since 1 September 1998, ex officio legal aid in criminal cases also has been granted at pretrial stage; thus, the Ministry of Justice has separate data on amounts spent on ex officio legal aid in public prosecutor’s offices and courts, starting in 1999.

Data concerning state expenditures for ex officio legal aid in public prosecutor’s offices and courts for the years 1999–200290

<table>
<thead>
<tr>
<th>Year</th>
<th>1999</th>
<th>2000</th>
<th>2001</th>
<th>2002 (to 30 Sept.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public prosecutor’s offices</td>
<td>216,879</td>
<td>677,386</td>
<td>589,743</td>
<td>608,747</td>
</tr>
<tr>
<td>Courts</td>
<td>23,376,831</td>
<td>37,632,400</td>
<td>53,987,322</td>
<td>73,416,846</td>
</tr>
</tbody>
</table>
This data reveals that the total of expenditures and obligations for *ex officio* legal aid at pretrial in 1999 constituted 0.9 percent of the total amount of expenditures and obligations for legal aid granted by courts. In 2000, it already amounted to 1.8 percent; therefore, costs of legal aid at pre-trial are also sometimes paid for by the courts—an attorney submits the bill for pretrial costs to the court, and remuneration is adjudicated together with the bill for court representation.

Thus, there is no data that would allow us to univocally determine which portion of expenses for *ex officio* legal aid is spent at pretrial and, consequently, what is the scope of such aid granted at this stage.

The above numbers presenting state expenditures for legal aid were collected by the Ministry of Justice in order to regularly monitor the degree of increase in expenses and obligations. This data is taken from accounting departments where all expenses of an organizational unit are being recorded. The information was collected based on so-called “cash paid out”; therefore, it can be assumed that it is correct and should not contain errors.

Since legal aid expenditures have increased significantly in the last couple of years, the Ministry of Justice has been analyzing it on a regular basis—units prepare an attachment to the monthly expense reports. Information on “costs of free *ex officio* legal aid” is included in the paragraph entitled “costs of court and public prosecutor’s proceedings.”

**Errors in the periodical report of the European Commission**

Data included in the periodical report of the European Commission concerning the progress of Poland toward accession to the Union, published in 2002, is surprising. On the one hand, we are pleased to emphasize that—for the first time—the problems of legal aid appeared in the periodical report. On the other hand, the data provided is incorrect. According to that data, Poland spent 54 million zlotys from the state budget and an additional 48 million zlotys from the budget of the Ministry of Justice for legal aid in 2001. Moreover, according to the report, this data does not include *ex officio* representation in civil cases. Although we have not managed to reach the source of this information, a comparison of these figures with data provided by us above shows that most probably a mistake was made and the same expenses were listed twice.

**Contribution of represented parties in expenditures for *ex officio* legal aid**

Parties in proceedings are also charged with expenses for *ex officio* legal aid. Only when the enforcement of payment is not effective does the state have an obligation to pay the fee for legal representation. Therefore, the state, which incurs such costs, has a legal title to claim them from some of the represented parties. It is not clear how often the state takes advantage of such titles in practice. It could be presumed that the scope of this phenomenon is small; however, it
would be worthwhile to examine this, since expenses would be lower if the state were more active in this respect.

6.3 **Number of cases supported by the state budget for legal aid**

Although we know the amount of expenditures incurred by the state for *ex officio* legal aid, it is impossible to determine the number of cases in which such aid is granted. The only data on the number of cases comes from legal professions—the Legal Advisers and the Bar. The legal advisers’ data seems to be relatively reliable, while the bar’s information, although published each year in *Rocznik Statystyczny GUS* (A Yearbook of the Main Statistical Office) as official, is not at all reliable.

**The number of “private” and *ex officio* cases reported by attorneys**

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Private:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>criminal</td>
<td>154,227</td>
<td>137,736</td>
<td>141,478</td>
<td>128,432</td>
<td>180,432</td>
</tr>
<tr>
<td>civil</td>
<td>45,957</td>
<td>39,129</td>
<td>36,101</td>
<td>36,844</td>
<td>46,461</td>
</tr>
<tr>
<td>other</td>
<td>93,740</td>
<td>85,953</td>
<td>87,957</td>
<td>78,307</td>
<td>101,194</td>
</tr>
<tr>
<td>Ex officio:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>criminal</td>
<td>44,215</td>
<td>47,460</td>
<td>54,294</td>
<td>64,983</td>
<td>88,086</td>
</tr>
<tr>
<td>civil</td>
<td>37,449</td>
<td>40,335</td>
<td>46,229</td>
<td>52,053</td>
<td>75,858</td>
</tr>
<tr>
<td>other</td>
<td>5,766</td>
<td>6,188</td>
<td>6,946</td>
<td>6,822</td>
<td>10,870</td>
</tr>
<tr>
<td>Total</td>
<td>198,442</td>
<td>185,196</td>
<td>195,772</td>
<td>193,415</td>
<td>268,518</td>
</tr>
</tbody>
</table>

This data was obtained in the following manner: each half a year, all professionally active lawyers within a particular region send information on the number of cases to Regional Councils of the Bar. Based on the received information, a list is prepared and sent to the National Council of the Bar.

The number of attorneys who filled in an information form and submitted it is not known. Based on verbal information provided by representatives of the Bar, it can be assumed that about 60–70 percent of the attorneys all over the country filled in the surveys.

Resolution No. 42/01 of the National Council of the Bar, of 3 March 2001, introduced an important change to the principles for practicing as an attorney, by providing that “an attorney practicing individually or in another form is obliged to submit to the
Regional Council of the Bar information on the number of cases under civil, criminal or administrative law, with consideration for cases appointed \textit{ex officio} and permanent or one-time contracts, within a month after the end of a calendar year.” The future will show whether this change brings the expected results; however, data for 2001 is already more full than in previous years.

On the other hand, it should be emphasized that in order to obtain an accurate picture of the situation, the notion of an “\textit{ex officio} appointed case” needs to be defined. If several attorneys provide \textit{ex officio} legal representation consecutively in the same case (in the same or different instances) and each of them reports the case, then the number of cases indicated by attorneys will not correspond to the actual number of cases in which legal representation was appointed \textit{ex officio}.

The best data concerning the number of cases in which \textit{ex officio} legal representation was appointed can be obtained from court statistics; however, although such statistical information is very detailed, it does not at present include any data on appointment of \textit{ex officio} attorneys. We suggest changes in this respect.

It may be concluded from the collected data that the number of criminal \textit{ex officio} cases increases every year. A similar tendency could have been observed in civil cases, although their number dropped in 2000, only to increase significantly again in 2001. It is not clear, however, whether these changes result from a more frequent appointment of \textit{ex officio} attorneys or whether they are due to the fact that different numbers of attorneys report their cases in particular years.

### The number of \textit{ex officio} cases reported by legal advisers\textsuperscript{97}

<table>
<thead>
<tr>
<th>Years</th>
<th>1997</th>
<th>1998</th>
<th>1999</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total \textit{ex officio} cases</td>
<td>18</td>
<td>157</td>
<td>378</td>
<td>570</td>
<td>854</td>
<td>1,339</td>
</tr>
</tbody>
</table>

The possibility to appoint legal advisers in \textit{ex officio} cases appeared in 1997. It is easier for the Regional Chambers of Legal Advisers to monitor the number of such cases as they appoint legal advisers themselves; besides, such cases are much less numerous than those conducted by attorneys. It is also important to remember that legal advisers cannot appear \textit{ex officio} in criminal cases (except for misdemeanor cases and, of marginal importance, representation of a legal person) and family law cases.

The information of the National Council of Legal Advisers on the number of \textit{ex officio} cases leads to a conclusion that
appointment of legal advisers in this capacity is not very popular. The existing possibility, then, is not sufficiently used.

Although every year the number of cases in which legal advisers are appointed clearly increases, it seems that they could be appointed more often and, thus, relieve the Bar. This would not even require any legislative changes, but rather changes in court practice as the court decides whether an attorney or legal adviser is appointed to provide ex officio representation.

6.4 Lawyers’ Fees

A Decree of the Minister of Justice sets the minimal level for lawyers’ fees. In general, the fees are determined for each case and specified for each stage of the proceedings. The fees do not separately cover the lawyer’s preparations for a case.

When delivering a judgment in a case with ex officio representation, the court determines the representative’s fee on the basis of the above-mentioned minimal fees. The particular fee may be set between 100 and 200 percent of the minimal amount. However, there are complaints from attorneys that the minimal amounts are too low and that courts usually grant only 100 percent of minimal amounts without taking into account the amount of work and time spent on the case.

In ex officio cases, the court also decides on reimbursement of lawyer’s necessary expenses that resulted from the case. The expenses must be listed and documented.

However, attorneys complain that courts often do not reimburse these expenses.

6.5 Support for Non-State Initiatives

Citizen Advice Bureaus

See section 5.5.

Consumer organizations

According to the Office for Competition and Consumer Protection, 99 percent of the costs of sustaining activities of consumer non-governmental organizations are covered by governmental administration through yearly subsidies from the state budget. These subsidies are transferred from the budget administered by the president of the Office for Competition and Consumer Protection. Recently, the procedure for the grant of subsidies has been made more difficult and lengthy.

Income of NGOs devoted to activities of “public interest” are free from income tax. However, NGOs are not exempt from value added tax (VAT) or excise taxes when making purchases of goods or services. They are not entitled by law to indirect funding; if they receive indirect funding, it is granted by individual decisions of local authorities.

7. Data Collection

There have been no comprehensive surveys on legal aid conducted in Poland so far.
Relevant data are not collected by courts or the Ministry of Justice. The Institute of Justice has not conducted research on *ex officio* legal aid to date. One of the goals of the HFHR’s project is to encourage government authorities, research institutes, and the academic world to undertake surveys and to systematically collect data in this field.

The data cited above are the only statistics available. No surveys on legal aid in terms of population of needy persons are conducted.

**8. Legislative developments**

Working on the concept of court reform, a team that formed within the Supreme Administrative Court developed draft solutions containing provisions on legal aid provided to the indigent. The suggestions were as follows:

- Adoption of a solution whereby the party chooses the lawyer himself or herself or approaches the association of lawyers or legal advisers for the appointment of legal representation. According to authors of this provision, in the future this could lead to the emergence of a group of lawyers specializing in administrative cases.
- Creation of the possibility of remuneration to people who provide legal representation at the moment of taking up the case and not, as is the current practice, only after the case has been completed.
- Remuneration from special funds of the administrative court established for this purpose.
- Organization of special funds for securing the right of indigent persons to exemption from court fees. Half of the fees would be transferred to the state budget account as takings, and the other half would be transferred to a separate account holding funds for legal aid to the indigent. An additional source would be the annual payments made by lawyers’ and legal advisers’ associations on the motion of the president of the Supreme Administrative Court.
- Performance of some actions in proceedings by court officials (registrars) to grant indigent persons the right to legal aid.

All but the last proposition have been rejected in the final version of the Act on Procedure before Administrative Courts. Currently, the act (together with the new Act on Structure of Administrative Courts) awaits entry into force, which is due on 1 January 2004.

Work is in progress in the Ministry of Justice on a draft Act on Court Costs. The draft provides for a reduction of the filing fee from 8 percent to 5 percent of the value of the dispute, introduction of a detailed questionnaire (means test) prepared by the Ministry of Justice on the financial status...
of the person applying for legal aid, and the possibility of decision-making on exemption from court costs by court officials (registrars) instead of judges.

9. Recommendations

Proposed changes in the legal aid system

The list of problems and possible solutions related to the present system of access to legal aid for the indigent is long. Entities concerned—state authorities and legal corporations, as well as scientific circles and non-governmental organizations—need to discuss various submitted suggestions and adopt a position in their respect.

We hope that a serious joint reflection of various professional circles on the reform of the system of access to legal aid for the indigent will be continued.

The proposed changes and reforms can be divided into two groups: changes within the current system of legal aid provision that are easier to introduce, and systemic changes that require a broader discussion and thus more time and preparations.

Changes within the current model of legal aid provision

Data collection and evaluation: The Ministry of Justice, legal corporations, and scientific institutions should gather information and statistical data, and conduct research and a debate on the system of access to legal aid, which would enable a precise identification of problems and a regular appraisal of the current system’s effectiveness.

Development of clear criteria for granting ex officio legal aid: What can be done in this area includes the following:

• The Council of Ministers should draft amendments to provisions of law regulating access to legal aid to provide such aid to persons who really need it, and to make the provisions consistent with standards established by the European Court of Human Rights in Strasbourg and by recommendations of the Council of Europe.
• The Ministry of Justice should develop and introduce a detailed questionnaire (means test) on the financial situation of persons who apply for ex officio legal aid.
• The Council of Ministers should consider the possibility of partial payment for legal aid granted ex officio to persons who cannot afford to pay the entire lawyer’s fee but can cover some of the costs of legal aid.
• The Ministry of Justice should prepare clear guidebooks for citizens that explain their right to ex officio legal aid. We suggest that simple, clear, and understandable instructions be drawn up, informing people of the possibilities and procedures for exercising one’s right to defense and representation in all cases—of both hired, ex
officio, and mandatory defense and representation—together with a form for applying for an ex officio lawyer.

Changes in the procedure for appointing attorneys and legal advisers: The Ministry of Justice, judicial bodies, and legal corporations should consider compiling new lists of attorneys and legal advisers, different from those that exist now, from which lawyers would be appointed to conduct specific ex officio cases:

- lists of willing professionals (with an additional possibility of stating individual specialization or preferences as far as ex officio cases are concerned), to be used in the first place;
- lists of specialization and preferences, to be used in the second place;
- alphabetical lists of all lawyers, to be used if the other two lists prove insufficient.

Judges should appoint legal advisers as ex officio representatives in civil cases more often. Legislators should consider moving the power of decision on granting legal aid from judges adjudicating particular cases to independent institutions or court registrars.

Fees for ex officio cases: The Ministry of Justice should determine precise rules concerning the payment of fees for ex officio cases, to eliminate delays in their payment.

Quality of legal aid: The Ministry of Justice and Legal Professions—Bar and Legal Advisers—should establish minimum standards for lawyers conducting ex officio cases. The Ministry of Justice and legal professions should establish evaluation procedures, such as evaluation forms, to monitor the quality of performance of ex officio lawyers. Legislators should consider introducing the possibility of appealing disciplinary decisions of the professional disciplinary courts to common courts of law. The Bar and Legal Advisers Department of the Ministry of Justice should undertake actions aimed at making disciplinary responsibilities realistic. The Ministry of Justice should start to exercise its supervisory powers with respect to the legal profession. Disciplinary hearings should be made public.

Promoting positive attitudes and image: To promote positive attitudes among lawyers and to take care of the legal profession’s image, steps can include the following:

- The Ministry of Justice and legal corporations should introduce the element of promoting pro bono attitudes among lawyers into their training system; for example, part of the training could take place at non-governmental organizations providing citizen advice or at university legal clinics.
- The legal circles should consider a proposal to organize a competition in which lawyers and law firms that make the greatest contributions in the area of legal aid to the indigent or pro bono work would be awarded for their activity (promoting positive attitudes).

Systemic changes
Legal aid fund: The Council of Ministers should consider putting sums of money for state-financed legal aid into a separate legal aid fund.

Legal Aid Board/Commission: The Council of Ministers should consider the possibility of creating an independent institution dealing with problems of access to legal aid and administration of the system: the Legal Aid Board/Commission.

Alternative models for provision of legal aid: The Council of Ministers should plan for the introduction of models for legal aid provision as alternatives to ex officio legal aid, such as:

- taking out some funds from the legal aid budget and developing a pilot Public Defender Office program, modeled on that of other countries (within the jurisdiction of a single regional court) and staffed with lawyers dealing exclusively with ex officio legal aid;
- considering the possibility of introducing another model—contracting legal services for the indigent—whereby individual lawyers or law firms would undertake to conduct ex officio cases within a given jurisdiction for a fixed fee;
- conducting a comparative survey of costs and effectiveness of legal aid provided within different solutions described above, and potentially introducing a mixed model applied by many countries;
- combining a pilot Public Defender Office program with the lawyers’ training—so that, supervised by experienced attorneys, the trainees could provide ex officio legal aid during their training;
- creation of an institution of “duty attorneys” who provide legal aid in emergency situations such as arrest or detention.

Recruitment to the legal professions: The Ministry of Justice and legal professions should introduce fully objective criteria and procedures for recruitment of attorneys and legal advisers. The Bar should open access to the attorneys’ profession, to significantly raise the number of attorneys (accepted on the basis of high but objective standards).

Legal Aid Act: The Council of Ministers should consider adopting a separate Legal Aid Act, which would regulate all major issues related to access to legal aid.

Assistance provided by non-governmental organizations: Legal professions and non-governmental organizations should develop standards for cooperation. NGOs should create an Internet database of leaflets, guidebooks, handbooks, etc., prepared by various organizations and institutions.

Extra-judicial legal assistance: The Council of Ministers should consider developing a system of access to extra-judicial legal assistance—in the form of a right to free or par-
tially paid-for (depending on means) consultation or legal advice. Such a system would allow the resolution of many cases without involving the administration of justice. Already existing all over the country, Poviats’ family assistance centers and Poviats’ consumer protection centers might be the institutions that, if well equipped and staffed, could play the role of local legal advice centers for the indigent.

Alternative methods for resolving disputes: The Ministry of Justice, responsible for educating judges and prosecutors, as well as legal professions, responsible for educating attorneys and legal advisers, should place an emphasis in their training on the use of existing possibilities of alternative dispute resolution methods (e.g., mediation, settlement). When drafting legislative changes, the Council of Ministers should create the possibility of alternative dispute resolution.

Notes

1 This report is an updated and expanded version of a country report prepared for the Access to Justice Forum in Budapest, December 2002. More information on legal aid in Poland might be found in a separate publication prepared by the Helsinki Foundation for Human Rights in Poland (in Polish, English, and Russian), as well as on the Foundation’s Web site: www.hfhrpol.waw.pl.

2 More information about the HFHR’s project, as well as some empirical tools used in the survey, might be found on the Foundation’s Web site (in Polish, English, and Russian): www.hfhrpol.waw.pl.

3 Article 42, point 2, of the Constitution of the Republic of Poland: “Anyone against whom criminal proceedings have been brought shall have the right to defense at all stages of such proceedings. He may, in particular, choose counsel or avail himself—in accordance with principles specified by statute—of counsel appointed by the court.”

4 Article 6 of the Code of Criminal Procedure.

5 Article 82 of the Code of Criminal Procedure.


7 Article 83 of the Code of Criminal Procedure.

8 Article 245, section 1, of the Code of Criminal Procedure.

9 Article 244, section 2, of the Code of Criminal Procedure.

10 Article 246, section 1, of the Code of Criminal Procedure.


12 Article 257, section 2, of the Code of Criminal Procedure.

13 Article 249, section 3, of the Code of Criminal Procedure.

14 See section 2.2.1 for more details on mandatory defense.

15 Journal of Laws no. 38, 1987, item 218, with subsequent changes.

16 Last Changes to the Code of Criminal Procedure (in power starting 1 July 2003) limited even this possibility, as the final review of the case file in the presence of defender would no longer be obligatory. This solution aiming at speeding up the Procedure might thus cause a situation in which the first contact between client and lawyer would take place during the first court hearing, with no contact or common preparation for the case.
17 Article 36, section 1, and Article 44 of the Act on Procedure in Minors’ Cases.
18 Article 49 of the Act on Procedure in Minors’ Cases.
19 Article 51, section 2, of the Act on Procedure in Minors’ Cases.
20 Article 49 of the Act on Procedure in Minors’ Cases (Article 56 in connection with Article 12 of the act).
21 Article 48, paragraph 1, of the Act on Protection of Mental Health.
22 See material in section 3 on access to legal aid in civil cases.
23 Specified in Article 79, sections 1 and 2, and Article 80 of the Code of Criminal Procedure.
24 Last Changes to the Code of Criminal Procedure, new section 4 in Article 79 (in power starting 1 July 2003), limited the scope of mandatory defense in these cases. Previous regulations meant that if there were doubts as to the defendant’s sanity resulting in a medical examination on the motion of the court, mandatory defense applied even when the medical examination did not confirm those doubts. The new solution limits the scope of the mandatory defense only to the “doubts of the sanity” proven by a medical examination. The result of this change would be an obvious increase in the number of criminal defendants not being represented in a court.
26 The less serious offenses (misdemeanors) for which the Penal Code provides for penalties of up to 12 years of deprivation of liberty are specified, e.g. in the following Articles: 154, section 2, 156, section 3, 163, section 3, 165, section 3, 166, section 1, 173, section 3, 185, section 2, 197, section 3, 207, section 3, 228, section 5, 229, section 4, 280, section 1.
27 Article 55, section 2, of the Code of Criminal Procedure.
28 Article 446, section 1, of the Code of Criminal Procedure.
29 Article 526, section 2, of the Code of Criminal Procedure.
30 Article 545, section 2, of the Code of Criminal Procedure.
31 Article 81 of the Code of Criminal Procedure.
32 Article 79, section 2, of the Code of Criminal Procedure.
34 Article 87 of the Code of Criminal Procedure.
36 Section 111, point 1, of the Internal Rules of Operation . . . (see note 11).
37 See note 33; p. 366.
38 Article 619, section 1, and Article 626, section 1, of the Code of Criminal Procedure.
39 Article 78 of the Code of Criminal Procedure.
40 Organizational Department, Ministry of Justice.
41 National Council of the Bar, Zastawienie statystyczne o działalności adwokatów w Polsce (Statistical information on activities of attorneys in Poland).
42 According to the Bar’s estimation, only 60–70 percent of attorneys send complete information about number of cases they deal with.
43 Section 91 of the Decree of the Minister of Justice of 19 November 1987 on Regulation of Internal Operation of Ordinary Courts; see also Article 20 of the Code of Criminal Procedure, which states that in cases of gross violation of procedural duties by lawyers, prosecutors (during pretrial proceedings) and judges (during trial) should notify the lawyers’ professional body.
44 Article 45, point 1, of the Constitution of the Republic of Poland: “Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.”
45 Article 393, section 2, of the Code of Civil Procedure.
46 Article 111, section 1, of the Code of Civil Procedure.
47 Article 117, sections 1 and 2, of the Code of Civil Procedure.
48 Article 4 of the Legal Advisers Act excludes the legal adviser’s participation in family and guardianship cases.
49 Articles 114 and 117 of the Code of Civil Procedure.
50 Article 10, point 1, of the Act on Court Costs in Civil Cases, 13 June 1967; see Journal of Law no. 24, item 110, with subsequent changes.
51 Article 116, section 2, of the Code of Civil Procedure.
52 II PZ 46/64.
53 Article 394, section 1, of the Code of Civil Procedure.
54 Article 115 of the Code of Civil Procedure; this is sometimes indispensable to make it possible for the higher-instance court to examine the complaint.
56 Section 217 of the Internal Rules of Procedure of Common Courts of Law.
57. Paragraph 23 of the Ordinance of the Minister of Justice of 12 December 1997 concerning the fees of lawyers’ and legal advisers’ actions; see Journal of Laws no. 159, 1998, item 1013, with subsequent changes.
58. 13 June 1967; see Journal of Laws no. 24, item 110, with subsequent changes.
60. Part II of Chapter II regulating actions in civil, commercial, family, and juvenile cases and in cases arising under labor and social insurance law.
63. Article 46 of the Code of Civil Procedure.
64. It is obviously just an estimate, as data provided by the legal professions might be not reliable.
66. Of 13 June 1967; see Journal of Laws no. 24, item 110, with subsequent changes.
68. Article 48, section 2, of the Law on the Constitutional Tribunal of 1 August 1997.
69. Articles 14, 69, 90.2, 91a, and 95b of the Act on the Bar; Articles 31, 47, and 48 of the Act on Legal Advisers.
70. Article 95m of the Act on the Bar; Article 74 of the Act on Legal Advisers.
71. Article 16 of the Act on the Bar; Article 22 of the Act on Legal Advisers.
72. Chapter 8 of the Act on the Bar; chapter 6 of the Act on Legal Advisers.
74. Article 10 of the Act on the Ombudsman.
76. Decree of the Minister of Justice of 11 April 1992, Regulation of Internal Operation of Ordinary Units of Public Prosecutors Offices.
78. “Regional.”
80. “Region.”
82. Citizen Advice Bureaus Internet site: www.zbpo.org.pl. 
85. Data from Grażyna Urbaniak, chief accountant of the Budgetary Department of the Ministry of Justice, Department of the Budget and Assets of the State Treasury.
86. Source of data: budgetary laws for consecutive years.
87. Amounts of adjudicated fees have been calculated in the following manner: expenditures in a given year were reduced by obligations accrued until the previous year and increased by obligations accrued in a given year. The result should present an accurate scale of fees adjudicated in a given year. An error may result from the fact that some obligations are carried over each year and may disturb the true picture.
88. Rounding up.
89. Regulated at the time of discussed changes by the Ordinance of the Minister of Justice on Fees for Attorneys and Legal Advisers, 12 December 1997. Currently, these issues are regulated by Ordinances of the Minister of Justice, separate for attorneys and legal advisers, of 28 September 2002 (Dz.U. No. 169, items 1348 and 1349)—“concerning fees for attorneys and covering by the state Treasury costs of free ex officio legal aid” and “concerning fees for legal advisers and covering by the state Treasury costs of free ex officio legal aid,” respectively.
90. Calculations based on data from Grażyna Urbaniak, chief accountant of the Budgetary Department of the Ministry of Justice, Department of the Budget and Assets of the State Treasury.
91. “Attachment to the Rh-28 report on expenses.”
93. The entire short section, included in two paragraphs, of the periodical report on legal aid should be critically evaluated as fragmentary and unreliable. We are even more upset by the fact that such information for other countries is more complete.
94 Information confirmed by judges.
95 Data collected by the National Council of the Bar and published in the Statistical Year-Book: Zestawienie statystyczne o działalności adwokatów w Polsce (Statistical information on activities of attorneys in Poland); data for 2001, prepared by the chief accountant of the National Council of the Bar, was made available by the Council’s Presidium.
96 It should be emphasized that such an official publication as the Main Statistical Office’s yearbook has been publishing unreliable data for years, without any information on its adequacy. This data is later quoted and treated as accurate.

97 Data obtained from the National Council of Legal Advisers and Regional Councils of Legal Advisers.
98 According to opinions of attorneys obtained in the pilot survey, they estimate that the number of ex officio cases exceeds their capacities.
ACCESS TO JUSTICE COUNTRY REPORT: ROMANIA

Cozmin Obancia, Marinela Cîrtoaba, and Andrei Savescu

EXECUTIVE SUMMARY

Article 24 of the Romanian Constitution recognizes the right to a defense as one of the fundamental human rights guaranteed by the Constitution. According to the opinion of legal scholars interpreting the Constitution, this provision applies to criminal cases as much as it does to civil cases or to commercial, labor, or administrative disputes.

Under Romanian criminal procedure, the defendant’s legal representation can be optional or mandatory. If legal assistance is optional, the defendant may hire counsel or choose to defend himself or herself. If legal assistance is mandatory, the proceeding authorities are obliged by law to ensure that the defendant has been represented by counsel; violations of this obligation can result in nullification of the judicial act.

Both optional and mandatory legal assistance can be free of charge for the defendant. Optional legal assistance will be free of charge if the dean of the Bar Association approves the application for free legal assistance. In this case, the defendant does not pay the lawyer’s fees, but the lawyer will provide the service for free. In addition, optional legal assistance will be free if the proceeding authority (the prosecutor during the preliminary investigation, and the court if the case has been referred directly to the court by the injured party) finds that the defendant does not have sufficient means to pay the fee and approves the request for free legal assistance. In this case, the lawyer’s fee will be covered by the Ministry of Justice. However, there are no objective criteria for the granting of legal aid in either the Romanian Code of Criminal Procedure or the law or advocacy statute.

Regarding civil cases, the law does not provide clear financial criteria for granting legal aid in cases when free legal assistance is approved by the dean of the Bar Association, nor does it provide for clear criteria when free legal assistance is ordered by the proceeding authority in cases of court-appointed counsel. The practice, like that of
criminal legal assistance, lacks clearly established rules. For instance, there is no minimum income threshold that mandates the granting of legal aid, nor is there set criteria that measure the income of the beneficiary’s family.

Other problems arise in connection with the communication between courts and the bar associations in cases regarding the appointment of *ex officio* attorneys. Sometimes it takes months before a lawyer is appointed. In such cases, the only solution for the court is to adjourn the case at every legal term and to continue issuing addresses. There is no official state mechanism to monitor legislation, and no state agency authorized to administer legal aid.

There is a lack of effective means in evaluating the competence level of attorneys and the sufficiency of their training. Furthermore, attorneys who represent clients in legal aid situations are often uninvolved in the cases and do not offer zealous representation, as a result of inadequate remuneration. This situation is even more problematic as the number of cases supported by the state budget for legal aid are on the rise.

Recommendations to help the legal aid system include educating prosecutorial authorities and the police in the proper manner of offering legal aid to persons involved in the criminal justice system. Legislative reform, whereby legal aid could be more easily obtained, should be a priority. Furthermore, there needs to be greater cooperation between the Bars, the Ministry of Justice, and the Romanian Lawyers Union to protect the rights and interests of people under the jurisdiction of the courts. In addition, greater information on the right and procedure to legal aid must be promoted and prison lawyers should be provided for those who are incarcerated.

1. **Introduction**

As of January 2000, Romania had a population of 22,455,500. This represents a decrease of 1.6 percent in the Romanian population since 1992. Presently, there are 164 courts of law in Romania: 107 low courts, 41 tribunals, 15 courts of appeal, and the Supreme Court of Justice.

The total number of lawyers in Romania for the last two years has been approximately 11,500. This means that there is approximately one lawyer for every 1,952 inhabitants. Within this pool of lawyers, the Romanian legal aid system must function.

The Romanian Constitution recognizes the right to a defense as a right protected under both domestic law and international treaties ratified by Romania. Specifically, the Constitution proclaims the right to a defense as a fundamental human right protected by Title II (Fundamental Rights, Liberties and Duties), Chapter II (Fundamental Rights and Liberties). In implementing constitutional law, many domestic statutes have further addressed the right to a defense.

In the last few years, the Constitutional Court has frequently dealt with the question
of the right to a defense and delivered hundreds of decisions concerning this issue. The court’s jurisprudence has helped clarify the legal texts concerning the right to a defense and has strengthened the protection of citizens’ rights and liberties.

In addition, legal doctrine has focused greatly on the problems of legal assistance and the right to a defense. Numerous studies and articles dedicated to this matter have been published in the last few years.2

2. CRIMINAL LAW: EFFECTIVE ACCESS TO THE JUDICIAL SYSTEM FOR THE INDIGENT IN CRIMINAL CASES

2.1 RIGHT TO COUNSEL

2.1.1 Constitutional guarantees of the right to counsel and the right to legal aid

Article 24 of the Romanian Constitution3 recognizes the right to a defense as one of the fundamental human rights guaranteed by the Constitution.4 According to the opinion of legal scholars interpreting the Constitution, this provision applies to criminal cases as much as it does to civil cases or commercial, labor, or administrative disputes.5

The right to a defense, as recognized by the Constitution, has been interpreted both broadly and narrowly. In the broad sense, it includes all rights and procedural guarantees available to a person charged with a criminal offense. It also includes the possibility for the parties to appear to present their claims or to disprove their adversary’s claims in contentious civil, commercial, or labor trials. This broad meaning also includes the right to counsel.

In the narrow sense, the right to a defense concerns only the right to resort to the services of an attorney (right to counsel). As his or her own agent a person can choose, at personal risk, whether to exercise this right. The Constitution does not contain any specific references to the right to legal aid.

In addition to the right to a defense, other provisions of the Romanian Constitution are relevant to the right to counsel. Article 20, paragraph 1, of the Constitution6 provides that the constitutional provisions regarding citizens’ rights and liberties (including the right to a defense) should be interpreted and enforced in accordance with the relevant international treaties ratified by Romania.

Therefore, international treaties, which guarantee the right to counsel, are part of the domestic law if they are ratified by the Parliament of Romania.7 If these treaties are ratified, they have primacy over domestic legislation.8 The Romanian Constitution recognizes equality before the law with no privilege and no discrimination.9 It further provides for guarantees against any illegal criminal provision.10 The Constitution also establishes the fundamental principles of the judicial system, including the principles of judicial independence and the structure of the courts.11 Article 127 (1) is important for the right to access to justice
and criminal legal aid. This provision ensures members of national minorities and those who do not understand Romanian language the right to be informed about all documents in the court file, to speak in court, and to plead through an interpreter. In criminal cases, this interpreter is provided free of charge.\textsuperscript{12}

2.1.2 Right to counsel in criminal proceedings

In its typical structure, the criminal process has three stages: pretrial investigation; judicial process, consisting of trial, appeal and cassation; and execution of the criminal sentences.

Right of the defendant\textsuperscript{13} to be notified of his or her right to counsel before the first interrogation

According to the Code of Criminal Procedure, before the first interrogation, the defendant should be informed of the right to be assisted by a chosen lawyer or by a lawyer appointed \textit{ex officio}. The Code requires that this notification be recorded in the minutes of the court session on the relevant procedural action.\textsuperscript{14}

Every defendant, regardless of whether the case falls into the category of mandatory defense cases (see below), is entitled to this right to assistance of counsel. The proceeding authority, the prosecutor during the preliminary investigation, and the court, if the case has been referred directly to the court by the injured party,\textsuperscript{15} are obliged to secure this right for the defendant.

In practice, although the proceeding authorities usually respect this right, the fact that the accused has been informed about this right is not always recorded in the minutes. Usually the first written statement signed by the accused includes text regarding the defendant's right to counsel.\textsuperscript{16}

If the proceeding authorities have failed to inform the accused of the right to counsel, the court of appeals should repeal the sentence and reopen the proceedings. There are two types of grounds for procedural violations, absolute grounds and relative grounds. However, the legal doctrine and the jurisprudence are not unanimous as to whether a violation of this right constitutes an absolute or a relative ground for repealing the sentence, and therefore what the consequences of violating this right are. If a procedural violation constitutes an absolute ground for repealing the sentence, the court should repeal it even in the absence of a specific motion. If, however, the violation is a relative ground for repeal, the court can act only on a motion by the defendant or the affected party.

In one case involving a violation of the right of the defendant to be notified of his or her right to counsel, the court of cassation annulled the sentence and held that this violation constituted an absolute ground for repealing the sentence. This decision was criticized with the argument that a violation of Article 6 of the Code of Criminal Procedure is not an absolute nullity, but a relative nullity.\textsuperscript{17} The procedural violations that constitute absolute grounds for repeal of a sentence are exhaustively
named in the Code of Criminal Procedure (Article 197, paragraph 2). The procedure of notifying a defendant of the right to counsel is not specified in this section. Therefore, the argument contends, while absence of defense counsel when his or her presence is mandatory constitutes an absolute ground for repeal, a violation of the defendant’s right to be informed of the right to counsel does not. In the latter instance, the sentence can be repealed on this ground only by a defendant’s motion.

**Right to be informed of the charges and to be given the opportunity to prepare a defense**

Article 6, paragraph 3, of the Code of Criminal Procedure requires that the accused be informed about the crime with which he or she has been charged (including the particular circumstances and the legal background) and be given the opportunity to prepare and to exercise a defense, including the opportunity to be assisted by a lawyer. The requirements of this provision are not satisfied if the proceeding authority only informs the accused that he or she has been charged with Crime X under Article Y, without informing the accused of the facts of the crime and how it has been committed.

The proceeding authority should postpone the proceedings if the accused requests a postponement in order to prepare a defense, including hiring a defense counsel. Violation of this right is a relative ground for repealing the sentence (see above). During trial, the court can send the case back to the prosecutor to correct this violation, or the defendant can raise the issue on appeal.

**Right to be appointed *ex officio* defense counsel if legal representation is mandatory**

Pursuant to Article 171, paragraphs 2 and 3, of the Code of Criminal Procedure, the defendant should be effectively provided with the legal assistance of a chosen defense counsel or should be appointed *ex officio* defense counsel in cases of mandatory legal representation (see section 2.2.1).

**Right of the detainee to have contact with his or her defense counsel**

Article 172, paragraphs 4, 5, and 7, and Article 294, paragraph 3, of the Code of Criminal Procedure correlate with the stipulations of Article 34 from Law No. 51/1995, according to which “contact between the lawyer and his or her client cannot be disturbed or controlled, directly or indirectly, by any state authority.” The doctrine outlines that the connection between the counsel and the arrested defendant must be understood not only in the sense of physical contact, but also in written correspondence and phone conversations. If serious grounds are present, the prosecutor can ban contact between lawyer and detainee once during the entire criminal proceeding and for a period of no longer than five days. Contact between counsel and detainee cannot be banned when arrest
is ordered and when the case file is presented to the accused.23

Right of defense counsel to assist the defendant in any action during the prosecution, to draw up petitions, and to file complaints24

According to Article 172, paragraph 1, of the Code of Criminal Procedure, in the preliminary investigation, the defense counsel has the right to assist the accused in any action during the prosecution, to draft petitions, and to file complaints. It is proposed that in the future, the text be modified to eliminate any other doubts, to reword the text as follows: “In the course of prosecution, the lawyer for the accused or for the defendant has the right to assist at any action that is made, to take any procedural measures, to draw up petitions, and to file a complaint.”25

The absence of defense counsel is not a violation of procedural rights if there is evidence that counsel has been notified of the date and the hour of the procedural action. If the prosecutorial authority does not notify the lawyer of the date and time of the procedural action, the sentence can be repealed (a relative ground for nullity) if the defendant can prove damage that cannot be recovered unless the procedural action is canceled. In cases of mandatory representation, the presence of counsel is mandatory at the interrogation of the accused.

Right of the detainee to be present at the trial even if he or she has a lawyer

Article 140, paragraph 1, of the Code of Criminal Procedure regulates the complaint against the arrest and the interdiction to leave town ordered by the prosecutor.26 The arrested person should appear before the court at the hearing of the complaint. There are several exceptions, however, which somewhat nullify this rule. For instance, if the defendant is in a hospital and cannot be brought before the court, due to his or her state of health, or in other cases in which bringing the detainee to court is not possible, the court will examine the complaint without the accused, but in the presence of the counsel who will have the opportunity to give concluding statements. The phrase “in other cases in which bringing the detainee to court is not possible” has been broadly criticized by lawyers, because bringing the detainee is basically left to the discretion of the law enforcement authorities. It is optional to bring the arrested person to the appeal against the decision on the complaint. This practice violates the provisions of Article 24 of the Constitution, which state that the party has the right to be assisted by counsel during trial. However, to date, this provision has not been found unconstitutional. The situation regarding hearings on complaints against detention during trial (Article 159 of the Code of Criminal Procedure) is similar.

In cases that concern bringing the detained person before the court in hear-
ings on the appeal (Article 402, paragraph 3), the Constitutional Court held that the provision allowing for discretion on whether the defendant should be brought before the court is unconstitutional because it violates the constitutional right to a defense (Decision No. 348/2001).

Right to counsel in execution proceedings
The execution procedure is usually non-contentious and is carried out by a judge designated by the execution court (according to Article 418 of the Code of Criminal Procedure, the execution court is the trial court). If the conviction is disputed, the execution court will hold hearings. At the hearings it will be decided if a defense is mandatory under the general rules of the Code of Criminal Procedure. If so, the court will appoint an ex officio defense counsel. The detainee will be brought to court only if his or her situation may worsen or if the court considers his or her presence necessary.

There is controversy in the doctrine regarding legal assistance during execution stage. One opinion stated that in the forced execution stage, the judicial obligation to grant legal assistance does not exist, as the trial stage of the criminal proceedings has ended and the guilt of the defendant has been established through a definitive sentence. From this point of view, there is strong criticism of the decision of a court of law to repeal the second appeal declared by the convicted person remanding the case for a new trial at the court of appeals. The ground for repeal is the fact that the convict’s right to a defense has been violated because he or she has already filed a demand to delay execution. Although the conviction was for a crime for which the law provides as punishment imprisonment for more than five years, the appellate court proceeded to resolve the appeal in the absence of defense counsel.

2.1.3 Right to counsel and right to legal aid in non-criminal proceedings when deprivation of liberty is at stake

Right to counsel in juvenile criminal cases
Under Romanian law, the criminal treatment of minors is different from the treatment of adults with respect to conditions for engaging criminal liability and the punishment that can be applied.

Minors who have not reached the age of fourteen are not criminally liable. Minors between fourteen and sixteen years of age are criminally liable only if it is proved that they acted with discernment. Therefore, for this category of minors, a presumption of lack of intent exists. Minors who have reached the age of sixteen are criminally liable.

The sanctions that can be applied to criminally liable minors are educative measures and punishment. Between these, only educative measures are specific for minors. Criminal law provides four educative measures: censure, supervised freedom, con-
finement in a rehabilitation center, and confinement in a medical-education institution.

The courts have discretion to decide whether to apply a criminal punishment or an educative measure within the framework of the principles set up by the law. Should the court choose to apply punishment, the limits of the punishment will be reduced to half of the potential sentence for adults.

In case of criminal proceedings against minors, it is mandatory that the minors should be represented by an attorney (see above). In addition, minors are subject to a special procedure regardless of whether they are to receive punishment or an educative measure. This procedure involves the summoning (but not actual presence) of parents or guardians at interrogations or court hearings. However, defense for minors is mandatory only at trial; therefore, it is possible for a fourteen-year old minor to be alone when the case file is presented. The special procedure also includes a special inquiry that is mandatory at the trial, special composition of the court, the minor’s presence at trial, and the summoning of parents or guardians to the court sessions.

In addition, according to the doctrine and the case law, during the prosecution and the trial, a minor defendant’s absence may not be sustained by the presence of defense counsel. In one particular case, the course admitted the cassation and repealed the decision of the court of appeals, remanding the case for retrial in the court of appeals, on the ground that Article 484, paragraph 1, of the Code of Criminal Procedure was violated.30 The minor defendant was absent during the arguments before the court of appeals but did not flee from justice, was present at the previous terms, and proved to be cooperative. The cassation court decided that the written conclusions of the defense counsel do not compensate the absence of the minor defendant.31

Right to counsel during safety measure proceedings

Safety measures are criminal law sanctions with preventive character, which may be imposed on persons who have committed actions described by criminal law. The imposition of safety measures is not a consequence of criminal liability, but a necessity to remove a state of danger and to prevent the perpetration of other criminal deeds. The safety measures sanctioned by Romanian Law (Articles 111–118 of the Code of Criminal Procedure) include:

- compulsory medical treatment;
- medical confinement;
- restriction from occupying a function or from exercising a profession, a job, or any other work;
- interdiction from appearing in certain places;
- expulsion of foreigners;
- restriction from returning to the familial dwelling for a determined period of time.

Safety measures can be imposed by the court. As an exception, the prosecutor or
the court may decide to take, during the
criminal trial and as a provisional measure,
the safety measure of medical confinement. These measures are to be taken until their confirmation by the court. Consequently, even if the prosecution stage has ended through a decision of the prosecutor to dismiss the prosecution, he or she will have to notify the court for confirmation in order for it to become a definitive measure. If the safety measure is taken for one of the persons in one of the situations mentioned above in which legal assistance is compulsory, the presence of the lawyer will, of course, be compulsory. In case of replacement, cessation, or dismissal of the measure of medical confinement, if the confined person does not have defense counsel, one will be provided ex officio.

Right to counsel for foreigners in connection with violations of immigration laws

According to governmental ordinance No. 102, regarding the statute and the regime of immigrants in Romania, a foreigner who applies for refugee status has the right to be assisted by a lawyer, to be provided with an interpreter free of charge throughout the procedure, and to be advised by Romanian or foreign non-governmental organizations.

Romanian law does not deal with the right to counsel for foreigners detained for violating immigration laws. If a foreigner is charged with a crime, the general principles of criminal procedure will apply, and if he or she is eligible for mandatory defense, the proceeding authority will appoint an ex officio lawyer.

Law No. 296/2001 regarding extradition provides for mandatory legal aid during the extradition proceedings. The person facing extradition has the right to free assistance of an interpreter and of an ex officio lawyer if he or she does not choose to hire a lawyer.

The right to counsel in proceedings for detention of mentally ill persons, drug addicts, alcoholics, or persons convicted to imprisonment for minor offences

If such persons are suspected of having committed crimes, the general principles of criminal procedure apply.

Recently, Law No. 487/2000, entitled Mental Health and the Protection of Persons Suffering from Mental Illnesses, entered into force. According to this law, the patient and his or her personal or legal representative have the right to appeal the decision of involuntary confinement. “Personal representative” refers to the legal guardian of the incapacitated person. However, the law does not require mandatory legal representation for patients. The only provision regarding the relationship with a lawyer mentions that restrictions regarding the individual freedoms of the involuntary confined patient are limited by the person’s state of health and by the effectiveness of the treatment. The patient’s rights regarding communication, at his or her free will, with any competent authority related to the situation, with members of the patient’s
family, or with his or her lawyers, cannot be restricted.

Law No. 143/2000, regarding the fight against illicit drug trafficking and consumption,\textsuperscript{35} does not contain any provision regarding the right to counsel for drug addicts. Article 27 of the law prohibits illicit drug consumption without medical prescription. A person who consumes drugs illicitly is subjected to either detoxification treatment or medical supervision, depending on the circumstances. These measures can be imposed by the medical institutions designated by the Ministry of Health, and their decisions can be appealed within ten days before the court in the judicial district where the medical institution is located. Furthermore, the decision of the first court can be appealed in cassation proceedings.

2.2 Right to legal aid: Eligibility criteria for granting legal aid in criminal cases

Under Romanian criminal procedure, the defendant’s legal representation can be optional or mandatory. If legal assistance is optional, the defendant may hire counsel or choose to defend himself or herself.

If legal assistance is mandatory, the proceeding authorities are obliged by law to ensure that the defendant has been represented by counsel; violations of this obligation can result in nullification of the summons.

Both optional and mandatory legal assistance can be free of charge for the defendant. Optional legal assistance will be free of charge if the dean of the Bar Association approves the application for free legal assistance. In this case, the defendant does not pay the lawyer’s fees, but the lawyer will provide the service for free. Optional legal assistance will also be free if the proceeding authority finds that the defendant does not have sufficient means to pay the fee and approves the request for free legal assistance. In this case, the lawyer’s fee will be covered by the Ministry of Justice. However, neither the Code of Criminal Procedure nor the law or advocacy statute settles objective criteria for granting legal aid.

In a single situation, the Romanian law sets up clear criteria for granting legal aid. This is the case of extradition (see above), according to which a person facing extradition has the right to be assisted by an \textit{ex officio} lawyer before the court rendering a decision on the extradition. In order to receive legal aid, it is sufficient that the person participate in an extradition procedure in the capacity of a person facing extradition.

2.2.1 Substantive criteria

Pursuant to Article 171, paragraphs 2 and 3, of the Code of Criminal Procedure, either the defendant should be effectively provided with the legal assistance of a chosen defense counsel or, in cases of mandatory legal representation, an \textit{ex officio} defense counsel should be appointed.\textsuperscript{36} The defendant’s legal representation can be optional or mandatory. The cases where defense by \textit{ex officio} counsel is mandatory are the following:
A. When the defendant is a minor

Defense is mandatory in these cases only while the defendant is a minor; if he or she reaches the age of majority during the proceedings, this condition is no longer a ground for mandatory representation. A minor is a person under the age of eighteen.

In one case, the prosecutorial authorities questioned a minor prior to the formal initiation of criminal proceedings. Pursuant to the sentence of the first court, the minor was convicted to two years’ imprisonment for theft. The superior court annulled the sentence and remanded the case to the public prosecutor in order to retry the case. The cassation filed by the public prosecutor (rejected by the cassation court) pleaded that there was no violation of the guarantee of the right to a defense because the interview with the minor took place before the start of the criminal case. The cassation court opined that the right to a defense (the right to be informed of the opportunity to hire a lawyer, as well as mandatory legal representation for the minors) cannot be avoided by interviewing the suspects prior to the formal beginning of the criminal trial. The investigations that precede the start of the criminal case cannot include interviews with the suspects, in order to avoid the guarantee of the right to a defense. A person may be interviewed only as an accused person or as a defendant—hence, only after the start of the criminal case.

However, the Romanian Constitutional Court’s prior rulings seem to disagree with this jurisprudential stance. The Constitutional Court has stated that the guarantee of the right to a defense does not exist prior to the start of the prosecution, when the perpetrator does not have the procedural status of accused person or of defendant. Rather, the court stated, prosecution starts the moment the preliminary complaint is filed, except in cases where there is no prosecutorial phase. Therefore, acts performed by prosecutorial authorities prior to the initiation of the prosecution, in order to gather the necessary data for the start of the criminal case, do not represent the moment at which the criminal case starts. Such acts are undertaken in order to establish whether there are reasons to start the criminal case, and therefore the right to a defense cannot be guaranteed outside a criminal charge or until a criminal case has already started. The Constitutional Court did not express an exception for minors in these instances.

B. When the defendant is a drafted soldier (in full or reduced term), persons called back to the army, or a student in a military school

This provision applies to conscripted soldiers (serving a full term or a reduced term of compulsory military preparation), those who have been redrafted, and students in military school if they have been charged with a criminal offense.

C. When the defendant is detained in a reeducation center or in a medical education institution, or when he or she is arrested, even in a different case

Prosecutorial authorities are entitled to
take preventive measures; moreover, in some instances it is compulsory to take these measures.\textsuperscript{42} The preventive measures are constrictive features of criminal procedural law, by which the accused person or the defendant is not allowed to perform certain activities that would have a negative effect on the criminal trial or would prevent it from reaching its conclusion. The preventive measures provided by the Code of Criminal Procedure are: initial detention (twenty-four hours), preventive arrest, and obligation not to leave the locality.\textsuperscript{43} Legal assistance is mandatory if the defendant is arrested. The prosecutor can order preventive arrest of the accused if there is solid evidence\textsuperscript{44} that he or she has committed a crime and if at least one of the conditions stipulated by Article 148 of the Code of Criminal Procedure is satisfied.\textsuperscript{45}

A person may also be arrested if he or she is a threat to public order. Such a threat is enumerated in Article 148 (h) of the Code of Criminal Procedure.

If the prosecutor decides to order an arrest, he or she is obliged to: (1) immediately inform the person of the reasons for the arrest, in the presence of a lawyer\textsuperscript{46} (referring to Article 137, paragraph 1 of the Code of Criminal Procedure, the legal community has taken note of the fact that the term “at once” is more rigorous than the term in “the shortest term”);\textsuperscript{47} (2) inform, in writing within twenty-four hours, a family member or a person indicated by the accused about the arrest;\textsuperscript{48} and (3) to proceed with an interview of the defendant.\textsuperscript{49}

The initial arrest can be ordered to be in effect for a period no longer than five days.\textsuperscript{50} After this, the Code of Criminal Procedure establishes different deadlines for the arrest, depending on whether it takes place during the preliminary investigation (arrest can be ordered for up to thirty days) or during the court stage (until the sentence becomes final).\textsuperscript{51} In a decision interpreting this provision, the Constitutional Court held that the duration of the arrest should be no longer than thirty days and that at the expiration of this term, the trial court presiding over the case should verify \textit{ex officio} whether it is justified to continue the arrest.\textsuperscript{52}

However, the judicial practice is not unanimous about the interpretation of the effects of this decision of the Constitutional Court. Some courts have concluded that, because the text of the final paragraph of Article 149 has been declared unconstitutional, not even during trial can the preventive arrest, ordered or prolonged by the court, last more than thirty days.\textsuperscript{53} Nevertheless, other courts, including the Supreme Court of Justice, have interpreted differently the effects of the decision of the Constitutional Court. Thus, it was concluded that the decisions of the Constitutional Court do not apply to judicial bodies, but only to legislative bodies, which have to conform with the Constitution and modify the ordinary laws. The judicial bodies apply the existing law, and the legislative bodies have the obligation to conform to the dispositions and to the principles of the Constitution by modifying the ordinary law.
to correspond to the Constitution. In the absence of these modifications, Article 300 of the Code of Criminal Procedure is applied; it is considered to exclude the check of legality of the preventive arrest by the court, until the final resolution of the case.

This jurisprudential solutions that tend to ignore the effects of Constitutional Court decisions (which, according to the Constitution, is compulsory from the moment of its publication in the Monitorial Oficial, it being understood that the obligatory aspect concerns every subject of law, and it being opposed erga omnes) came about as a result of the fact that the law has no specification for the procedure for the enlargement of preventive arrest during the trial phase. It is true that the legislature should have responded promptly after the admission of the exception of unconstitutionality and proceeded with the modification of the legal text to fill the empty space created by the judiciary. However, as the Constitutional Court has stated, if a law is declared unconstitutional, the constitutional text will be applied until the adoption of a solution conforming to the constitution by the legislature. In no situation can there be a detract from the decision of the Constitutional Court published in Monitorial Oficial.

In order to overcome the problem of the applicable procedure, the legal community proposed the analogy of the procedure regulated by the law for expanding the preventive arrest in the phase of the prosecution.

Of course, the implementation of the solution pronounced by the Constitutional Court has created serious difficulties. The most serious among them come to the surface at sentencing. At this moment, pursuant to Article 350, paragraph 1, of the Code of Criminal Procedure, the court will decide whether to arrest the defendant, revoke the arrest, or maintain the arrest. If the court decides to maintain the preventive arrest based on the constitutional dispositions, the duration will not exceed thirty days. (The Constitutional Court stated, in its decision on 24 January 2000, that the provisions of Article 350, paragraph 1, of the Code of Criminal Procedure are unconstitutional when they are interpreted to mean that maintaining or taking measures of arrest of the defendant may occur for an indeterminate period of time that is not limited to thirty days, as stated in Article 23, paragraph 4, of the Constitution.) This means that from the moment of sentencing until thirty days later, the following steps are to be taken: the solution should be drawn up and communicated if necessary; the deadline to file an appeal should have passed; the file should have been sent to the next superior court (assuming an appeal is filed); the superior court should fix a hearing date within those thirty days; and the parties should be notified. Practically speaking, however, it is almost impossible to proceed by the book within thirty days. This is obviously a complicated problem that needs to be remedied by the legislature.

Legal representation is mandatory when preventive arrest has been ordered against the accused or the defendant, irrespective of the stage of criminal proceedings.
In the situations mentioned above, legal assistance is mandatory for all stages of the criminal proceedings. Legal representation is mandatory only at the trial stage in the following cases:

- If the maximum limit of the potential sentence exceeds five years’ imprisonment. This provision also applies in cases in which the charges are changed at trial to an offense for which a defense is mandatory.
- Upon a decision of the court if the defendant cannot defend himself or herself. Accepted judicial practice is that the court should appoint defense counsel if the defendant is mentally ill and has not chosen a lawyer. The legal doctrine supports the notion that a defense should be mandatory if the defendant requests the appointment of an *ex officio* lawyer. Furthermore, the doctrine maintains that the court should appoint a defense counsel on this ground if the defendant requests a lawyer because he or she does not have the financial ability to hire one. The same author quotes cases in which courts have rejected such requests on the grounds that legal aid representation is no longer mandatory and the defendant has admitted guilt, and therefore the appointment of an *ex officio* lawyer would not be justified. These decisions arguably violate the constitutional provisions on the right to a defense and the provisions of the Code of Criminal Procedure, which requires mandatory legal representation in cases where the defendant cannot defend himself or herself. Another problem is whether a defense can be mandatory on this ground at the stage of preliminary investigation as well. The doctrine sustains that the obligation to ensure mandatory legal representation lies with the prosecutorial authority as well, if the accused cannot defend himself or herself alone. The legal basis for this interpretation is Article 24 of the Constitution, which states that the right to a defense is guaranteed in all stages of the criminal proceedings.

Other situations quoted by the doctrine under which the defendant is considered not to be able to defend himself or herself are: if the person is sick, if the person has physical and psychological deficiencies, and if the person is handicapped. In both the optional and mandatory legal aid representation situations, the defendant or accused has the right to be defended by a lawyer of his or her choice.

In the case of mandatory legal representation, if the accused does not choose a lawyer, an *ex officio* lawyer will be designated. The interpretation of this text has been the object of controversy both in doctrine and in practice. Consequently, the prosecutorial authorities have tended to interpret this as meaning that, in the prosecutorial phase, the judicial authorities are only obliged to designate an *ex officio* lawyer.
Even if the designated ex officio defender does not appear to assist the accused, the procedural act will be considered fulfilled. For the judgment stage, the legal provision specifically states that the hearing should be adjourned in case the lawyer is absent.

### 2.2.2 Financial criteria

The law does not provide clear financial criteria for granting legal aid in cases when free legal assistance is approved by the dean of the Bar Association, nor does it provide for clear criteria when free legal assistance is ordered by the proceeding authority in cases of mandatory defense. The practice has no clearly established rules on this matter either. There is no minimum income threshold that may require the granting of legal aid, nor are there criteria concerning the incomes of the beneficiary’s family.

According to the practice of the Bucharest Bar Association, legal aid is granted to individuals without any income or with low income, to disabled people, and to people with reduced discernment.66

There are no clear rules regarding the evidence that should be produced by the legal aid beneficiary. A simple declaration of the petitioner on his or her material status is not enough. Generally, a defendant seeking legal aid will be required to produce written evidence, such as: evidence regarding his or her salary or the receipt of unemployment benefits; evidence regarding family situation, such as children or parents living in the same household, etc.

### 2.2.3 Other eligibility questions

**Legal aid for non-citizens**

There are no specific legal provisions regarding non-citizens, and the general principles of criminal procedure apply. In practice, non-citizens may be asked to produce additional evidence related to their status as foreigners.

### 2.2.4 Legal aid for victims of crimes

Pursuant to the provisions of Article 173 of the Code of Criminal Procedure,67 during the prosecution stage, defense counsel for the injured party, the civil party, and the civilly responsible party make requests to be present at the following procedural actions: interrogation of the represented party, inspection of the crime scene, searches and autopsies, extension of the arrest. Counsel may be present at other procedural actions during pretrial investigation only with the consent of the prosecutor. During trial, counsel exercises the rights of the party he or she assists.

If the court decides that the injured party, the civil party, or the civilly responsible party is not able to defend himself or herself, it may, ex officio or upon a request, appoint counsel.

There are no special legal provisions concerning the right to legal aid for victims of crime. The general provisions of the criminal law and Article 68 of Law No. 51/1995 apply.
2.3 Procedure for granting legal aid

Obligation to inform

There is no legal obligation for the proceeding authorities to inform the defendant of his or her right to legal aid. We have mentioned above, in section 2.1, the obligations of judicial authorities regarding mandatory legal representation.

Legal aid and mandatory legal representation are provided by the Bar through its legal assistance services. Each Bar will organize legal assistance services:

- at the premises of all courts of law;
- at the premises of the local prosecutorial authorities.

Legal assistance is coordinated, for each Bar, by a member of the Council of the Bar.

A fully licensed lawyer designated by the board of the Bar conducts each legal assistance service. The services of legal assistance work in spaces provided by the Ministry of Justice, in the headquarters of the courts.

Competent authority

The application for legal aid should be addressed to the dean of the Bar, to the court, or to the prosecutorial authority. It makes no difference whether the application is for legal aid in cases of optional legal assistance or in cases of mandatory legal assistance. No legal criteria exist regarding the authority to which the application should be addressed. If the case is in the trial phase, the right to decide belongs to the court. Yet between the potential decision-makers (the dean, the court, and the prosecutorial authority) there is no hierarchy regarding whose decision has priority. In fact, they have the same competence: to approve requests for granting legal aid.

If the application is addressed to the dean of the Bar, the Bar will decide whether to grant legal aid (Article 55 of Law No. 51/1995 and Article 144, paragraph 3, of the Advocacy Statute), depending on whether the application is solidly grounded.

If legal aid is granted by the relevant proceeding authority (a form of mandatory legal representation according to Romanian law), this authority will decide whether the application has been submitted within the procedural deadlines and whether there are grounds for granting legal aid. In this case, the dean of the Bar Association will only designate the attorney who will provide legal assistance (Article 144, paragraph 3, of the Advocacy Statute). There is no legal provision regarding how the lawyer granting legal aid is to be selected. See section 2.1 for authorities on mandatory legal aid.

The decision of the dean can be appealed before the board of the Bar Association, and its decision, in turn, can be appealed before the board of the Romanian Lawyers Union. The decision of the board of the Romanian Lawyers Union can be appealed before the administrative division of the Court of Appeals. This decision can also be appealed before the administrative division of the Supreme Court of Justice, whose decision is final.

If the application for legal aid is
addressed to the court or to the prosecutorial authorities in a criminal matter, the law does not provide guidelines for the trial procedure and the means of appeal. For the consequences of violating the obligation to grant legal aid in cases when a defense is mandatory, see section 2.1.

2.3.1 THE PROCEDURE IN PRACTICE

Legal aid
The court, the prosecutorial authorities, or the applicant will draw up a demand addressed to the dean of the Bar, through the legal assistance service, which functions within the competence of that court or of that prosecutorial authority. The dean or his or her delegate will appoint a lawyer for the case. If the legal aid is granted by the dean of the Bar, the petitioner will bring attention to this in the petition, accompanied by proof. The dean or delegate will receive the demand, grant a review, and resolve it depending on the specifics of the situation.

Mandatory legal representation
As there is no regulation of the communication between the proceeding authorities and the Bar Association, in practice, the procedure differs according to the solution reached in each case.

In the Bucharest Bar Association, in the first ten days of each month, lawyers wishing to take ex officio cases complete and submit a form to the legal assistance service. The form contains information about the courts in which the lawyer is licensed to practice and the lawyer’s earnings from his or her own private practice. After the information in the form is verified, a list of lawyers who can take ex officio cases is made and, depending on the available courts and locations, the lawyers are appointed for certain days in court for the following month.

According to “compulsory regulations” issued by the Bar defining the rights and obligation of lawyers granting legal aid, the appointed lawyer has the duty, among other things, to study the files for the day in which he or she grants legal aid. According to the same regulations, if there are two or three lawyers appointed, each of them will handle one-half or one-third, respectively, of the files for the day.

In order for the ex officio lawyer to be present in each courtroom and to serve the interests of the defendant, prompt and systematic communication between the courts and the Bar Association should exist. In practice this does not happen, due to a lack of resources. The costs of employing courier services or maintaining an informational system cannot currently be afforded by the Romanian judicial system. This is why alternative solutions were found, and in each court, there are some lawyers ex officio for cases requiring mandatory legal representation.

In order not to delay the trial, when the presence of an ex officio lawyer is required, the court asks if there is a lawyer in the courtroom willing to provide legal assistance. If nobody volunteers, the case is adjourned (the effect of which might be
that the accused remains in police detention. If a lawyer is present in the courtroom and volunteers to take the case, that lawyer assists the beneficiary of legal assistance. After the session, the bailiff sends a written request to the Bar Association to designate an ex officio lawyer. The lawyer brings the request to the Bar Association, and the representative of the dean of the Bar designates the bearer of the request as the ex officio lawyer in the case indicated in the request.

In the Tulcea Bar Association, the ex officio lawyer is designated before the court session, which makes it possible for the lawyer to study the file before the session.

The prosecutors usually request that the Bar Associations appoint an ex officio lawyer for the relevant procedural actions. If no lawyer appears at a procedural action and the law requires defense counsel to be present, the prosecutor will either postpone or, if there is an emergency, call an acquaintance lawyer to be present at the procedural action.

After the work on the case is completed, the proceeding authority signs a document prepared by the lawyer certifying his or her participation in the case; the lawyer submits it to the legal assistance service (the department of the Bar that processes payments), which in turn submits the document to the president of the service. The report contains, at minimum, the following data about the case: file number, party that benefited from the legal assistance, type of case, number of hearings, and outcome. The fee of the ex officio lawyer is determined on the basis of this data. All papers collected by the Bar during the month are compiled and submitted to the minister of justice, who transfers the money to the Bar Association.

**Lawyers providing legal aid and mandatory representation**

Most of the lawyers designated are trainee lawyers and young lawyers. For the higher courts, the designated lawyers must have the right to prepare written conclusions in those courts. Retired lawyers who continue their activity will not be designated for ex officio assistance.

**2.3.2 Lawyer’s fees in cases of mandatory and free legal representation**

**Legal aid**

If the legal aid is granted by the dean of the Bar, the beneficiary does not pay the fee and the lawyer provides a free service regardless of the outcome of the case. If legal aid is granted by the courts and/or by the prosecutorial authorities, the lawyer receives the fee from the funds of the Ministry of Justice. If free legal aid is granted, the beneficiary may or may not bear the cost of the fee. Specifically, if the defendant is convicted, the defendant will bear the lawyer’s fee as well as the costs of the proceedings. If the defendant is found not guilty, the cost of ex officio legal assistance is covered by the state.
2.4 Scope of legal aid

Legal aid and mandatory legal representation may cover, by law, the whole trial: the prosecution phase, the judgment phase, and the execution phase. Legal aid covers the entire content of legal assistance. Therefore, the free appointed lawyer assists and represents the party, drafts petitions or other acts, formulates complaints, declares appeals, etc. The lawyer is appointed for the whole trial, provided that the material status of the beneficiary remains the same.

In the situation of mandatory legal representation when the defense is compulsory by law, the lawyer’s appointment is made for limited procedural periods. Therefore, when the lawyer is appointed during the prosecution phase, the appointment covers only that procedural phase. When the appointment is made anytime during the judgment phase, that appointment covers a procedural stage, respectively the one in which it was issued.

We elaborated above on the details regarding the content of mandatory legal representation. We only reiterate here the obligation of the prosecutorial authority to ensure the lawyer’s presence when the defendant testifies. The lawyer’s presence is also necessary at the prolongation of the length of the arrest, as well as when resolving complaints against prevention measures taken by the prosecutorial authority. In the judgment phase, the lawyer’s presence is necessary at all judgment terms and all procedural acts.

2.5 Application of the legal aid norms in practice

Legal aid approved by the proceeding authorities (courts and prosecutorial)

The authors of this report obtained the following information from interviews with ten judges (four from the Bucharest Tribunal and six from several first courts of Bucharest: the First Court of Sector 1, the First Court of Sector 2, and the First Court of Sector 6):

- Four judges stated that they had not approved such requests; they did not specify whether they had rejected any requests or simply had not received any.
- Three judges stated that they had not received requests in such matters.
- Two judges stated that they have approved such requests; one of them has approved two requests, while the other one does not recall how many.
- One judge stated that only such requests are rare.

In interviews with thirty lawyers from the Bucharest Bar Association, ten answered that they had granted legal aid after being appointed by the court (five of the lawyers had up to five years of experience each, three had between five and fifteen years of experience, and two had between fifteen and twenty-five years of service).
**Legal aid approved by the dean of the Bar Association**

According to data obtained from the Bucharest Bar Association, legal aid has been granted in 550 cases in the year 2001, and in 300 cases during the first eight months of 2002. Usually the dean appoints lawyers with their consent, and the applicant usually indicates in his or her application the name of the lawyer who will provide legal assistance. Unlike the cases of mandatory defense, there is no list of lawyers wishing to take cases for free. There are no legal criteria regarding the selection of lawyers in these cases, except for a recommendation that priority should be given to young lawyers and lawyers on probation. There are no requirements regarding the number of years of experience and the lawyers’ specialization.

According to interviews with thirty lawyers of the Bucharest Bar Association conducted by the authors of this report, only one lawyer who fell into the category of five to fifteen years of experience reported that he or she had been appointed by the dean of the Bar to provide free legal assistance in a case before the Supreme Court.

The Bucharest Bar Association has come up with a mechanism to overcome this lack of procedure; it works with young lawyers appointed by the Young Lawyers’ Association to grant legal advice for the poor. If the case is above the level of competence of those lawyers, they will make an appointment for the petitioner at a legal advice office where more experienced lawyers grant legal advice. In future, these activities may be funded by the Ministry of Justice. In addition, the Bucharest Bar Association and the Young Lawyers’ Association conduct regular trainings for lawyers on probation, who are also authorized to provide free legal assistance.

The Bureau for Human Rights of PRO EUROPA League monitors the respect for human rights and the rights of minorities and provides free legal advice and assistance to persons whose rights have been violated. PRO EUROPA League reported that in cases of mandatory legal representation provided free of charge, defendants complained about the quality of the representation: often, the appointed lawyer did not show up for court sessions or failed to argue the charges of the prosecution, which left the defendants practically without legal representation.77

### 2.6 Quality of Free Legal Representation

Violations of lawyers’ professional obligations constitute professional misconduct. Lawyers managing the legal assistance centers at each court should inform the Council of the Bar Association of cases of professional misconduct.

Law No. 51/1995 and the Statute of Professional Conduct provide for the following professional obligations of the lawyer: (1) to deal professionally and with dignity with his or her client (Article 38 of Law No. 51/1995 and Articles 103 and 104 of the statute); (2) to keep documents
received from the client (Article 43 of Law No. 51/1995 and Article 108 of the statute); (3) to avoid conflict of interests (Article 44 of Law No. 51/1995); and (4) to assure that he or she will be substituted if it is not possible to perform his or her professional obligations (Article 110 of the statute).

All lawyers must have professional responsibility insurance. Probation lawyers are insured for a professional risk of a minimum of 3,000 euros per year, and fully licensed lawyers for a minimum of 6,000 euros per year.78

Lawyers can be subject to disciplinary proceedings for violations of their professional responsibilities. The disciplinary procedure is initiated by a complaint addressed to the Council of the Bar Association. After investigating the complaint, the Council can impose one of the following sanctions: censure; warning; a fine of between 500,000 lei and 5,000,000 lei, which goes toward the Bar’s budget; interdiction of practicing the profession for a period of one month to one year; suspension from the legal profession. The disciplinary procedure does not exclude civil, penal, or administrative responsibility.

According to interviews conducted by the authors of this report with police and judges, both the judges and the police expressed criticism about the quality of mandatory legal representation. Out of fourteen interviewed police, six reported that they were familiar with cases in which defendants were dissatisfied with the performance of the ex officio lawyers. Out of twenty-two interviewed judges, nine stated that they were familiar with defendants who were not satisfied with their ex officio lawyer.

Only one judge was asked to grant legal aid in a criminal case, but that judge rejected the request. All fourteen of the interviewed police stated that they had neither received nor approved any request for legal aid. Two of the police officers stated that they were not authorized to approve such requests, and four said they were not aware of the right of the accused to have legal aid.

3. CIVIL LAW: EFFECTIVE ACCESS TO THE JUDICIAL SYSTEM FOR THE INDIGENT IN CIVIL CASES

3.1 NORMATIVE BASIS OF THE RIGHT TO ACCESS TO COURTS IN CIVIL CASES

The Romanian Constitution guarantees to everybody the right to access to justice in civil cases. Article 21 of the Constitution guarantees free access to justice, and Article 24 guarantees the right to a defense, including the right of the parties to civil proceedings to be assisted by lawyers throughout the entire lawsuit. Although the Romanian Constitution does not mention any explicit right to free access to court, it is accepted in legal theory that the right to counsel also includes the right to legal aid if the party cannot afford to retain a lawyer.

The Code of Civil Procedure contains a special chapter describing the procedure of granting legal aid. Other provisions of the Code of Civil Procedure regulate the
right to a defense in civil cases and provide for its procedural guarantees.

In addition, Law No. 51/1995 and the Statute of the Legal Profession contain provisions relevant to this matter.

3.2 Civil cases for which legal representation is mandatory

The Code of Civil Procedure does not provide for mandatory representation of the parties in civil matters.

3.3 Eligibility criteria for granting legal aid in civil cases

3.3.1 Substantive criteria

Legal aid in civil cases can be granted for all categories of cases. There are no restrictions based on the type of case or the procedural capacity (plaintiff or defendant) of the party.

3.3.2 Financial criteria

Legal aid can be granted in two situations:

- on a request to the court or to the local public administrative authorities, if the person seeking legal aid cannot afford to pay the costs the lawsuit without damaging his or her own, or his or her family’s, means of support;\(^{79}\)

- on a request to the dean of the Bar when the person’s rights could be damaged because of delays due to lack of financial means.\(^{80}\)

In the first instance, lawyers’ fees are covered by the Ministry of Justice or by the local public administrative authorities. In the second, the lawyer provides free legal services.

Neither the Code of Civil Procedure nor any other law contains a detailed regulation regarding the right to legal aid in civil cases. The only criteria to be taken into account when deciding on the application for legal aid are the financial criteria.

Similarly with criminal cases, the jurisprudence has not established clear rules regarding the financial threshold for granting legal aid in civil cases. However, the Code of Civil Procedure establishes a supplementary legal criterion for granting legal aid by the court: the recipient of legal aid should prove that the refusal of legal aid will damage not only his or her own financial status but also the financial situation of his or her family.

If the indigent chooses to apply for legal aid to the dean of the Bar Association, he or she has to prove a lack of financial means and the fact that his or her rights will be violated because of the impossibility of defending them in court.

No specific requirements exist as to the type of evidence that must be presented in these procedures except that the evidence should be in writing (see also section 2.2.2).
3.3.3 Other eligibility questions

**Legal aid for vulnerable groups**

There are no special legal aid provisions for vulnerable groups. However, some other procedural remedies are available:

- The public prosecutor is authorized to bring a lawsuit to protect the rights and the lawful interests of minors, missing persons, and persons with restricted ability to manage their affairs;  
- The public prosecutor is authorized to participate in civil lawsuits in order to protect the legal order and the rights and interests of citizens;  
- The law nullifies the procedural actions brought by the representatives of minors, missing persons, and people with restricted ability to manage their affairs, if these actions are contrary to the person’s interest.

**Legal aid for non-citizens**

Foreign citizens in Romania have the same rights (including the right to legal aid) as Romanian citizens.

3.4 Procedure for granting legal aid

Similarly to criminal cases, the decision to grant legal aid in civil cases can be made by the dean of the Bar or by the court that is judging the case. If the application is addressed to the dean of the Bar Association, the dean should designate a specific lawyer to the case if the application is approved. (See also section 2.4.)

In the first instance, the applicant presents the demand together with evidence to the dean of the Bar. The dean examines the application and renders a decision on the demand. The law does not specify a maximum time period within which the dean is obliged to resolve the request. At the same time, there is no recommendation about the possibility or the obligation of the dean to deal with the request. The law does not specify any means of communicating the decision. In addition, there is no recommendation regarding the content of the decision, such as whether it has to contain the motion or indication of appeal in this matter. Legal aid granted by the dean can be recalled if it is proved that the legal aid was obtained without an accurate presentation of the facts, or that the complainant’s situation improved such that the person can afford to pay the lawyer’s fee. There is no mention about who has to prove the improved situation or to whom.

If the application is addressed to the court, the applicant should present evidence of his or her financial situation. The court can request information and proof from the complainant and can produce new proof by asking the local authorities for information; it will then render a decision on the request behind closed doors. The decision of the court cannot be appealed. The opposing party can present evidence against the declarations of the complainant who requests legal aid. The court then undertakes new examinations, but during this time, legal aid is suspended. If the court
decides that the request is not founded or that the grounds on which the request was founded no longer exist, the court can reconsider the measure. This decision cannot be appealed. If the court decides that the petition for legal aid has been made with bad intention (mala fide) by hiding the truth, it can withdraw legal assistance and condemn the party to pay a sum equal to the fees that were spared by the legal aid. If it approves the application, the court should send a request to the service of the legal assistance to designate a lawyer.

**Fees**

If legal aid has been approved by the Bar, the lawyer provides legal services for free. If legal aid has been granted by the court, the lawyer's fees are paid for by the Ministry of Justice. If the party represented by a legal aid lawyer wins the case, the court may order the other party to pay for all costs and expenses, including the expenses of the ex officio appointed lawyer. In this case, the lawyer's fees, in theory at least, may be paid twice: by the Ministry of Justice and by the losing party. The Code of Civil Procedure should provide clearer regulation on this matter.

3.5 **Scope of legal aid**

Legal aid can be granted for the entire case or only for certain procedural stages. The Code of Civil Procedure and Law No. 188/2000 regarding enforcement proceedings provide no regulation of whether legal aid can be granted for enforcement proceedings. Considering that legal aid should be available for all stages of civil proceedings and that the enforcement stage is part of the civil proceedings, legal aid should be available for this procedure, as well.

Once legal aid is approved, it covers all legal activities: consultation, assistance and representation of the party, writing petitions and any documents, filing appeals, etc.

3.6 **Quality of free legal representation**

There are no mechanisms in place to monitor the quality of free legal representation in civil cases. (See also section 2.7.)

According to interviews conducted by the authors of this report with eighteen judges from different courts in Bucharest on the quality of the services of lawyers in civil legal aid cases, one judge reported that he or she was aware of complaints about the quality of the representation, fifteen judges said they were not aware of such complaints, and two judges did not answer the question.

3.7 **Application of the right to legal aid in practice**

According to interviews with thirty-four individuals conducted by the authors of this report in the Palace of Justice in Bucharest, seventeen reported that they were aware of their right to legal aid. Most of them, however, could not specify the grounds triggering the right to legal aid, or
the authority to which they could address their application, or the procedure. On the question of whether they had ever received legal aid, one of the seventeen replied that she had filed an application once, while the sixteen others replied no.

On the question about the fee they paid to their lawyers, the interviewed persons gave answers varying from lei 200,000\(^6\) for each stage of the proceedings to lei 10,000,000.

In interviews conducted by the authors of this report with nineteen judges from Bucharest, five judges reported that they had received applications for legal aid. The judges who had received applications for legal aid replied that they each had received two applications on average.

On the question about the shortfalls of the legal aid system, the judges identified the following problems: (1) lack of interest by the \textit{ex officio} appointed lawyer; (2) difficulties in communication between the Bucharest Bar Association and the courts; (3) frequent unsatisfactory performance by the legal aid lawyers.

3.8 Other barriers to the effective access to courts in civil cases

**Court fees**

The Code of Civil Procedure provides the possibility to grant partial or full waivers of court fees, to postpone payment of court fees, or to permit payment in several installments. These waivers are granted, at the applicant's request, by the Ministry of Public Finance through its territorial divisions.

The application for a waiver should be submitted to the court presiding over the case, which transmits it to the territorial financial agency organ. The request must be motivated and accompanied by supporting documents concerning the incomes of the petitioner and his or her family, a declaration concerning persons supported by the petitioner, proof of his or her inability to work, a declaration that he or she has no other source of income, etc. The request is to be resolved within thirty days.

3.9 Alternative dispute resolution (ADR) and similar schemes

In Romania, the tradition of arbitration is not significant. Texts concerning arbitration appeared only recently in the Civil Procedure Code, and until 1990 they had not been applied in the internal juridical reports. Regarding these aspects, \textit{de facto}, arbitration in Romania is an alternative in solving commercial conflicts of certain financial dimensions.

Despite some advantages, such as the simplicity of procedure and a shorter trial duration, arbitration does not represent an often-used alternative in practice. According to the law\(^7\), arbitration can be used only to resolve patrimonial conflicts, except for those that cannot be subjects for transactions. In addition, only people with full legal capacities can agree to resolve conflicts by arbitration.
Paradoxically, arbitration is now expensive in Romania, not only because people without special legal knowledge are unfamiliar with the procedure of arbitration, but also because even some lawyers are unfamiliar with it. In practice, arbitration is looked upon as a procedure that is applied to commercial conflicts with financial connotations. For this reason, lawyers who practice arbitration are few, and their fees are quite high.

In addition, there is no distinctive settlement regarding the conflicts before the European Court of Human Rights. There is no legal provision concerning this matter. There is no example of legal aid being granted for application to the European Court of Human Rights.

5. Organization of the System for Provision of Legal Aid

5.1 Special state body authorized to administer the legal aid system

There is at present no state agency in Romania specializing in administrating the legal aid system. The Human Resources and Judicial Statistics Department within the Ministry of Justice has certain duties pertaining to the collection of data related to the Romanian judicial phenomenon. However, the Ministry of Justice does not have the legal competence to interfere with the mechanism of legal aid. If the mechanism is blocked, it will have to adjust itself, because neither the Ministry of Justice nor any other state authority may interfere.

In one case, a judge from a Bucharest court of law declared, “Although we issued several requests to the Bar within the last seven months requiring that a lawyer be appointed to represent an older person having applied for free legal aid, this has not yet been done. Meanwhile, the applicant has died.”

In such a case, the only solution for the
court is to adjourn the case at every legal term and to continue issuing addresses. In return, the courts of law, the prosecution, and the investigative authorities have closely bounded competences to approve legal aid applications. Unfortunately, the role of the Bar, as a private rather than state body, is also closely bounded. The Bar has no say in settling fees for *ex officio* lawyers or for others who perform legal services, depending on the consent of the courts on legal aid applications. In exchange, the Bar has to provide lawyers. On the other hand, the dean does not have at his or her disposal legal texts that may help in appointing lawyers.

5.2 Role of the Bar Association in the Administration of the Legal Aid System

As mentioned in the corresponding sections, the Bar has the following main roles regarding legal aid:

- It organizes the list of lawyers from a district and, for the Bucharest Bar, of those from the city of Bucharest. The Bar annually draws up, in alphabetical order, a list of permanent and trainee lawyers, which includes the following: first name, last name, official title, date when he or she became a member of the Bar, professional premises, form of exercising the profession, and the courts in which each lawyer is qualified to make concluding statements. Under the care of the Bar, the annual list of lawyers and the changes made to it are given to the courts of law, to the prosecutorial authorities, to the administrative authorities from a district or from Bucharest, and to the Union of Lawyers of Romania.
  - It approves, through the dean, legal aid applications and appoints lawyers who will grant *ex officio* assistance and legal aid.
  - It provides *ex officio* assistance and legal aid through the legal assistance services.
  - It supervises the lawyers’ compliance with their obligations regarding the granting of legal aid and *ex officio* legal assistance. The Bar, through its bodies, brings and exercises disciplinary action against lawyer who violates such obligations.

The duties of judicial assistance services regarding legal aid are:

- to receive the applications of the courts and the prosecutorial authorities in this matter,
- to receive notice of the courts and the prosecutorial authorities against lawyers and regarding the prosecutions and trials begun against lawyers,
- to compile the reports made up by lawyers finishing *ex officio* assistance or legal aid and to refer them to the minister of justice,
- to distribute to lawyers who have granted *ex officio* legal assistance the fees that the Ministry of Justice has transferred,
• to organize the record of the cases in which legal aid and ex officio legal assistance were granted.

However, it is almost impossible to examine this record at this time, since most of it is just large piles of unprocessed files stored in huge archives. A computerized record was developed only recently (in 2001).

According to the law, each lawyer has the obligation to grant legal assistance in cases in which he or she was appointed ex officio or provides free legal services. Thus, lawyers appointed ex officio or free of charge cannot refuse their appointment unless they can show serious reasons, which include, poor health, plans to travel abroad or to another city the same day, excessive overload, conflict of interests in that case, etc. The unjustified refusal of the lawyer to fulfill the task of granting legal aid is considered to be a disciplinary offense. As we have mentioned above, incorrect fulfillment of the obligations regarding (free) legal assistance can trigger civil, minor offense, or penal actions against the lawyer. Mainly trainee lawyers and young lawyers are appointed.

5.3 Role of the Courts

The courts of law receive and resolve applications requesting legal aid. As shown in the corresponding sections from the present material, there is little practice in this field. We believe that the level of the citizen’s income justifies, in a large number of cases, the granting of legal aid. The courts work together with the Bars to grant legal aid.

After having approved the applications, the courts issue addresses to the Bar asking the dean to appoint a lawyer, showing the object of the cause in order to determine the allowed fees, and showing the identification data in the brief.

5.4 Role of the Prosecution and the Police

According to Law No. 51/1995, both the police and prosecution can approve legal aid applications; the payment of the fees occurs later and is drawn from the funds of the Ministry of Justice. After receiving the plaintiff’s application and approving it, the police and the prosecutors issue an address to the Bar, through which they ask the dean to appoint a lawyer who will provide legal aid. The address must include the object of the dispute in order to establish the fee.

5.5 State Models of Organization of the Provision of Legal Aid

Legal aid is mainly organized as the work of private ex officio appointed lawyers, as presented in detail throughout the present material. To summarize, the dean of the Bar appoints lawyers from the Bars after approving legal aid applications received by the dean, courts, or prosecutorial authorities. We have also mentioned the possibility of local administrative authorities becoming involved in granting free assistance. However, legal settlement on these possibilities has not been established and is not reflected in practice.
The Ministry of Justice ensures the financing of legal aid that has been approved by the courts of law and prosecutorial authorities. In cases of legal aid approved by the dean, the appointed lawyers are the ones to finance the legal aid. The citizen obtains the consent of the lawyer who will work free of charge before addressing the dean of the Bar with a petition on this issue.

The effectiveness of the system is rather low. Some non-governmental organizations try to remedy this situation by establishing, free of charge, legal aid services for the underprivileged. Though successful, this scheme is totally insufficient and cannot make up for the large-scale flaws of the legal aid system.

Lawyers grant legal aid for publicity reasons. Public announcements concerning legal aid, made through the Internet, increase the visibility of the lawyer and of the law firm, which works toward its longer-term benefit. Yet it is debatable how effective the social impact of this practice is.

5.6 Evaluation and Training

Within the Ministry of Justice, there is a department in charge of judicial statistics. The collected data arrive on the desks of the high clerks. We have not identified concrete reactions of the high clerks. The ombudsman could do an assessment of the effectiveness of the legal aid system. However, this institution is perceived by the public as ineffective and simply decorative. Unfortunately, law schools are not involved in the matter of legal aid. The initiation and the encouragement of attractive projects might motivate students to become involved in such activities, which would have an excellent social resonance.

The lawyers’ assessments are probably the most subjective ones. The lawyers’ dissatisfaction regarding the organization of the legal aid system is determined almost exclusively by the financial aspect. The judges are interested in the smooth and effective functioning of the system, because the lawyers facilitate the judges’ work.

The legal aid system has problems, but the Bars are making managerial efforts to improve the situation. The Bars deal with poverty, because the allowed fees are ridiculously low. The lawyers who provide legal aid have a single complaint in common: they are disappointed by the fees paid by the Ministry of Justice. Judges make arguments such as: for lawyers, legal assistance is not a significant means of obtaining income, and thus they have a superficial involvement in the case during its trial; generally we are talking about lawyers with little experience, most of the time trainee lawyers, and often they lack interest in preparing the brief.

There are no signs of the existence of a national program of authorities for the encouragement of the law professionals to grant legal aid. Some NGOs, such as APADOR-CH and the Legal Resources Center, are active in this sense; however, the support of the state is necessary because the activity of such NGOs cannot represent more than an initiative model.
The NGO activity cannot replace the state involvement in this field.

6. **Financial aspects of ensuring effective access to justice for the indigent**

6.1 **Determination of the legal aid budget**

Pursuant to Article 137, paragraph 2, of the Constitution, the government each year presents the state budget projection, which is subject to the approval of the Parliament. The state budget projection is presented by the government through the Ministry of Finance, based on the budget projections of the main distributors of the credits of this budget. The budget for legal aid is based on the request for legal aid from the previous year. If in the course of the running year, the need for legal aid exceeds the budget, the money allocated will be supplemented when the state budget is rectified.

6.2 **Budgetary information**

The situation of legal aid in the state budget:

<table>
<thead>
<tr>
<th>Year</th>
<th>State budget (lei)</th>
<th>Budget allocated to the judicial system (lei)</th>
<th>Budget allocated to mandatory legal aid representation (lei)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997</td>
<td>52,731,900,000,000</td>
<td>342,648,000,000</td>
<td>10,440,000,000</td>
</tr>
<tr>
<td>1998</td>
<td>88,443,700,000,000</td>
<td>634,294,000,000</td>
<td>20,154,000,000</td>
</tr>
<tr>
<td>1999</td>
<td>93,384,400,000,000</td>
<td>1,089,771,000,000</td>
<td>40,841,000,000</td>
</tr>
<tr>
<td>2000</td>
<td>143,755,300,000,000</td>
<td>1,917,921,000,000</td>
<td>45,109,000,000</td>
</tr>
<tr>
<td>2001</td>
<td>194,398,200,000,000</td>
<td>2,739,553,000,000</td>
<td>48,483,000,000</td>
</tr>
</tbody>
</table>

The Romanian Lawyers Union does not have statistics regarding the funds allocated by the Bars from all over the country. Each Bar has a direct connection with the Ministry of Justice.

The amount of payments for mandatory legal aid representation in 2001, and the first several months of 2002, for the Bucharest Bar:

<table>
<thead>
<tr>
<th>Year</th>
<th>Lawyers</th>
<th>Value (lei)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>4,802</td>
<td>11,474,904,000</td>
</tr>
<tr>
<td>Jan.–Aug. 2002</td>
<td>2,728</td>
<td>8,407,650,000</td>
</tr>
</tbody>
</table>
If the number of the lawyers for each month is exact, the same thing cannot be said about the total. The calculation is purely formal, because it cannot be determined from the dates how many lawyers had engaged in mandatory legal aid representation for how many months. For the year 2001, we have an approximate average of 2,389,609 lei per lawyer, and for the year 2002, approximately 3,081,983 lei per lawyer.

In the year 2000, a criminal rate of 305 accused per 100,000 inhabitants was estimated; the prosecutorial authorities sent to trial 68,483 accused. In the year 2001, a criminal rate of 365 accused per 100,000 inhabitants was estimated; the prosecutorial authorities sent to trial 81,948 accused. Thus, compared to the year 2000, there was an estimated increase of 19.7 percent in 2001.

From the total number of accused who were sent to trial in 2001, 52,225 were alleged to have committed infractions causing damages of more than 4,000 million lei.

There were 8,576 minors accused in 2001, or 10.5 percent of the total number of people accused; it was estimated that compared to the year 2000, the number of minors increased 17.1 percent.

The estimates of new cases before the courts during the period 1990–94 are as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>New cases in the judicial courts</th>
<th>New cases before the penal courts</th>
<th>New cases before the civil courts</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>589,660</td>
<td>94,981</td>
<td>494,679</td>
</tr>
<tr>
<td>1991</td>
<td>845,137</td>
<td>142,662</td>
<td>702,475</td>
</tr>
<tr>
<td>1992</td>
<td>1,130,312</td>
<td>184,109</td>
<td>946,203</td>
</tr>
<tr>
<td>1993</td>
<td>1,172,072</td>
<td>221,397</td>
<td>950,675</td>
</tr>
<tr>
<td>1994</td>
<td>1,272,149</td>
<td>234,426</td>
<td>1,037,723</td>
</tr>
</tbody>
</table>
Related to the distribution of these cases among the courts in concrete terms, here are some examples. The president of the Court of Appeals of Alba Iulia, Judge Mircea Comșa, presented the activity analysis of the subordinate courts, which are the courts and the tribunals from the three districts of Alba, Hunedoara, and Sibiu in the year 2001: “Over the course of the last year, the courts subordinate to the Court of Appeals of Alba Iulia have resolved 97,178 cases, of which 6,417 cases were in the Court of Appeals, 22,551 cases were in the three tribunals, and 68,210 cases were in the fifteen courts. In comparison with the previous years, at the level of the Court of Appeals, this is an increase in the number of cases solved.” In 2001, the twenty-four judges of the Court of Appeals of Alba Iulia had rolled over 29,000 cases, meaning that an average of 1,210 cases rolled over per judge, Judge Comșa declared. 91

The total numbers of civil cases on trial between the years 1997 and 2002 are as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Courts</th>
<th>Tribunals</th>
<th>Courts of Appeal</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997</td>
<td>1,097,328</td>
<td>266,273</td>
<td>69,646</td>
<td>1,433,247</td>
</tr>
<tr>
<td>1998</td>
<td>1,000,067</td>
<td>285,031</td>
<td>77,653</td>
<td>1,362,751</td>
</tr>
<tr>
<td>1999</td>
<td>947,715</td>
<td>319,815</td>
<td>96,498</td>
<td>1,363,273</td>
</tr>
<tr>
<td>2000</td>
<td>970,724</td>
<td>340,966</td>
<td>110,558</td>
<td>1,422,248</td>
</tr>
<tr>
<td>2001</td>
<td>1,032,486</td>
<td>365,202</td>
<td>102,298</td>
<td>1,499,986</td>
</tr>
<tr>
<td>2002</td>
<td>620,084</td>
<td>272,028</td>
<td>60,916</td>
<td>953,028</td>
</tr>
</tbody>
</table>

The total numbers of criminal cases on trial between the years 1997 and 2002 are as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Courts</th>
<th>Tribunals</th>
<th>Courts of Appeal</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997</td>
<td>277,788</td>
<td>73,836</td>
<td>17,271</td>
<td>368,895</td>
</tr>
<tr>
<td>1998</td>
<td>263,972</td>
<td>87,059</td>
<td>26,306</td>
<td>377,337</td>
</tr>
<tr>
<td>1999</td>
<td>243,881</td>
<td>87,138</td>
<td>29,921</td>
<td>360,940</td>
</tr>
<tr>
<td>2000</td>
<td>239,182</td>
<td>85,159</td>
<td>28,693</td>
<td>353,034</td>
</tr>
<tr>
<td>2001</td>
<td>254,723</td>
<td>90,488</td>
<td>25,795</td>
<td>371,006</td>
</tr>
<tr>
<td>2002</td>
<td>147,441</td>
<td>57,695</td>
<td>16,248</td>
<td>221,384</td>
</tr>
</tbody>
</table>
6.4 Lawyers’ fees

Ordinarily, lawyers’ fees are settled by negotiation between the lawyer and the client. The fees of lawyers who grant legal aid *ex officio* are settled by the Ministry of Justice. The value of the fees is, as we have shown, estimated as being very low. An average fee of a lawyer is probably between 200 and 300 euros for a case that lasts approximately one year. The personal income of a lawyer is probably a few hundred euros per month. The average fee is likely affected by the general low-income level of the persons under the jurisdiction of the court. In addition, we must call attention to a very strong evident tendency of lawyers to engage in many cases at about the same time in order to increase their overall income, which damages the quality of the work.

Minimum lawyer’s fees are settled by the Romanian Lawyers Union and range from 300,000 lei for criminal and civil cases to 800,000 lei for commercial cases.92

When the lawyer’s fee is calculated at an hourly rate, all activities, including transportation, are taken into consideration as time billed by the lawyer, so such time must be compensated by payment. However, the lawyer’s social activities with the client are not included in the fee.

The fees are the same regardless of the nature and complexity of the case. Yet the fee differs according to the number of the defendants in the case. We conclude that the number of the defendants is a way to determine the complexity of the case.

7. Data collection

Publications or magazines of the Bars or of the other organizations do not offer data concerning legal aid or mandatory legal representation. Lawyers do not have the obligation to report to the Bars or to the other authorities any data concerning the number of cases in which they have granted legal aid or mandatory legal representation. However, lawyers are, of course, obliged by the law to keep records regarding the cases for which they have been hired.

The Romanian Bar Association has even fewer duties regarding the organization of recording legal assistance than the Bars. The Romanian Bar Association does not have any data regarding legal aid or mandatory legal representation, because it does not have, according to law, any competence in this field.

There are records concerning *ex officio* legal assistance to the Ministry of Justice. According to the government decision regarding the organization and functioning of the Ministry of Justice, within its structure are directives concerning the organization of the law courts, human resources, and judicial statistics. There is, however, no centralized recording system at the national level regarding free legal assistance.

8. Legislative developments

The analysis and synthesis of the proposed amendments to the existing legislation should be a project undertaken by the Min-
istry of Justice and other institutions. However, our personal investigation into the Ministry of Justice, as well as research performed by Internet search engines, does not offer any examples that there are existing projects in this area.

9. Recommendations

First, prosecutorial authorities do not know that, according to the law governing legal practice, they have the right to approve requests for legal aid. We believe that it is necessary to inform police officers and prosecutors of this possibility. The relatively small number of suspects who are assisted by lawyers, in correlation with the large number of accused, makes us think that it should be obligatory to post informative posters in the rooms where the police officers who investigate crimes hear the suspects, so that all suspects can benefit from the services of an ex officio lawyer even if assistance by a lawyer is not obligatory according to law (especially considering the fact that the fee of the ex officio lawyer would be paid by the convicted).

Currently, the legal texts that govern the possibility of the criminal investigation authority approving legal aid requests are Articles 48 and 49 of Law No. 51/1995. In regard to these texts, we have identified two problems: (a) the regulation is merely a summary, and (b) this is the lawyers’ law. Regarding the first problem, we believe that more detailed regulation of the conditions and procedures for requests and their approval would be welcome, so that these problems are not left to the discretion of prosecutorial authorities. As to the second problem, we believe that these regulations would be better located within the framework of the Code of Criminal Procedure, which is the daily law of prosecutorial authorities. We also suggest that criminal investigation authorities should have the legal obligation to search the material condition of the investigated person and should require the Bar to appoint a lawyer paid from the funds of the Ministry of Justice or, at the very least, a free lawyer.

Second, the juridical assistance services are no more than departments in each Bar, usually in its headquarters. There exists near the courts of law, in the best situation, only one room on which is written the word “lawyers,” in which there are a few lawyers waiting for clients. If a person under the jurisdiction of the court comes to obtain information, he or she is offered a minimum of concrete information (such as: where registration takes place, where the second criminal section is, etc.). If that person wants a lawyer, depending on the case, one of the lawyers will eventually offer to assist. Of course, this service is not provided for free. If the person under the jurisdiction of the court says that he or she has no money, that person is told to make a request addressed to the dean and to file it with the Bar headquarters.

At some of the courts that lack space, the lawyers have a little table in the lobby of the court headquarters. At the offices of the prosecutorial authorities and the head-
quarters of police authorities, there is neither a lawyers’ room nor even a table for lawyers. We believe that the logistics of the judicial assistance system must improve through cooperation between the Ministry of Justice, the Romanian Lawyers Union, and the Bars. We believe that investment in the logistics of the legal assistance service can contribute to higher quality in the securing of justice and to better protection of the rights and interests of people under the jurisdiction of the courts.

Third, we believe that the lack of legal aid information available to people under the jurisdiction of court regarding these people’s rights is a negative element. We believe that the rights of citizens should be made well known to them. The legal provisions cannot be effective at all if they are entirely unknown by those for whose benefit they were issued. To implement these considerations, we believe that informing the citizens through brochures would be welcome. Another way of informing them would be through the Internet; however, use of the Internet among social groups to whom legal aid is more commonly addressed is rather low.

Finally, there is a widespread belief that there should be a lawyer available in each prison. These lawyers should be paid from the Ministry of Justice funds and should grant legal assistance to the convicted in any domain. There are many situations in which people who are in detention have to resolve civil problems that will not be postponed, that may require going to certain places, that may require written requests, etc. Often, the people who are in detention satisfy the terms stipulated by law to achieve certain actions. We believe that having lawyers work in prisons is an excellent idea. Part of the goal of deprivation of liberty should not be for a defendant to miss the deadlines within which he or she has to demand justice, such as restitution of debt from a debtor. Lawyers working in the prisons could be extremely useful to the prisoners, who must not become disadvantaged people from a juridical point of view. We also believe that the permanent presence in each prison of a lawyer who may be easily contacted by prisoners could contribute to the improvement of the general environment of detention.

Notes

1 Others who contributed to this report are: Andrei Brujan, Alina Roata, Cristina Turcu, Bruce Lasky, Constantin Cojocariu, and students Ioana Sampek, Ramona Pentulescu, Dan Bodescu, and Radu Grigoriu.
2 The pages of the most important legal magazines and publications are full of references to the problems generated by the legal right to defense. The criminal law is the main beneficiary of the doctrinal preoccupations. See the magazines Droptul, Revista de Drept Penal, etc. Yet it is not possible to determine whether the abundant jurisprudence is the result of intensive doctrinal preoccupations or if the doctrine has taken
some of the ideas stated in the jurisprudential decisions. 


4. Article 24: “(1) The right to defense is guaranteed. (2) Throughout the course of the trial, the parties have the right to be assisted by a lawyer chosen by them or by an *ex officio* lawyer.”


6. Article 20, paragraph 1: “The constitutional dispositions regarding the rights and the liberties of the citizen will be interpreted and applied in concordance with the Universal Declaration of the Human Rights and with the other treaties to which Romania is a party.”

7. Article 11: “(1) The Romanian State is obligated to perform exactly and with good will the obligations that devolve from the treaties in which are part. (2) The treaties ratified by the Parliament, according to the law, are part of the internal law.”

8. Article 20, paragraph 2: “If there exists no concordance between the pacts and treaties regarding fundamental human rights to which Romania is a party, and the internal law, the international settlements have priority.”

9. Article 16, paragraph 2: “(1) All citizens are equal before the law and public authorities, without privilege or discrimination. (2) Nobody is above the law.”

10. Article 23: “(1) Individual freedom and the safety of the person are inviolable. (2) Search, preliminary detention, or arrest of a person are allowed only in the situations and by the procedures settled by law. (3) Preliminary detention of a person cannot exceed twenty-four hours. (4) Any arrest must be based on an arrest warrant, issued by a magistrate, for a period of no more than thirty days. Regarding the legality of the warrant, the arrested person can complain to the judge, who is obliged to decide by a motivated sentence. Only the court can approve the prolongation of the detention. (5) The arrested or detained person must be immediately informed of the reasons for the preliminary detention or the arrest, and must be informed about the charge as soon as possible; he must be informed of the charge only in the presence of a lawyer, who can be chosen or appointed *ex officio*. (6) Release of the arrested or detained person is compulsory if the reasons for these measures have ceased. (7) A person who is arrested for preventive reasons has the right to request temporarily release, under judicial control or on bail. (8) Until the conviction sentence is definitive, the accused person is considered to be not guilty. (9) Punishments can be settled or applied only in the terms and under the conditions of the law.”

11. Articles 123, 124, 125, and 126.

12. Article 127: “(1) The judicial procedure takes place in Romanian. (2) Persons belonging to national minorities and persons who do not understand or do not speak the Romanian language have the right to be informed about all documents in the file, to speak in court, and to plead through a translator. In criminal cases, this right is provided free of charge.” As a result of the entering into force of the Constitution, the provision of the first paragraph abrogates the provisions of Article 7, 2nd paragraph, of the Criminal Procedure Code, according to which “before the judicial authorities from the administrative-territorial districts inhabited also by populations having nationalities other than Romanian, the usage of the mother tongue of that population is insured.”

13. For the purposes of this report, the term “accused” will be used to refer to the person subject to criminal proceedings at pretrial stage, and “defendant” at trial stage and appeals stage. The term “defendant” will also be used in cases where a particular procedural norm applies to all stages of criminal proceedings.

14. Article 6: “(1) The right to defense is guaranteed to the accused person, to the defendant and to the other parties to the criminal case. (2) During the criminal case the judicial authorities are obliged to provide the parties with full exercise of judicial rights according to the conditions stipulated by the law and to administer necessary evidence for their defense. (3) The judicial authorities have the obligation to inform the accused person or defendant of the allegation for which he is charged, to appoint counsel, and to ensure him/her the possibility of preparing and exercising his defense. (4) Every party has the right to be assisted by a defender throughout the criminal case. (5) The judicial authorities have the obligation to inform the accused person or the defendant, before of the first statement, that he has a right to be assisted by a chosen lawyer or by a lawyer appointed *ex officio*, and to mention this disclosure in the record of the hearing. Under the conditions and cases stipulated by law, judicial authorities are obliged to take measures to provide legal assistance to the accused person or to the defendant if he does not have a chosen defender.”
16 Ibid., p. 74.
17 Titus Punga, “The Right of Defense: The Obligation to Inform the Accused Person or Defendant, Before His First Hearing, of the Right to Be Assisted by a Defender; The Omission of It; Consequences,” Dreptul, no. 4/2000, pp. 173–75.
18 Article 197: “(1) The violation of the legal procedures that settle the progress of the criminal case determine the nullity of the act only in the situations when it has caused an injury that can be removed only by cancelation of that act. (2) The disposals regarding the competence due to the matter or the quality of the person, the seized of the court, its composition, and the publicity of the court hearing are stipulated under the sanction of absolute nullity. Also provided under the sanction of nullity are disposals regarding the participation of the public prosecutor, the participation of the defendant, and assistance by a defender when they are compulsory by law, and regarding social investigation in cases with minor offenders. (3) The nullity stipulated in paragraph (2) cannot be removed in any way. It can be set forth in any phase of the trial and it can be taken into consideration ex officio. (4) Violation of any other legal stipulation than the ones stipulated in paragraph (2) determines nullity of the act under the conditions mentioned in paragraph (1), only if it has been set forth during the accomplishment of the act when the party is present or at the first hearing in court with complete procedure when the party is absent during the accomplishment of the act. The court takes into consideration ex officio the violations, at any stage of the trial, if the cancellation of the act is necessary for finding the truth and for the correctly solving of the case.”
20 Article 172 was quoted at footnote 24.
21 Article 294: “(1) In cases in which the appointment of an ex officio counsel is compulsory, the court chairman, at the settlement of the trial term, takes measures to appoint counsel. (2) The defendant, the other parties and the lawyers have the right to be informed of the brief during trial. (3) When the defendant is detained, the court chairman takes measures so that he first may exercise the right provided in the previous paragraph and have contact with his/her counsel.”
23 The presentation of the prosecutorial material concludes the prosecutorial stage and gives the defendant the opportunity to be informed of evidence given in the brief and to organize his or her defense.
24 Article 172: “(1) During the prosecution, the lawyer of the defendant or the accused has the right to assist in any action that is made during prosecution and can draw up petitions and file complaints. The absence of a lawyer does not halt the prosecution, if proof exists that the defender has been notified about the date and time when the action is performed. (2) In the case of mandatory legal representation, the prosecutorial authority will ensure the presence of the defender at the hearing of the defendant. (3) If the lawyer of the accused or the defendant is present at the initiation of the prosecution, it will be mentioned, and this will be signed by the lawyer. (4) The arrested defendant has the right to contact his lawyer. Exceptions are made when the interest of the prosecution requires it; the public prosecutor, either ex officio or at the proposal of the prosecutorial authority, may choose, based on a motivated ordinance, to ban contact between the defendant and the lawyer, once, for a maximum of five days. (5) The contact between lawyer and defendant cannot be forbidden in the case of the prolonged duration of arrest by the court, and is obligatory at the presentation of the prosecutorial material. (6) The lawyer has the right to complain, according to Article 275, if his requests are not accepted; in the situations stipulated in paragraphs 2, 4, and 5, the prosecutor is obliged to resolve the complaint within forty-eight hours. (7) During the trial, the lawyer has the right to assist the defendant, to exercise the procedural rights of the defendant, and if the defendant is arrested, to have contact with him or her. (8) The lawyer who has been chosen by the defendant or provided text office is obliged to provide legal assistance to the accused or defendant. If he does not respect these obligations, the prosecutorial authority or the Court may inform the board of the Bar to take disciplinary measures.”
26 Article 140, paragraph 1, of the Code of Criminal Procedure: (1) A complaint can be made to the court
against the ordinance of arrest or the order not to leave town; the complaint has to address the judgment on its merits. (2) The complaint, along with the case file, will have to be sent to the court stipulated in paragraph 1, within twenty-four hours, and the defendant or the accused who is arrested will be brought to justice and will be assisted by a lawyer. (3) If the defendant is hospitalized and because of health cannot be brought to justice, or in other cases in which his or her appearance is not possible, the complaint will be examined in the absence of the defendant, but only in the presence of his or her lawyer, who will deliver closing statements at the trial. (4) The complaint will be examined in the council room. (5) The Court will decide within the same day, through arguments regarding the legality of the measure, after the cross-examination of the accused or the defendant. (6) The decision is submitted as the legal remedy. The term for the cassation is three days, which is counted from the pronouncement for those who are present and from the communication for those who are absent. The defendant is brought to the judgment of the cassation only when the court considers it necessary. (8) The court, when it deems that the preventive measure taken is not legal, orders the revocation of the arrest and the liberation of the accused person or defendant or, depending on the situation, the revocation of the preventive order not to leave the locality.”


29 Articles 99–104 of the Code of Criminal Procedure provide the conditions for engaging the liability of minors and the sanctions, which can be applied to them. There is also a chapter in the Code of Criminal Procedure, containing Articles 480–490, regarding the trial of minors.

30 Article 484: “(1) The trial of a case concerning a crime committed by a minor is conducted in the presence of the minor, excepting the case in which the minor is fleeing from justice. (2) When trying the case, besides the parties, the guardianship authority and the parents are also summoned, and if necessary, the tutor, the guardian or the person in whose care or supervision the minor is encountered, as well as other persons whose presence is considered necessary by the court.

(3) The persons indicated in the previous paragraph have the right and duty to give explanations, to draw up demands, and to present proposals regarding the measures that are to be taken. (4) The absence of the legally summoned persons does not stop the trial of the case.”


32 Article 162 of the Code of Criminal Procedure: “(1) Throughout the criminal trial, if the prosecutor or the court finds that the accused or the defendant is encountered in one of the situations described in Article 113 or Article 114 of the Code of Criminal Procedure, he or she can decide to take a suitable safety measure as a provisional measure. (2) The prosecutor or the court can take all measures necessary for applying the provisional confinement and also can give notice to the medical commission competent to endorse the confinement of mentally ill persons and of dangerous drug addicts. (4) The confinement is done on the ground of the endorsement of the medical commission. (5) If the measure of medical confinement is also disposed, the measures provided by Article 161 are to be taken as well. (6) The decision of the court may be contested with a cassation. The cassation does not suspend the execution.”

33 Published in Monitorul Oficial, Part I, No. 326, from 18 June 2001. In accordance with Article 5 of the mentioned law: “(1) The following categories of persons cannot be extradited from Romania: a) Romanian citizens; b) persons who were granted sanctuary in Romania; c) foreigners who enjoy immunity from jurisdiction in Romania under the terms and limits established by covenants or other international settlements; d) foreigners summoned from abroad in order to be heard as parties, witnesses, or experts before a Romanian judicial authority, under the limits of the immunities settled through an international covenant.”

34 Published in Monitorul Oficial, Part I, No. 587, from 8 August 2002.

35 Published in Monitorul Oficial, Part I, No. 362, from 3 August 2000.

36 Article 171: “(1) The accused person or the defendant has the right to be assisted by a defender during the entire period of the prosecution and of the trial, and the judicial authorities are obliged to inform him or her
of this right. (2) Legal assistance is compulsory when the accused person or the defendant is a minor, a soldier in term, a soldier with a reduced term, persons called back in the army, a pupil in military school, an intern in a reeducation center or in a medical education institute, or when he or she is arrested, even in a different case. (3) During the course of the trial, legal assistance is also compulsory in situations in which the law stipulates for the committed offense punishment of more than five years’ imprisonment or when the court considers the defendant unable to defend himself or herself. (4) When legal assistance is compulsory, if the accused person or the defendant has not chosen a defender, measures must be taken for the appointment of an ex officio defender. (5) The delegation of the ex officio appointed defender ceases at the appearance of the chosen defender. (6) If at the judgment of the case the defender is absent and cannot be replaced, the case is postponed.”


Article 8, paragraph 2, of Decree No. 31/1954, referring to the definition of persons and legal persons: “The person reaches the age of majority at the age of eighteen.”

Article 224, paragraphs 1 and 3, of the Code of Criminal Procedure: “(1) In order to institute a criminal lawsuit, the prosecutorial authority can undertake preparation. (3) The official report that establishes the undertaking of preparation can be evidence.”


In the case of flagrant crimes, the special procedure mentioned by Articles 465–479 of the Code of Criminal Procedure is applied, and the initial detention of the accused person is compulsory, according to the provisions of Article 468, paragraph 1.

Article 136.

Solid evidence is evidence on the basis of which the conclusion can be drawn that the defendant is the one who committed the crime (the Court of Appeals of Craiova, criminal sentence No. 923 from 6 July 2000, quoted by Costel Niculeanu in “Synthesis of Judicial Practice of the Court of Appeals of Craiova in Criminal Matters in the Third Trimester 2000,” Dreptul, no. 8/2001, p. 184).

See Articles 146 and 148 in conjunction with Article 143.

Article 146: “(1) The public prosecutor, ex officio or at the seizure by the prosecutorial authorities, when the conditions stipulated in Article 148 are satisfied, if he deems that it is in the interest of the prosecution to deprive the accused person of liberty, he decides by a motivated ordinance the arrest, indicating the reasons that justify the measure and fixing the duration of the arrest, which cannot be longer than five days. (2) At the same time, the public prosecutor issues a warrant for the arrest of the accused person. The warrant for the arrest of the accused person must contain the statements required by Article 151 a), c), and j), and must also contain the name and surname of the accused person and the duration of the arrest.”

Article 148: “(1) The arrest of the defendant can be undertaken if the conditions mentioned in Article 143 are satisfied, and only in one of the following situations:

a) the identity or the address of the defendant cannot be established due to a lack of necessary data;

b) the offense is flagrant, and the punishment settled by the law is longer than three months’ imprisonment;

c) the defendant has fled or hidden in order to avoid the prosecution or judgment, or he has made preparations to do so, and if during the trial there is information showing the defendant’s intention to avoid the execution of the punishment;

d) there is sufficient information regarding the defendant’s intention to prevent the finding of the truth by influencing a witness to the case or an expert, by destruction or degradation of material evidence, or other such facts;

e) the defendant has committed another crime or there is information that justifies the suspicion that he or she will commit other crimes;

f) the defendant is recidivist;

g) there are aggravating circumstances;

h) the defendant has committed a crime for which the law imposes a punishment of imprisonment, which is longer than two years, and to set him or her free would represent a threat to public order.
(2) In cases mentioned in parts c)–g), a defendant can be arrested only if the imprisonment is longer than one year.

Article 143: “(1) The measure of detention can be taken by the prosecutor or authority against the accused person if there is solid evidences or proof that he or she has committed an act stipulated by the criminal law. (2) Detention occurs in the situations stipulated by Article 148, no matter what the limits of the imprisonment for the committed crime are. (3) There is solid evidence when the existing information results in the presumption that the person involved in the prosecution is the one who has committed the crime.”

Article 137, paragraph 1: “The arrested or detained person is informed at once of the reasons for the arrest or detention. The arrested person is informed of the charge as promptly as possible, in the presence of a lawyer.”


Article 137/1, paragraph 2: “When the preventive arrest of the accused person or of the defendant is ordered, the public prosecutor or the court informs a member of the family or another person indicated by the defendant or by the accused person within a term of twenty-four hours, and a report is made about this.”

Article 150: “(1) A defendant can be arrested only after his or her interview by the public prosecutor or by the court, except when the defendant has disappeared, is abroad, or avoids the prosecution or the trial. (2) In the situation mentioned above, when the warrant for the arrest has been issued without interviewing the defendant, he or she is to be heard immediately after he or she is caught or appears.”

See Article 146 as it is quoted in footnote 44.

Article 149: “(1) The duration of the arrest of the defendant cannot exceed thirty days, except when it is prolonged under the terms of the law. The term starts at the date the arrest warrant is issued, when the arrest has been ordered after the defendant’s interview, but in the situation when the arrest has been ordered in the absence of the defendant, the term starts from his or her appearance before the authority that has issued the warrant. (2) When a cause is given for the continuation of the prosecution from one prosecutorial authority to another, the arrest warrant issued previously remains valid. The duration of the arrest is calculated according to the stipulations of previous paragraph.

(3) The arrest of the defendant during the trial lasts until the final decision of the case, except when the court revokes it.”


54 Article 300 of the Code of Criminal Procedure: “(1) The court must verify *ex officio*, at the first sitting, the regularity of the order. (2) When it is noticed that the order was not made according to the law, and the irregularity cannot be repaired at once according a term of judgment for it, the file is given back to the authority that has undertaken the act of order, in order to be redone. (3) In cases in which the defendant is arrested, the legally ordered court also must verify *ex officio*, at the first sitting, the regularity of the arrest and of its maintenance.”

Ibid.

56 See Dumitru Diaconu, “The Mandatory Force of the Decisions of the Constitutional Court, and, as a consequence of this, the obligation of the courts to prolong the preventive arrest only for a period of no more than thirty days in the phase of the trial,” Drapelul, no. 7/2001, p. 128, n. 21.

57 Article 350, paragraph 1: “The court has the duty to decide, by the sentence, whether to arrest the defendant, to revoke the arrest, or to maintain the arrest, with the respect of the provisions of the general part, Title IV, Chapter 1.”


59 To be seen: Criminal Decision No. 242, from 1994, pronounced by the Court of Appeals of Bacău. The court held that because the accused had no discernment, the court on the merits did not have the obligation to ensure the person a text office lawyer. Arion Țigănașu Jenică, *The Guarantee of the Right to Defense*, Aramus Publishing House, 2002, p. 233.


61 Ibid., p. 74.

62 Ibid., p. 71.

63 Ibid.

65. Article 171, paragraph 4, quoted at footnote 36.
66. One of the assistants to the dean of the Bucharest Bar Association provided this information.
67. Article 173: “(1) The defense counsel for the injured party, the civil party, and the civilly responsible party has the right to draw up demands and to file complaints. The defense counsel has the right to assist the conduct of the following acts of prosecution: the hearing of the party he defends, inquiry at the crime scene, searches and autopsies, prolongation of the length of the arrest; he also has the right to be present when conducting other acts of prosecution with the consent of the prosecutorial authorities. (2) During trial, the defense counsel exercises the right of the party he assists. (3) When, for certain reasons, the court deems that the injured party, the civil party, or the civilly liable party is not able to defend himself or herself, it may decide, ex officio or on demand, to take the appropriate measures for designating defense counsel.”

68. Article 68, paragraph 3, of Law No. 51/1995: “The Bar organizes services of judicial assistance at the headquarters of every court in the district, and also grants legal assistance with the local prosecution authorities, lead by a permanent lawyer, designated by the Council of the Bar and coordinated by a member of the Council.” These provisions are also in the Advocacy Statute.

Article 142 of the Advocacy Statute: “(1) The Bar organizes services of judicial assistance that function near each court, and prosecutorial authorities in their circumscription. (2) The legal assistance will be coordinated by a member of the Council of the Bar; The Council of the Bar will appoint a responsible person from the permanent lawyers for each locality in which there is a court.”

69. Article 147 of the Advocacy Statute.
70. Article 55, paragraph 1(c), of Law No. 51/1995: “The dean of the Bar has the following competences: . . . c) approves the demands for granting legal aid.”
71. Article 144, paragraph 3, of the Advocacy Statute: “The dean appoints the lawyer who will grant the legal assistance. The appointed lawyer can refuse the task only for serious reasons.”
72. According to Article 2 of the Regulations: “If two lawyers are assigned to the same court and for same term, the first one will grant assistance in half of the existing cases, and the second one to the second half.”

73. Article 6 of the Regulations: “If the assigned lawyer does not come to court at the term of judgment, he can be replaced by any other lawyer in the courtroom, with the obligation that the county clerk note that the assigned ex officio representation was absent on the note for the appointment of the lawyer.”

74. Article 105 of the Advocacy Statute: “(1) The lawyer has the duty to grant legal assistance if he has been appointed ex officio or if he provides the service for free. These cases will be preferentially distributed to lawyer trainees and to young lawyers, pursuant to the provisions of Article 22 of the law. (2) Retired lawyers who are still working will not be appointed the mandatory legal aid representation.”

75. Article 192 of the Code of Criminal Procedure.
76. The length of time in service is less worth mentioning, because the question regarded the lawyer’s whole career and we cannot know at exactly what point in the lawyer’s career the case of legal aid occurred.
78. Article 40 of Law No. 51/1995 and Article 106 of the Statute of Professional Conduct.
79. This is what the Code of Civil Procedure calls legal aid, and what Law No. 51/1995 calls ex officio legal assistance. Article 68, paragraph 1, of Law No. 51/1995: “(1) The Bar provides judicial assistance in all cases in which defense is mandatory according to law, as well as on demand of the courts of law, and the prosecutorial authorities or the local public administrative authorities recognize that the person lacks sufficient means to pay the fee.” This article, enforced in both civil and criminal cases, correlates, in civil matters, with the provisions of Article 74 of the Code of Civil Procedure: “The person who cannot afford to pay the costs of a lawsuit without damaging his or her own, or his or her family’s, means of support may call for legal aid.”
80. This is what Law No. 51/1995 calls legal aid. Article 68, paragraph 2: “(2) In case of exception, if the rights of the person without material means would be damaged because of the delay, the dean of the Bar may approve the granting of legal aid.”
82. Ibid.
83. Ibid.
84. Article 163 of Law No. 105/1992, regarding the settlement of private international conflicts of law: “(1)
Before the Romanian courts and in accordance with the law, foreign natural persons and legal persons benefit by the same rights and procedural obligations as Romanian natural persons and legal persons. (2) In cases regarding private international law, foreign citizens benefit, before Romanian courts, by exemptions or decreases from taxes and other procedural expenses as well as by legal aid, in the same measure and under the same conditions as Romanian citizens, under the reservation of reciprocity from their native state. (3) Under the same condition of reciprocity, the foreign applicant cannot be obliged to post bail or any other guarantee because he or she is a foreigner or does not have a residence or domicile in Romania.”

85 Article 148 of the Statute of Professional Conduct.

86 At the time this research took place, 1 euro equaled approximately 32,000 lei.
87 Article 340 of the Code of Civil Procedure.
88 Article 23 of Law No. 51/1995.
89 Article 48 and subsequent portions of Law No. 51/1995.
90 This data was obtained with the help of Prime Minister Adrian Năstase at a video conference with the districts and Bucharest on Friday, 15 February 2002.
Access to Justice Country Report: Slovakia

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Executive Summary

The Constitution of the Slovak Republic No. 460/1992 Coll. (Ústava Slovenskej republiky), adopted on 1 September 1992, protects the right of every person to legal aid in proceedings before courts, other state bodies, and public administration authorities. This also represents the constitutional basis for access to legal aid for those who cannot obtain legal services for a variety of reasons, mainly financial.

Basic norms governing judicial proceedings in both civil and criminal matters give the definition of circumstances that give the right to legal aid in such proceedings. However, these statutory norms do not yet fully embody the constitutional provision. As a result, the right to legal aid is often declared formally, but it is not backed up by adequate legislation guaranteeing implementation of the right to free legal representation in all cases.

An amendment to Advocacy Act No. 132/1990 Coll., effective 30 November 1999, created room for the legal community to provide free or reduced-fee legal services in situations where this is justified by the applicant’s personal or property circumstances or other reasons worthy of consideration. However, even this important—although partial—legislative change falls short of addressing the needs of people who have reasonable grounds to seek free legal aid.

The need to improve access to free legal aid is reflected in the demand for services of informal legal aid centers—created by the Ministry of Justice of the Slovak Republic in 1999 to work with regional courts—and by the large number of requests for advice addressed to the Office of the Public Defender of Rights (ombudsperson), which started to function this year.

The Slovak Bar Association prepared a rough legislative draft in 2000 of alternative institutional and financial arrangements that would enable access to free legal aid; it has
not yet elicited a response from the Ministry of Justice, which, in conformity with existing legislation, continues to finance attorneys’ services out of its own budget. The Bar Association’s draft sought to create an independent public entity, with its own budget, that would be responsible for decision-making on free legal aid issues.

Although the issue of access of disadvantaged population groups to legal aid has not yet become a “hot” political question and politicians did not raise it as an election issue, the need for its solution in Slovakia is great. The existing legislation and practice show the need for a new, systematic, and comprehensive legal arrangement creating conditions for real access to justice—including access to legal aid—for people going through difficult periods in their lives.

1. Introduction

Slovakia is a country in transition from an authoritarian regime to a democracy that is based on a statutory law system. The basic law is the Constitution,3 which lays down the scope of guaranteed basic rights. The Constitution provides the framework and represents the basis for all laws, and no law can be in conflict with the Constitution. If such a law is passed, the Constitutional Court has the power to reverse it. Furthermore, international agreements concerning human rights and fundamental freedoms, ratified by the Slovak Republic and promulgated in accordance with the law, take precedence over national laws.4

The Slovak Republic declares very strongly its plans of joining the European Union—especially after the result of the elections in September 2002—and strives to become a member of European community. The country is in the middle of a process of reform in which it has made many important social, political, and legal changes, and it has definitively broken with the Communist legacy. Many basic constitutional and legal guarantees of democratic principles, including judicial independence, are in place. However, a number of essential changes still need to be addressed. For example, there still is not a very strong commitment to a legal culture, even among judges.

The total population of the country is 5.4 million inhabitants. There are three instances of general courts in Slovakia. The courts of first instance, handling the vast majority of cases, are district courts. In addition, the regional courts handle some cases of first instance as well. Regional courts also serve as appellate courts, and three of them further serve as bankruptcy courts.

The Supreme Court in Bratislava acts as the court of first instance in some administrative cases, and as the appellate court in those cases in which a regional court acts as a court of first instance. In addition, the Supreme Court of Bratislava decides on so-called extraordinary legal remedies (such as retrial and complaints on points of law), and by passing standpoints, it unites the decision-making of lower courts. There is a system of military courts as well (special
courts for soldiers and police), which is considered to be part of the general court system and has the same attributes as the judiciary. At present, there are fifty-five district courts with 777 judges, eight regional courts with 390 judges, and one Supreme Court with 86 judges. The Constitutional Court based in Košice has 13 judges.

Private attorneys—lawyers with the license to provide legal aid—are organized into two associations with compulsory membership: the Slovak Chamber of Advocates (Slovenska adovitá komora), head-quartered in Bratislava, and the Slovak Chamber of Commercial Lawyers (Slovenská komora komerčných právnikov), head-quartered in Žilina. The Slovak Chamber of Advocates (the association that is considered as a “bar”) does not have any regional structure; the Slovak Chamber of Commercial Lawyers has two regional departments, in Bratislava and in Košice. The highest body of both of these associations is the congress (assembly) of all members. The executive bodies are presidiums. Each association has its own disciplinary and revision commission. Advocates provide general legal aid, while commercial lawyers focus on commercial law. (Commercial lawyers are not allowed to represent clients in criminal matters.) At present there are 1,233 advocates in the country.

2. Criminal law: Effective access to the judicial system for the indigent in criminal cases

2.1 Right to counsel

2.1.1 Constitutional guarantees of the right to counsel and the right to legal aid

A normative basis for exercising one’s right to legal aid and right to free legal representation is provided, as is the case with other fundamental rights, in the Constitution of the Slovak Republic, pursuant to Article 46, paragraph 1: “Everyone may claim his or her right by procedures laid down by law at an independent and impartial court or, in cases provided by law, at other public authority of the Slovak Republic.”

In addition to the proceedings before the courts and other state authorities provided for by law, this constitutional provision also embodies the right not to be hindered in seeking the exercise of one’s right before a court or other body, and not to be discriminated against on grounds of sex, race, skin color, language, faith, religion, political affiliation or conviction, national or social origin, nationality or ethnic origin, property, birth, or any other status: “The purpose of this fundamental right is to ensure access to court and identical legal status in the proceedings before the court to any person seeking the protection of those interests protected under the legal system that the state has entrusted to the
competence of judicial authorities. The right guaranteed under Article 46, paragraph 1, thus enables every person to become a party to judicial proceedings subject to the fulfillment of conditions provided for by law. If the person exercises his or her right in harmony with the conditions provided for by law, judicial authorities are obliged to enable the citizen who exercises his or her right guaranteed under Article 46 of the Constitution to become a party to judicial proceedings.\(^8\)

In another decision, the Constitutional Court of the Slovak Republic held: “The essence of the fundamental right to judicial protection resides in everyone’s right to effectively seek protection of his rights at a court of law. This right is matched by the obligation of the court to hear and decide the case in an independent and impartial manner, granting protection to the contested right within the limits of legal norms implementing the provision on judicial protection.”\(^9\)

In Article 47, paragraph 2, the Constitution guarantees: “Everyone shall be entitled to legal aid in court proceedings and the proceedings before other state and public administration authorities right from the outset of the proceedings under conditions provided for by law.”

These rights may be sought, within the meaning of Article 46, paragraph 1, and Article 47, paragraph 2, only within the limits of the laws implementing such rights.\(^10\) This means that, as regards individual details, effective implementation is ensured through legal norms with lower legal force—in other words, laws and/or implementing decrees are issued by individual ministries.

The Constitution specifically provides for the right to defense in criminal proceedings. Article 50, paragraph 3, states: “Everyone charged with an offense shall have adequate time and facilities for the preparation of his defense and shall have the right to defend himself in person or through legal assistance.”

The Constitutional Court gave the following legal opinion concerning the substance of the right to defense: “All entitled persons shall be guaranteed, under Article 50, paragraph 3, necessary time to prepare for their defense, facilities to prepare their defense, and an opportunity to conduct their defense in a legally meaningful manner either in person or through counsel. The exercise of the right to defense does not guarantee that the entitled person will obtain the decision sought by applying the right to defense. The purpose of the right guaranteed under Article 50, paragraph 3, of the Constitution is to give the defendant an opportunity to defend himself against the charges of the commission of a criminal offense (II. ÚS 8/96).\(^11\)

It follows from the wording of Article 7, paragraph 5, of the Constitution that international instruments on human rights and fundamental freedoms, ratified and promulgated in a manner provided for by law, take precedence over the laws of the Slovak Republic. After the dissolution of
the Czechoslovak Federal Republic in 1993, the Slovak Republic adopted the commitments arising from the signature of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Therefore, Article 6, paragraph 3, of the European Convention is directly applicable in this area.

Equally binding on the Slovak Republic is the International Covenant on Civil and Political Rights, in which Article 14 defines similar obligations and rights as those set out in Article 6, paragraph 3, of the Convention. The standard of the right to defense as provided above is therefore binding, even if the laws do not explicitly guarantee such access to a defense in criminal proceedings.

2.1.2 Right to counsel in criminal proceedings

In the wording of the Constitution, the legal system of the Slovak Republic distinguishes the right to legal assistance (Article 47, paragraph 2) from the right to defense (Article 50, paragraph 3).

The right to defense

As described in Article 50, paragraph 3, of the Constitution and in the international treaties mentioned in section 2.1.1, the right to defense is of special significance in criminal proceedings, which are more likely than civil proceedings to interfere with fundamental rights and freedoms. In addition, the obligations of criminal justice agencies and the rights of criminal defendants are provided for by law.

Key legislation governing criminal procedure in the Slovak Republic is the Code of Criminal Procedure as amended. Under Section 2, paragraph 13, of the Code of Criminal Procedure, “everyone charged with an offense shall be advised of his right to full defense and right to take counsel at any stage of criminal proceedings; all criminal justice authorities shall be obliged to enable him to fully exercise these rights.” Section 33, paragraph 1, of the Code of Criminal Procedure defines the content of the right to defense of a person accused of committing a criminal offence as follows: “The accused shall have the right to give his opinion concerning all charges brought against him and the related evidence; however, he shall not be required to testify. The accused shall have the right to submit exculpatory circumstances and evidence, file motions and legal remedies. The accused shall have the right to choose counsel and to seek counsel’s advice, including during the procedures carried out by criminal justice agencies. However, the accused shall not have the right to seek counsel’s advice on answering the questions posed during interrogation. The accused may ask that his counsel be present during interrogation and that his counsel be present also during other formal investigation procedures. (Section 165). The accused who is remanded in custody or serves an imprisonment sentence has the right to speak with his counsel in private. The accused shall have the
above-mentioned rights even if he is deprived of legal capacity or has a reduced legal capacity.”

Section 37, paragraph 1, of the Code of Criminal Procedure provides that the accused also may choose counsel through the intermediary of other people. If the accused does not use his or her right to choose counsel and where no counsel is chosen by a legal guardian, counsel may be chosen for the accused by next of kin in direct descent, sibling, adoptive parent, adoptive child, spouse, common-law spouse, or another participating person.

It should be added with respect to the interpretation of the right to defense that this right is exercised, within the limits of relevant rules, in two ways. They are: the right to mandatory defense, which will be dealt with in more detail in the next section, and the right to counsel of one’s choosing. Mandatory defense—i.e., “ex officio defense”—constitutes a special form of a defense for the accused, based on the appointment of counsel at a concrete and clearly defined stage of criminal procedure, regardless of whether the accused wants to have counsel.

A defense through counsel of one’s choosing is a common form of legal assistance in criminal proceedings and is not automatically provided by the state. Because the accused may choose counsel at any stage of criminal proceedings, this kind of representation is not linked to a specific stage in the proceedings. As soon as the accused chooses counsel, the state is obliged to respect the decision of the accused to be represented by counsel of his or her own choosing.

No restrictions are imposed on the scope of the defense provided by counsels appointed by the state or counsels chosen by the accused. The opposite is in fact the case: irrespective of whether counsel is chosen or appointed, “he shall be obliged to provide necessary legal assistance to the accused, to effectively use means and methods of defense provided for by law; and, in particular, to see that the facts exculpating or mitigating the guilt of the accused be presented in the proceedings in a proper and timely manner, and thus contribute to properly clarifying and deciding the case (Section 41, paragraph 1, of the Code of Criminal Procedure). Counsel shall be entitled to submit motions, file applications and legal remedies, look into the files on behalf of the accused already during formal investigation, and to participate in criminal investigation procedures as provided for in this Act. He shall have the right to communicate with the accused who is remanded in custody. In court proceedings, counsel shall have the right to participate in the same acts of procedure as the accused (Section 41, paragraphs 2 and 3, of the Code of Criminal Procedure). Counsel shall have the right to be present in investigation procedures right from the filing of indictment; he may ask questions of the accused and other examined persons, but only after the competent body has concluded examination and has given him the floor (Section 165, paragraph 1, of the Code of Criminal Procedure).”
The Code of Criminal Procedure provides for a free or reduced-fee legal defense in Section 33, paragraph 2, which guarantees the right to free or reduced-fee defense for accused individuals who do not have sufficient means. All criminal justice authorities shall be obliged to advise the accused of his or her rights and to fully enable the accused to exercise those rights.

Although it follows from the wording of this provision that the right to free or reduced-fee legal defense is granted both to the accused in cases subject to a mandatory defense (in which the state appoints counsel) and to the accused who retain counsel of their own choosing, the Code of Criminal Procedure does not provide in any way for ensuring the exercise of this proclaimed right by the accused in cases that do not involve a mandatory defense. Thus, in practice, the right to a free defense is genuinely exercised only in cases involving a mandatory defense, where the decision on appointment of counsel and termination of a mandatory defense is made by the court, which also decides on awarding the costs of legal representation.

Article 47, paragraph 2, of the Constitution makes the exercise of the right to legal aid conditional on the fulfillment of the eligibility criteria set out by law. Consequently, eligibility for and conditions of access to legal aid must be sought in various legal provisions. The most universal legal norm governing the provision of legal aid is Act No. 132/1990 Coll. on Advocacy (Zákon o advokácií). Within the meaning of this act, attorneys help the citizens implement their constitutional right to defense, and they protect other rights and interests of individuals in conformity with the Constitution and the laws. Under Section 1, paragraph 2, of the Advocacy Act, attorneys fulfill these tasks mainly through defending citizens in criminal proceedings; representing individuals in courts before state authorities and other legal entities; drawing up legal deeds; providing legal advice; and preparing legal analyses.

Thus, the provision of legal aid by attorneys includes all the activities connected with and forms of representing the rights and legitimate interests of clients in compliance with the law. It is not limited exclusively to legal advice or representation in court. Naturally, if a client needs or requires legal advice or representation only with respect to certain legal procedures, it is possible to agree on such an arrangement. The terms of such an arrangement are usually set out in writing through a power of attorney granted to the attorney by his client, which the attorney submits when representing his client before state authorities, in court, etc.

Section 19, paragraph 3, of the Advocacy Act provides that individuals have the right to free or reduced-fee legal aid, if this is justified by personal or property circumstances of the client or if there is another reason worthy of special consideration. Its implementing decree further specifies this rule as follows: “Attorneys may provide legal service free of charge only in infor-
mative sessions or under conditions defined by the Board of the Slovak Bar Association.” The Board of the Slovak Bar Association issued Resolution No. 7/1990 concerning the provision of free or reduced-fee legal aid, stipulating that eligibility for free or reduced-fee legal aid arises when average monthly income of the applicant does not exceed the statutory minimum wage and the applicant does not possess any movable or immovable property, except for property meeting basic life necessities.

The reasons worthy of special consideration include situations in which:

- the use of the reduced rate eliminates or alleviates harshness that would result from the use of the pertinent rate of tariff fee (e.g., in marital property settlement cases),
- the court has discretion to determine the amount of the claim (e.g., in cases involving damages),
- the use of the reduced rate facilitates settlement of the case by conciliation,
- the attorney represents his employees or provides legal aid to a significant other.

In practice, every attorney has discretion to decide whether he or she will provide or deny free or reduced-fee legal aid.

Section 15 of the Advocacy Act provides for the right of every person to legal aid and the right to request any attorney to provide such legal aid. Unless he or she has been appointed to provide such aid, the attorney has the right to refuse granting legal aid, but the refusal must be based on serious grounds, because such a refusal would thwart the effective provision of legal assistance. The attorney must justify any refusal to provide legal assistance to a client. The grounds given for the refusal will be reviewed by the Bar Association. The person whose application for legal aid was denied may then ask the Bar Association to designate another attorney. Such an application will be decided by the Presidium. The decision of the Presidium can be appealed to the Congress.

The actual exercise of the right to seek legal aid from any attorney, and the attorney’s obligation to grant such a request, greatly differs from the process described by the statute. Attorneys often specialize in certain legal fields and exercise their discretion when deciding whether to accept representation. Attorneys perceive any attempt at changing this situation as a violation of the principle of contractual freedom. In practice, no review takes place of cases in which legal aid was denied.

However, if the person who has been denied legal aid turns to the Bar Association and asks to be appointed an attorney free of charge, the Bar Association examines the refusal and designates an attorney in the district of the applicant’s residence. A representative of the Bar Association will then send a letter to the respective attorney asking him or her to consider granting free legal aid. However, the attorney is not obliged to provide free legal ser-
vices. The attorney’s decision will be conditional on an agreement with the client (interview with the deputy president of the Slovak Bar Association, Bratislava, 5 September 2002).

**Stages of criminal procedure and the right to defense**

The individual stages of criminal procedure can be divided into the so-called formal pretrial investigation, proceedings before the court, and enforcement proceedings. The right to defense is constitutionally guaranteed at all stages of criminal procedure—for example, also in the hearing of appeals, including after the pronouncement of judgment in connection with a demand for pardon, or the proceedings concerning enforcement of judgment. This interpretation also has been confirmed by the Constitutional Court of the Slovak Republic, which, in its decision, No. III. ÚS 6/00, states that “the rights guaranteed under Article 50, paragraph 3, of the Constitution shall be granted also to the accused and to sentenced persons until the court decision becomes final.”\(^1\) In its finding, II. ÚS 54/1999, the Constitutional Court holds: “The purpose of the right guaranteed under Article 50, paragraph 3, of the Constitution is to give the accused an opportunity to defend himself against the charges brought against him (II. ÚS 8/96). This right shall be guaranteed with equal intensity at all stages of criminal proceedings.”\(^2\)

The stage of formal pretrial investigation represents the part of the process from the opening of prosecution until the filing of accusation to court. Charges may be brought at this stage against persons suspected of a criminal offense. From the moment of issuance of a resolution to bring charges, the accused has the right to choose counsel and the right to free or reduced-fee defense.

Proceedings before the court represent the stage of criminal procedure between a prosecutor’s filing an accusation with the competent court until the pronouncement of a final decision in the case. It therefore includes appellate procedure until the time when the last-instance court decision becomes final.

Enforcement proceedings include all the steps taken to enforce the court’s final decision (such as committal to prison in case of imprisonment sentences, placement in a protective treatment facility, parole release of individuals serving imprisonment sentences, etc.)

The issuance of the resolution to bring charges triggers prosecution against a person; it is sometimes preceded by other investigation procedures carried out by the police. Section 76 of the Code of Criminal Procedure entitles an investigator or police authority to detain a person suspected of the commission of crime even without having to bring charges against that person. Detention may not exceed forty-eight
hours. Within that time limit, the suspect must be brought before the court, which decides either to remand him or her into custody or to release the suspect if there are no grounds for custody. The Code of Criminal Procedure gives the detainee the right to choose counsel and to seek counsel’s advice during detention. The detainee also has the right to request that counsel be present during interrogation, except where counsel cannot be reached during the forty-eight-hour time limit (Section 76, paragraph 6). This means that if counsel cannot be reached, investigation authorities are not precluded from continuing to clarify the offense and from performing relevant procedures.

The Code of Criminal Procedure does not guarantee the detainee the right to free or reduced-fee defense during the detention period before any charges are brought. But the Code does oblige the police (within the forty-eight-hour time limit) to advise the detainee of his or her rights.

The Constitutional Court gave its legal opinion concerning the right to defense prior to the bringing of charges in case ÚS 34/1999: “Article 50, paragraph 3, does not guarantee the right to defense to a person who does not have the legal status of the accused. This right is implied in the protection granted under Article 47, paragraph 2, of the Constitution. Entitlement to statutory protection based on the circumstances of the case is represented by Section 76, paragraph 6, and Section 165, paragraph 1, of the Code of Criminal Procedure.”

**Police custody and the right to legal aid**

In the performance of their statutory tasks (especially protection of life, health, and property), the police have the right—subject to the fulfillment of statutory conditions—to restrict the liberty of persons prior to the filing of formal charges. The ways in which personal liberty may be restricted are provided for in Act No. 171/1993 Coll. on the Police Force and the Code of Criminal Procedure. It should, however, be remembered that the police may use this power even if no criminal proceedings are subsequently instituted (e.g., in case of misdemeanors).

The police have the power to detain a person (Section 19, Act No. 171/1993 Coll.) on the grounds set out in Section 19, paragraph 1, letters a to d (e.g., persons presenting a threat to themselves or others, persons presenting a threat to property, persons caught committing a misdemeanor, etc.). Police custody may not exceed twenty-four hours. If the police establish through relevant procedures the existence of grounds for handing the person over to criminal justice agencies, they must do so within twenty-four hours. Otherwise the person must be immediately released. To guarantee access to legal aid, the law specifically provides: “Every person detained pursuant to paragraph 1 shall be allowed, on a request and without undue delay, to inform a close person of his detention and to request legal aid from an attorney” (Section 19, paragraph 6, of Act No. 171/1993 Coll.). “If the detainee is a minor child, the
police shall have to inform his legal guardian of his detention.”

Thus, the wording of the law does not give the guarantee of free legal aid by an attorney retained through the intermediary of the police to a detainee who does not have sufficient means to obtain legal assistance. Neither does the law oblige the police to directly advise the detainee of the right to contact a paid attorney.

2.1.3 Right to counsel and right to legal aid in non-criminal proceedings when deprivation of liberty is at stake

Minors

There are special schools in the Slovak Republic intended for pupils who, due to a disability, cannot attend elementary or secondary schools. This does not restrict the liberty of minor children from a legal point of view, because children may be placed in special schools only with the consent of their legal guardians. Therefore, this section will address other types of restriction of the personal liberty of minor children, which are not connected with criminal procedure.

Restriction of liberty of minor children in non-penal areas is connected mainly with the placement of a child into an institution (children’s homes, special educational facilities). Decisions regarding these significant changes in the care for, and education of, children are made by court in conformity with Family Act No. 94/1963 Coll.

Section 45, paragraph 3, of Family Act No. 94/1963 Coll. explicitly states: “If the education of a child is seriously endangered or seriously disturbed, and if other educational measures failed to bring an improvement, or if the parents are unable to take proper care of their child on account of other serious reasons and the child cannot be placed under custody of other persons than its parents or in foster care, or if the child cannot be placed under custody of a guardian, the court may order institutional education. Where it is in the best interest of the child, the court may exceptionally order institutional education even in the absence of other prior custody measures. This step must be duly justified by exceptional circumstances of the case and by the impossibility to take different educational measures. If there are serious grounds, the court may extend institutional education by up to one year after the coming of age.”

The law does not specifically provide minors with access to legal aid by an attorney in these types of proceedings. Rather, in proceedings that are likely to restrict or remove parental rights, minor children are represented by a guardian ad litem appointed by court.

In these cases, the court must appoint a guardian ad litem (for the suit) to represent the child in the proceedings. The function of “guardian ad litem” is performed by the district authority (the District Office) in the framework of “social and legal protection.”20 The state district authority also performs all other activities connected with making sure that minor children receive proper care—they keep records on chil-
dren that should be placed in foster care, implement custody measures, file proposals for institutional education with the court, monitor the development of children receiving institutional education, etc. The court proceeds similarly when imposing “protective education” on minor children who have committed especially serious criminal offenses. In instances where the court orders protective education in response to a proposal from the prosecutor, the minor child must be represented by his guardian ad litem (Section 86 of the Code of Criminal Procedure).

**Persons placed in health care institutions**

Every health care institution that has anyone who has been placed there without the person’s written consent has to notify a court of such placement within twenty-four hours. The grounds for the placement may include psychiatric diseases, addiction to narcotic or psychotropic substances, other diseases requiring immediate institutionalization, or restriction of free movement. Based on a notification received from an institution, the court institutes proceedings concerning the necessity of placing or keeping the person in a health care institution. Under Act No. 99/1963 Coll. Code of Civil Procedure, if the person placed in an institution has no other representative, the court must appoint a guardian ad litem for the purpose of the above proceedings. If the financial situation of the person placed in an institution does not allow him or her to pay the costs of legal representation, that person (or the legal guardian thereof) may ask the court to appoint an attorney to act as legal representative; however, the court does not have to grant the request. If the court decides to appoint an attorney for such person, costs of legal representation will be borne by the state.

**Sentenced persons**

The rights of sentenced persons are protected under Act No. 59/1965 Coll. on Enforcement of Imprisonment Sentences and Justice Ministry’s Decree No. 125/1994 Coll. on the Rules of Enforcement of Imprisonment Sentences. The aforesaid legal norms provide that sentenced persons may exercise their rights by submitting applications, complaints, and proposals with the competent state authorities and through correspondence with their legal representatives. Lockable boxes are installed for this purpose in the premises used for the execution of imprisonment sentences. A designated officer empties the boxes every working day and posts the letters to the addressees without undue delays.

Upon request, sentenced prisoners may talk to the governor of the prison institution, prosecutor, judge, or to a representative of the body overseeing the prison institution. Sentenced prisoners can make their request orally or in writing. The request must be conveyed or communicated to the person concerned not later than on the next working day (Section 49, paragraph 4, of Decree No. 125/1994 Coll.). If the sentenced prisoner believes that his or her fundamental rights and freedoms have been
violated and that there is a breach of the legal system or principles of a democratic state governed by the rule of law, that prisoner also may complain to the public defender of rights. This person will examine the complaint and submit a proposal to the competent state authorities, urging them to take necessary measures and remedy the unlawful situation. However, the public defender of rights does not have decision-making powers. That person may contribute to eliminating irregularities or improper practices by making relevant proposals. Because this institution was established only recently (Act No. 564/2001 Coll. on Public Defender of Rights took effect on 1 January 2002), it would be premature to assess its real effectiveness.

In essence, sentenced prisoners—acting as parties to civil proceedings or as defendants in different criminal proceedings—have identical access to legal aid as other people, apart from the regime of communication established for individuals serving sentences of imprisonment. Act No. 59/1965 Coll. on Enforcement of Imprisonment Sentences guarantees, in a general manner, access to legal aid, in Section 15, paragraph 3. Every sentenced person has the right to receive legal aid from a legal representative who may, within the limits of his or her powers, have unrestricted written or oral communication with the sentenced person. The administration of the penitentiary institution must make arrangements whereby a designated prison guard can watch, without being able to listen to, the communication between the sentenced person and the legal representative.

It is evident from the wording of the above act that no specific conditions or rules apply to the access of sentenced persons to free legal aid. This means that access to free legal aid in both criminal and civil procedure is governed by the rules discussed in sections 2 and 3.

**Detention of aliens**

The police have the authority to detain aliens who unlawfully enter or stay in the territory of the Slovak Republic, or where detention is necessary to carry out administrative expulsion.

Within the meaning of Section 63 of Act No. 48/2002 Coll. on the Stay of Aliens, to fulfill the rights of aliens, the police have the following duties:

a) to ensure that the alien be informed, in a language that he understands and immediately after his detention, of the reasons for his detention and of the possibility to have the lawfulness of the detention decision reviewed;

b) to immediately inform of the detention the diplomatic mission of the country of which the detained alien is a national; if that country has no diplomatic representation in the Slovak Republic, the police department shall inform the Ministry of Foreign Affairs;

c) to immediately allow the detained alien to inform a close person and his legal representative of his detention.
For the purpose of exercising his rights, every alien may lodge applications and complaints with state authorities of the Slovak Republic (Section 71, paragraph 2, of Act No. 48/2002 Coll.).

The aforementioned act provides that aliens have an unrestricted right to communicate with the people who provide them with legal protection. However, similar to Police Act provisions concerning detention, there are no specific guarantees in this act concerning provision of free legal aid by attorney to aliens whose liberty is restricted through their detention. Apart from the obligation to contact a legal representative when so requested by the alien, the act does not require the police to inform the alien of the possibility to seek free legal aid or legal advice, or to provide the alien with such aid or advice.

2.2 Right to legal aid: Eligibility criteria for granting legal aid in criminal cases

2.2.1 Substantive criteria

As stated in the preceding chapter, the Slovak legal system distinguishes mandatory defense in criminal proceedings — where the defendant must have “ex officio” counsel — from the defense by counsel of the defendant’s own choosing. The cases where defense by “ex officio” counsel is mandatory are explicitly set out in the Code of Criminal Procedure.

Section 36 of the Code defines the circumstances under which the accused must have counsel during formal investigation, even where the accused has no counsel of his or her own choosing.

They are as follows:

- if the accused is held in detention,
- if the accused is serving a sentence of imprisonment or is under observation in a medical institution,
- if the accused was charged with the commission of another willful criminal offense,
- if the accused is a juvenile or on trial in absentia,
- if the accused is in proceedings concerning a criminal offense punishable by maximum imprisonment of more than five years,
- if the accused is in extradition proceedings or proceedings on ordering protective treatment, except for alcohol abuse treatment.

Furthermore, “every accused must have counsel also where the court — or investigation authority, or prosecutor during formal investigation — deems it necessary, in particular when in doubt as to his capacity to properly defend himself due to a physical or mental impairment.”

According to Section 36a, paragraphs 1 and 2, of the Code of Criminal Procedure, the sentenced person must have counsel in enforcement proceedings:

- if the person is deprived of legal capacity or has a reduced legal capacity,
• if the person is in parole proceedings and is a juvenile under eighteen years of age at the time of the parole hearing,
• if the sentenced person is held in detention,
• if there are doubts as to the person's ability to properly defend himself or herself,
• if a decision is being made on the enforcement of a foreign judgment.

Sentenced persons must have counsel in proceedings concerning extraordinary legal remedies—appeals on point of law or retrial motions—in cases involving:

• a person being held in detention,
• a person serving a sentence of imprisonment or under observation in a medical institution,
• a person who is deprived of legal capacity,
• a criminal offense punishable by a maximum imprisonment sentence of more than five years,
• a juvenile who was under eighteen years of age at the time of a public hearing and who is being held on a complaint on points of law or a motion for retrial,
• a person who may not have the ability to properly defend himself or herself,
• a deceased sentenced person.

Where the accused has no counsel and the law prescribes a mandatory defense, the police or the investigator will ask the accused to choose one within a specified period. If no counsel is chosen within the specified period, the court shall immediately appoint counsel for the accused for the entire duration of the mandatory defense (Section 38, paragraph 1, of the Code of Criminal Procedure). The accused may choose a different counsel than the one appointed or chosen for him or her.

The general rule applied in criminal proceedings is set out in Section 33, paragraph 2, of Act No. 141/1961 Coll., which states that an accused person who does not have sufficient means to cover the costs of a defense is entitled to a free or reduced-fee defense. The key criterion for providing a free or reduced-fee defense is thus the property and income situation of the accused. This is also supported by the existing case law, for instance: “During its subsequent decision-making concerning the obligation of the sentenced person to pay the fee and expenses of counsel appointed by the state under Section 155, paragraph 1, of the Code of Criminal Procedure, the court must identify the property and income situation of the sentenced person in order to establish whether he possesses sufficient means to cover these costs. If not, the sentenced person is entitled to free or reduced-fee defense (Section 33, paragraph 2, and Section 152, paragraph 1, letter b of the Code of Criminal Procedure); in such case, the court shall rule that the sentenced person is not obliged to reimburse appointed counsel's fee and expenses that were paid by the state, or a part thereof, depending on his property situation.”21
Section 33, paragraph 2, of Act No. 141/1961 Coll. provides that free defense should be guaranteed both where defense counsel is appointed by the state and where the defense is conducted by an attorney on the basis of a power of attorney granted by the accused. However, as stated already in section 2.1.2, the Code of Criminal Procedure contains no procedural provisions concerning this right and, therefore, does not really provide for its exercise by an accused person who fails to qualify for appointment of counsel.

2.2.2 Financial

The duty to reimburse the state for the costs of criminal proceedings and the fee and expenses of appointed counsel is imposed on the defendants only if, and after, they are convicted. The determination of whether the sentenced person is eligible for a free or reduced-fee defense is made on the basis of the rule set out in Section 33, paragraph 2, of the Code of Criminal Procedure, which stipulates that, in order to qualify for a free or reduced-fee, the accused must be found not to possess sufficient means to cover the costs of his or her defense. The decision on eligibility is fully in the hands of the first-instance court that heard the case on its merits. The law gives the court discretion to determine the manner and the ways of testing the means of the accused. The case law concerning the payment of court fees refers only to the “duty to identify the property and income situation of the sentenced person.” Neither the law nor the case law sets any uniform threshold. Sentenced persons have the right to challenge the decision holding them liable for paying attorney’s fee and expenses; this legal remedy has a suspensive effect.

2.2.3 Other eligibility questions

Determination of the right to defense and legal aid in criminal proceedings of special groups of the population must be made primarily on the basis of constitutional Article 12, paragraph 2, which guarantees fundamental rights and freedoms in the territory of the Slovak Republic to all regardless of gender, race, color, language, faith and religion, political or other conviction, national or social origin, belonging to a national or ethnic group, family, or other status. No person may be prejudiced, discriminated against, or favored on any of these grounds.

Special consideration is given to illiterate persons charged with an offense in the Ministry of Justice’s Decree No. 114/1994, issuing the Rules for the Enforcement of Custody. Section 15, paragraph 6, of the decree stipulates that every prison institution must provide assistance upon request to the accused who cannot, or is unfit to, read or write, by reading documents to the person and helping him or her write submissions, petitions, or complaints.

The Code of Criminal Procedure also defines the status of aliens in their dealings with criminal justice agencies, and it gives
aliens the right to use their mother tongue when communicating with the authorities. If an alien declares that he or she does not speak the state language, the state has the duty to provide an interpreter. Apart from the situations already described, the law does not contain separate provisions concerning access to legal aid and defense by aliens. This means that the generally valid rules are also applicable to foreigners. There are no specific provisions in the law dealing with other issues or with particular problems such as language barriers (e.g., when the aliens try to retain or communicate with an attorney). However, Slovak legal practitioners and judicial authorities report that they rarely receive requests for a free defense from aliens accused of a criminal offense.

Also absent is special legislation providing for other groups that are disadvantaged in other ways. Apart from ascertaining a defendant's financial situation in cases where the state appointed the attorney, Slovak statutes do not impose any statutory obligation on the state to provide for a free defense or other type of legal advice, and they do not provide any other mechanism to this effect.

2.2.4 Legal aid for victims of crimes

Victims of crime are referred to in the Code of Criminal Procedure as the “aggrieved”—i.e., people who have suffered bodily injury, harm to property, moral or other harm, or whose legally protected rights or freedoms were violated or threatened by a crime. Statutory rights of the aggrieved, who are deprived of legal capacity, may be exercised by their legal guardians. If the aggrieved cannot exercise his or her rights, even through the legal guardian, and could be harmed by delays in the proceedings (e.g., if it is impossible to take the proposed evidence, give consent to open the prosecution in specified cases, etc.), the court—or, during formal investigation, a prosecutor—will decide whether to appoint a guardian ad litem.

Section 50, paragraph 1, of the Code of Criminal Procedure stipulates that the aggrieved may decide to be represented in criminal proceedings by an authorized representative who is not required to have a legal background. However, Section 50, paragraph 3, also stipulates that if confidential facts are dealt with in criminal proceedings, the authorized representative of the aggrieved must be an attorney or a person who is authorized to deal with such confidential facts. Yet the law does not provide for, or stipulate the right of the aggrieved to, free legal representation through an attorney. There is an omission in the law in this regard even in case of indigent victims of crime.

Thus, the aggrieved may seek access to legal aid by applying for free legal aid to an attorney, or directly to the professional organization of attorneys—the Slovak Bar Association. Section 19, paragraph 3, of Advocacy Act No. 132/1990 Coll. provides for the right of citizens to free or reduced-fee legal aid where such aid is justified in
view of the personal or property situation of the client, or if there is another reason worthy of special consideration (see section 2.1.2). However, practice shows that criminal justice agencies do not inform the aggrieved of the possibility to seek legal aid when they advise the person of his or her rights. Therefore, current practices in this regard are not a sufficient guarantee for exercising the right to legal aid enshrined in Article 47, paragraph 2, of the Constitution.

2.3 Other cases

Besides what is stated above, the laws of the Slovak Republic lay down no other forms of legal representation. The accused in specific cases could, in theory, seek legal aid (in the form of legal advice or legal representation) from non-governmental organizations (see section 4.4, for example).

2.4 Procedure for granting legal aid

Section 33, paragraph 3, of the Code of Criminal Procedure stipulates that all criminal proceeding authorities must always inform the accused of his or her rights. Information given by criminal justice agencies at individual stages of criminal proceedings is based on the wording of relevant legal provisions. This information also includes a statement about the accused person’s right to free or reduced-fee defense. However, it does not include advice on how to implement this right in practice. Information is given orally or in writing. The content of information must be recorded in the protocol signed by the accused.

The decision on appointing ex officio counsel is made by a judge or a presiding judge of the panel during the formal investigation or in court proceedings, respectively. In certain cases, depending on the reasons for a mandatory defense, the accused may be present when the court decides on appointment of counsel (e.g., if the court simultaneously decides about remanding the person into custody). In other cases, the court decides on counsel appointment without the accused being present. If the accused has no counsel and there are grounds for a mandatory defense, the court will ask the person to retain counsel of his or her own choosing within a specified period of time. If the accused chooses no counsel within the specified period of time, he or she shall be appointed one by the court without delay. The court appoints ex officio counsels from the list of attorneys practicing law in the relevant territorial district, which is submitted to courts by the Bar Association and contains the names of attorneys who have indicated an interest to provide ex officio defense in criminal proceedings. However, even when the proceedings are in progress, the accused may choose a replacement for counsel appointed by the court.

Representation fees and expenses of appointed counsel are paid by the state. The court that decided the case on merits
in the first instance will, as soon as the sentencing judgment becomes final, first decide on the obligation of the state to pay counsel’s costs and fees. After this decision becomes final, the court then will decide on the obligation of the sentenced person to reimburse the state for the fees and expenses it paid to appointed counsel. If the court finds that the sentenced person does not have sufficient means to cover the costs of a defense, it will rule that the sentenced person is not obliged to reimburse counsel’s fees and expenses or part thereof.

Sentenced persons may challenge aforesaid decisions by lodging complaints, which have a suspending effect on the execution proceedings for cost reimbursement. Since the Code of Criminal Procedure provides that the decision on eligibility for a free defense is not made until after the final judgment convicting the accused—who was properly represented by an attorney (while the reasons for a mandatory defense remained throughout)—it is not possible to challenge the judgment on the grounds of absence of representation by counsel.

2.5 Scope of Legal Aid

If the court decides that the sentenced person who is given appointed ex officio counsel is entitled to free legal aid, the state will pay all costs of such aid at all stages of criminal procedure and for all legal aid procedures performed by the attorney on behalf of the accused. The amount of the costs of legal representation by an attorney is calculated on the basis of individual legal aid procedures, which the advocate must specify before the court makes its final decision. Attorney’s fees are regulated under Ministry of Justice’s Decree No. 163/2002 Coll. on Fees and Reimbursements of Attorneys Providing Legal Aid. These fees may include, for instance: fees charged per hour, even if not full, for taking over and preparing representation or a defense, including the first meeting with the client and subsequent meetings or any discussions with the client; fees charged per two hours, even if not full, for filing written motions to the court or other bodies and for taking part in investigation acts or court proceedings; fees for drawing up appeals, submission of appeals, retrial motions, etc. However, the decree does not give an exhaustive list of these procedures, and the attorney may also ask to be paid for procedures that are not explicitly mentioned in the decree. In addition to fees, attorneys are entitled to be reimbursed for the expenses they effectively and demonstrably incur in connection with the provision of legal services, in particular court and other fees, travel and telecommunication expenses, costs of expert opinions, translations, and copies (Section 18 of Decree No. 163/2002 Coll.). The amount of counsel’s fee and expenses (in conformity with the tariff schedule set out in the decree) is determined, and the court that decided the merits evaluates the effectiveness and correctness of the fee and expenses. This evaluation takes place after the conclusion of the case.
2.6 APPLICATION OF THE LEGAL AID NORMS IN PRACTICE

The Code of Criminal Procedure clearly defines the procedure applied in appointing counsels by the state when the law requires mandatory defense; the relevant provisions are respected by all criminal justice agencies. The fact that the state reimburses appointed counsels for their costs (i.e., the state pays the fees and expenses of ex officio counsels) before a decision is made on whether the sentenced person will be obliged to reimburse the state for these costs creates conditions for speedy acceptance of a defense by appointed counsel and does not make the exercise of the right to defense conditional on the decision of who ultimately will pay for the free counsel.

Where the grounds for a mandatory defense exist already at the formal investigation stage (see section 2.2.1), the right to defense is guaranteed in all steps and stages of criminal procedure, until the judgment becomes final.

However, it follows from the preceding sections that although the text of the law provides for access to counsel, this right is not actually secured for the accused who cannot afford to hire an attorney and whose case does not warrant a mandatory defense. This is why no relevant case law is available on the issue of appointing free counsel. It is also rare for the accused to ask for the appointment of free counsel. The state did not create statutory or practical arrangements for implementing the right to free legal aid (Article 47, paragraph 2, of the Constitution) by detainees prior to being charged, or by victims of crime.

The accused or the aggrieved may ask an attorney or the Bar Association for appointment of counsel (see section 2.1.2). This, however, does not adequately guarantee rapid, free, and sufficiently wide exercise of the right to defense. In practice, due to time consideration, this possibility is almost out of reach for the detainees prior to being charged.

2.7 QUALITY OF FREE LEGAL REPRESENTATION

The case law of the European Court of Human Rights (ECtHR) mentions, in connection with ensuring the quality of legal aid by an appointed lawyer, that: “Mere nomination does not ensure effective assistance; since the lawyer appointed for legal aid may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations.”

However, the European Court of Human Rights does not oblige the state to oversee the quality of legal aid of appointed counsel as an absolute duty: “It follows from the independence of the legal profession from the state that the conduct of the defense is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed. The competent nation-
al authorities are required to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way.”

The laws of the Slovak Republic do not provide for any specific mechanism to ensure the quality of defense conducted on an ex officio basis. The accused may bring the failure by counsel to fulfill his duty to the attention of the court that appointed him—however, this procedure is not laid down by law, and the court does not advise the accused of this possibility.

The case law of the Constitutional Court shows that, as regards responsibility of the state for the quality of ex officio defense, Slovakia embraces the approach of the European Court of Human Rights. The Constitutional Court justified the dismissal of the complaint in which the petitioner alleged that his right to defense was violated due to low quality of work of appointed counsel as follows: “State authorities of the Slovak Republic, regardless of the circumstances of the case, cannot be held responsible for reviewing the quality of legal aid provided by lawyers appointed by these authorities. Performance of this task by a court would represent an interference by the court with the proceedings which would go beyond the scope of constitutionally defined powers of the judiciary... If the deficiencies in legal aid provided by ex officio counsel are not evident and the entitled person does not bring such deficiencies to the attention of the state authority that appointed him, that state authority cannot be held responsible for the failure of appointed counsel to provide legal aid in the quality that he can be legitimately expected to provide.”

At the same time, the accused may lodge a complaint about the breach of duty by appointed counsel with the Bar Association, which will examine the complaint and either dismiss it or refer it for further proceedings to the chairperson of the Audit Committee of the Bar Association. If the chairperson finds that the attorney has breached his or her duty, that individual will bring a motion to commence disciplinary proceedings. The motion is decided by the disciplinary panel of the Bar Association. Disciplinary measures imposed against an attorney may have the form of a written reprimand, a pecuniary fine of up to SKK 10,000, or action striking the attorney’s name from the list of attorneys for up to five years (Section 71, paragraph 2, of Advocacy 311/2001 Coll.).

The attorney may challenge the disciplinary panel’s decision to issue a written reprimand or impose a pecuniary fine on him by lodging an appeal with the Board of the Slovak Bar Association. The attorney may challenge the decision to be struck from the list of attorneys through an appeal lodged with and decided by the Supreme Court of the Slovak Republic.

Besides the outcome of the examination of complaints lodged with the Bar Association and the results of their processing, irrespective of the type of proceedings and of whether the attorney was appointed by the state or chosen by the client, no other
data are collected or evaluated with a view to monitoring the quality of legal aid provided by state-appointed attorneys.

In 1998, the Bar Association registered 106 complaints; there were 135 in 1999, 123 in 2000, 128 in 2001, and 49 complaints by 30 August 2002. The most frequent complaints alleged inactivity of attorneys, their unethical conduct, or failure to return documents to clients after the termination of proceedings. Only a small portion of complaints were found to be justified (approximately 7 percent). However, a large number of complaints pending from the previous years are yet to be processed (interview with the deputy president of the Slovak Bar Association, Bratislava, 5 September 2002).

3. CIVIL LAW: EFFECTIVE ACCESS TO THE JUDICIAL SYSTEM FOR THE INDIGENT IN CIVIL CASES

3.1 NORMATIVE BASIS OF THE RIGHT TO ACCESS TO COURTS IN CIVIL CASES

Constitutional guarantees of access to courts and the right to legal aid in judicial proceedings are provided for, as in criminal proceedings, by Article 46, paragraph 1, and Article 47, paragraph 2, of the Constitution. The interpretation of these portions of the Constitution given in section 2.1.1 also is in full agreement with constitutional guarantees in civil proceedings.

The law that governs the provision of free or reduced-fee legal aid in civil proceedings is Act No. 99/1963 Coll. of the Code of Civil Procedure. The Code directs the conduct of courts in hearing disputes in the areas of civil, commercial, labor, or family law. General protection guarantees of the rights of parties to the proceedings is given in Section 5 of the Code of Civil Procedure. Section 5 states that the courts have a duty to advise the parties when such parties are not represented in the proceedings by an attorney or a commercial lawyer. However, the court only has the duty to advise the parties of their procedural rights and obligations.

The key rule guaranteeing free legal aid is laid down in Section 30 of the Code of Civil Procedure as follows:

A. The party who meets the criteria for exemption by the court from the payment of court fees may be appointed, upon request, a representative where this is necessary to protect his interests.

B. Whenever the interests of the party must be protected, he shall be appointed a representative from among attorneys by the presiding judge in cases referred to in paragraph 1.

If the state appoints an attorney to represent the party, it pays the attorneys’ fees and expenses; where appropriate, the court may grant the attorney an adequate advance (Section 140, paragraph 2, of the Code of Civil Procedure).

Section 138 of the Code of Civil Procedure defines the conditions for eligibili-
ty for exemption from the payment of court fees as follows:

A. On a motion filed by a party, the presiding judge may exempt a party from all or part of court fees if the situation of the party warrants it and if the motion does not constitute an arbitrary or manifestly unsuccessful attempt at exercising or defending one's right. Unless the presiding judge decides otherwise, exemption is granted in respect of the entire proceedings with a retroactive effect; however, the fees that had been paid prior to the decision on exemption will not be reimbursed.

B. At any time during the proceedings, the presiding judge may withdraw the exemption even with retroactive effect if it becomes apparent prior to the termination of the proceedings that the exemption is not or was not justified by the personal situation of the party.

C. Where the party exempted from the payment of court fees has been appointed a representative, exemption shall also apply to the representative’s expenses and representation fee.

The key rule governing civil proceedings is that the court will award the costs of the proceedings, incurred in defending or exercising a right (including the fee for representation by an attorney or a commercial lawyer), to the prevailing party.

This rule may be interpreted as the legally enshrined right of the prevailing party to be reimbursed for the costs of the proceedings, including legal representation costs. At the same time, the losing party runs the risk of being held liable by the court for reimbursement of the defendant's costs.

However, the Code of Civil Procedure modifies the principle of awarding the costs of the proceedings based on winning or losing a case, in the light of specific circumstances. One of these modifications is described in Section 150 of the Code of Civil Procedure: “If there are reasons worthy of special consideration, the court may exceptionally decide not to award the costs of the proceedings in whole or in part. When assessing the circumstances worthy of special consideration, the court shall consider personal, property, income, and other situation of all parties to the proceedings, and take account of the circumstances that prompted the parties to seek satisfaction of their right in court, as well as their conduct during the proceedings.”

Eligibility for free legal aid, provided for in Advocacy Act No. 132/1990 Coll. and described in section 2.1.2, also fully applies to all other fields of law. Rules governing the provision of free legal aid also are provided for in Act No. 129/1991 Coll. on Commercial Lawyers. In addition, although the act does not explicitly rule out the provision of free or reduced-fee legal aid, including legal services of a commercial lawyer, it sets no rules for it either.
3.2 Civil cases for which legal representation is mandatory

The Code of Civil Procedure provides for mandatory representation by attorneys or commercial lawyers in civil proceedings only in connection with the use of extraordinary legal remedies, complaints on points of law, and in matters involving the review of administrative decisions. Appeals on points of law may be lodged against final court decisions in cases explicitly set out by law, especially in cases of a serious breach of law. The person lodging an appeal on points of law must be represented before the court by an attorney or a commercial lawyer, unless the appellant or an employee (member) acting on his or her behalf has a legal background.26

In cases set out in the act, the court shall appoint a guardian ad litem to some parties in the proceedings; the latter, however, is not required to have a legal background (e.g., in certain cases involving minors, proceedings on divesting a person of legal capacity, cases where the whereabouts of a party are unknown, cases of unsuccessful service to a known address abroad, or cases involving a party suffering from mental illness or incapable of expressing himself or herself in an intelligible manner).

3.3 Eligibility criteria for granting legal aid in civil cases

3.3.1 Substantive criteria

As it follows from the previous chapter, the key criterion for providing free legal aid is linked to the decision as to whether there are grounds for granting exemption from the payment of court fees. According to a rule set out in Section 138, paragraph 1, of the Code of Civil Procedure, the court may grant a party to the proceedings an exemption from the payment of court fees, in whole or in part, “where justified by the personal situation of the party and where it does not constitute an arbitrary or manifestly unsuccessful attempt at exercising or defending one’s right.” At any time during the proceedings, the presiding judge may withdraw exemption even with retroactive effect if it becomes apparent prior to the termination of proceedings that exemption is not or was not justified by the personal situation of the party. Where the party exempted from the payment of court fees has been appointed a representative, exemption shall also apply to the representative’s expenses and representation fees.

According to Section 30, paragraph 2, of the Code of Civil Procedure, the court will appoint a representative from among attorneys “where this is necessary to protect the interests of the party.” Thus, basic criteria for appointing a representative from among attorneys will be:
• the situation of the party to the proceedings (especially the social and financial situation),
• the fact that it does not represent a manifestly unsuccessful exercise or defense of a right,
• objective need for better protection of the interests of the party by the attorney in view of the nature of the case and his overall situation,
• application by the party for appointment of a representative.

Based on these criteria, the court will decide whether it will appoint a representative for the party and whether this representative should be an attorney. The decisive circumstances that will be considered to determine eligibility for the exemption from the payment of court fees under Section 138 of the Code of Civil Procedure will be, in particular, the property and social situation of the applicant, as well as the amount of the compensation and nature of the claim.27

When deciding on the appointment of a representative, the court does not deem as relevant whether the party has been granted statutory exemption from the payment of court fees (Section 4 of Act No. 71/1992 Coll. on Court Fees).28 (See also section 3.7.)

3.3.2 Financial

When filing an application for exemption from the payment of court fees, which is also relevant for eligibility to be appointed a legal representative, the party must prove that in view of the applicant’s property or income situation, he or she cannot afford to pay the costs of the proceedings in court. The courts do not follow a uniform practice when requesting proof of the above situation. Certain courts base their decisions on individual facts stated by the party, evaluating the relevance of individual proofs of a party’s financial situation (size of income, pension, etc.). Other courts ask the parties to fill out preprinted forms created by these courts. Based on the data supplied in each form and supported by documents of proof issued by the competent authorities, the court decides whether it will appoint a legal representative.

The forms contain such items as net monthly income in the last six months confirmed by the employer, amount of pension, amount of unemployment benefit, amount of social benefits, etc. Supplied data must be confirmed by relevant competent bodies administering the payment of individual sums. The form also requests this type of data concerning the spouse or common law spouse of the party, ownership of real estate, number and status of children living in the same household with the party and, where applicable, data concerning the children for whom the applicant pays child support, and the amount of support payments. The form is submitted to the court in the form of a sworn affidavit.

Section 140, paragraph 2, of the Code of Civil Procedure provides that expenses and representation fee of an appointed
attorney are paid by the state. Thus, the outcome of the proceedings does not influence the scope of the provision of free legal aid.

3.3.3 Other eligibility questions

Article 46, paragraph 1, and Article 47, paragraph 2, of the Constitution guarantee legal aid to “every person.” The Slovak laws do not specifically regulate access to free legal aid on account of nationality, belonging to an ethnic group, physical disability, etc. However, general conditions of eligibility for the appointment of an attorney also take into account specific circumstances of parties, such as an unfavorable economic and social situation, women in adverse life situations, etc. As stated above, key criteria applied to granting an exemption from the payment of court fees or appointing an attorney include the party’s specific situation and need to have an attorney to protect his or her rights (e.g., the complexity of the case). However, the law does not explicitly set out the situations in which the state is obliged to appoint an attorney to a party or to pay an attorney’s fees and expenses. The appointment of an attorney is subject to application by the party concerned, as well as a decision by the court to appoint an attorney. Thus, to make this decision, the court must first receive an application from the party, accompanied by certified proofs of adverse circumstances.

Act No. 97/1963 on Private International Law and the Law of Procedure provides that, subject to reciprocal arrangements, aliens are exempt from the payment of court fees and advances, and are to be appointed a free representative to protect their interests (Section 50). This provision has not been harmonized with the wording of constitutional articles, and we have no knowledge of any concrete cases where it has actually been applied. Similarly, in no case has an alien requested the appointment of a free attorney in civil proceedings. Under the Code of Civil Procedure, all parties to the proceedings are guaranteed the right to use their mother tongue in judicial proceedings (Section 18 of the Code of Civil Procedure). Costs incurred for translation services are borne by the state.

Act No. 195/1998 stipulates that, in matters involving social and legal protection of minors, district authorities may draw up proposals and petitions concerning child support and custody of minor children (Section 13, paragraph 4, letter h). In this manner, they partly provide advice and assistance to minor children and their parents experiencing problems with collection and enforcement of child support payments.

Social Assistance Act No. 195/1998 Coll. was also the basis for establishing a state administration authority—the Center for International Legal Protection of Children and Youth—whose tasks include providing free legal aid and advice, especially in connection with enforcement of child support payments payable from a foreign country. In addition to those cases, they
include advice concerning international adoptions and international abductions of children.

3.4 Procedure for Granting Legal Aid

It follows, from the aforesaid conditions of eligibility for appointment of an attorney in civil proceedings, that a party may be assigned an attorney when he or she is also eligible for an exemption from the payment of court fees. The decision to appoint an attorney is made by a court that is competent to hear and decide the case on its merits. A party may file an application to be appointed an attorney together with an application for exemption from the payment of court fees, or at any time during the proceedings, until the case is finally decided. The application may be filed with the court in writing, orally on record, electronically with verified electronic signature, or by telegraph or telefax.

The party requesting the appointment of an attorney without submitting a justification of the grounds for such appointment will be mailed or supplied a form by the court, or will be requested to submit documentation on his or her financial circumstances (see section 3.3.2). On this basis, the court will determine whether the application for the appointment of an attorney is substantiated.

The judge normally appoints the attorney from a list of attorneys who practice law within the jurisdiction of the competent court. However, a party may also request to be appointed a specific attorney with reference to a previous agreement between the party and the attorney. The court decides to appoint an attorney or dismiss the application by issuing a resolution. The court will serve the resolution on parties to the proceedings; parties may challenge the resolution within a fifteen-day time limit. Parties are advised, in the written copy of the resolution, of the possibility to file an appeal. The appeal is lodged with the court that heard and decided the matter in the first instance. When the first-instance court grants the appeal in its entirety, it may change the resolution (Section 210a of the Code of Civil Procedure); otherwise, it will refer the appeal to an appellate court.

If a party that did not have legal standing (e.g., parties with restricted legal capacity, those who have been deprived of legal capacity, or minor children) was not properly represented, this constitutes grounds for filing an extraordinary legal remedy appeal on points of law. However, “proper representation” does not necessarily require the appointment of an attorney for legal representation.

3.5 Scope of Legal Aid

Once appointed by the court, the attorney will be assigned to the case for the duration of the proceedings, until a decision on the merits becomes final. Attorney’s fees and expenses are paid by the state. Where justified, the law allows the court to grant the
attorney an advance on his or her fees for legal representation. The state thus guarantees that the appointed attorney will be paid a fee for all the steps performed in the framework of legal aid, and will be reimbursed for all relevant representation costs. The amount of financial compensation to attorneys is limited by the attorney fee schedule and reimbursement scale set out in Decree No. 163/2002 Coll. on Fees and Reimbursement of Attorneys Providing Legal Services (see section 2.5).

In enforcement proceedings conducted under the Code of Civil Procedure (“judicial enforcement of a decision”), the law grants parties to the proceedings the right to request the appointment of an attorney under the same conditions as in other types of proceedings conducted under the Code of Civil Procedure. In practice, however, parties (obligors) almost never use this right. The Code of Civil Procedure (Section 251) provides also for the enforcement of decisions by “private” state-licensed executors, whose activities are governed by Act No. 233/1995 Coll. on Court Executors and Execution Activities. This type of decision-making is used much more extensively than enforcement of decisions through courts. In case of decisions made by private executors, the party against whom enforcement is sought has no right to apply to the court for appointment of an attorney.

In civil proceedings, the state also reimburses the court for the following costs: costs incurred in connection with the taking of evidence proposed by a party who was granted exemption from the payment of court fees; expenses of a non-attorney appointed representative; reimbursement of travel costs and lost earnings of summoned witnesses; and costs connected with the use of the party's mother tongue in court. Depending on the outcome of the proceedings, the court may order the losing party to pay all the costs of proceedings, including those that were paid by the state. However, the court may not order that the costs of proceedings paid by the state be reimbursed by a party that was exempted from the payment of court fees.

3.6 QUALITY OF FREE LEGAL REPRESENTATION

No special mechanism, independent of parties to the proceedings or the court that appointed the attorney, exists in civil proceedings to ensure quality control of legal aid. In this respect, we refer to the description given in section 2.7.

3.7 APPLICATION OF THE RIGHT TO LEGAL AID IN PRACTICE

No statistical surveys, or other types of monitoring, are made in the Slovak Republic concerning civil matters in which appointed attorneys provided legal aid. As a result, it is impossible to evaluate the annual number of persons granted free legal representation or legal advice. However, in general, attorneys are appointed by
courts in civil cases to a much lesser extent than in criminal proceedings. In practice, applications for the appointment of an attorney in civil proceedings are quite rare.

The total number of applications for the appointment of an attorney, filed in recent years with the Bar Association, was as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of applications</th>
<th>Attorney appointed</th>
</tr>
</thead>
<tbody>
<tr>
<td>1999</td>
<td>26</td>
<td>9</td>
</tr>
<tr>
<td>2000</td>
<td>35</td>
<td>3</td>
</tr>
<tr>
<td>2001</td>
<td>37</td>
<td>4</td>
</tr>
<tr>
<td>2002 (as of 5 Sept.)</td>
<td>28</td>
<td>5</td>
</tr>
</tbody>
</table>

*Source: Slovak Bar Association, 5 September 2002*

However, the above data comprise applications in both civil and criminal proceedings, and as stated in section 2.1.2, attorneys appointed by the Bar Association have discretion to decide whether and to what extent they will provide free legal aid. Thus, no data are available on whether free legal aid was granted in all the above cases. No aggregate data is available on the number of cases where free legal aid was provided by attorneys on an individual basis or by non-governmental organizations.

On the initiative of the Ministry of Justice, and based on the agreement it concluded with the Bar Association in August 1999, free legal aid started to be provided in the form of legal advice in civil, family, and labor law. Based on the agreement, free advice is provided by attorneys mostly in the seats of regional courts. The only exception is the capital city, where free legal advice is provided by an official of the Ministry of Justice. Under the agreement between the Ministry of Justice and the Faculty of Law of Comenius University, starting in 2000, law students have been taking part in the provision of legal aid under the guidance of a Justice Ministry official.

This type of legal advice is intended for socially disadvantaged persons. Data from the Ministry of Justice were gathered and analyzed for the period of time between June 1999 and June 2002. The data revealed that this type of legal aid service was used in Bratislava by 5,206 persons. It was provided three times a week at Košice and once a week in the seats of other regional courts. The number of persons who used free legal advice outside Bratislava between September 1999 and June 2002 was 14,120. However, there is no mechanism to evaluate the social situation of applicants who
apply for legal advice. It may be possible that this service also was and is used by people who do not really have to rely on it. Moreover, legal aid often fails to meet its purpose, because attorneys who provide it are not authorized to draw up complaints, letters to the courts, or other similar submissions.

3.8 Other barriers to the effective access to courts in civil cases

Court fees are set out in Act No. 71/1992 Coll. on Court Fees. As a rule, their amount is determined as a function of the value of the cause of action (5 percent of the value of the cause of action, but not more than SKK 200,000). If no value can be determined for the cause of action, the fee amounts to SKK 1,000. Other types of fees are set out in the act in relation to the type of the proceedings; they range, on average, between SKK 200 and SKK 5,000. For some parties, the amount of court fees fixed in relation to the value of the cause of action and type of litigation may, considering average wages of the population, represent a significant financial burden. However, the Code of Civil Procedure grants the court the right to exempt a party, upon request, from the payment of court fees. Eligibility for and the granting of an exemption were discussed in sections 3.1 and 3.3.1. Act No. 71/1992 Coll. on Court Fees defines the types of proceedings and the parties entitled to statutory exemption from the payment of court fees.

Pursuant to Section 4, paragraph 1, of Act No. 71/1992 Coll., exemption from court fees is granted in the proceedings concerning:

- guardianship, custody of minor children, adoption, or capacity to marry;
- legal capacity;
- compensation for damage caused by a decision of a state authority or its wrongful procedure;
- health insurance, social insurance including sickness insurance, pension insurance, state social benefits, social assistance and unemployment insurance, active labor market policy and guarantee fund, and provision of health care;
- execution of decisions concerning enforcement of claims related to court and notary’s fees, pecuniary sentences, fines, and costs of the proceedings enforced by the state;
- fulfillment of obligations under collective agreements;
- correction of errors and elimination of defects from voters’ lists;
- mutual maintenance obligation of parents and children;
- declaration on the admissibility of placing or keeping a person in a health care institution.
Depending on the type of claimant, Section 4, paragraph 2, of Act No. 71/1992 Coll. grants exemption from the payment of court fees to the following parties:

- claimants in disputes concerning damage compensations for industrial accidents or occupational disease, actions seeking annulment of dismissal from work, or actions concerning invalid termination of employment;
- claimants in disputes concerning maintenance and support allowance;
- unwed mothers in disputes concerning maintenance and support allowance and compensation for certain costs connected with pregnancy and childbirth;
- minor children in disputes concerning determination or denial of paternity;
- claimants in disputes concerning compensation for damage, including damage to things caused in connection with bodily harm;
- claimants in disputes concerning obligated party's debts;
- soldiers doing compulsory conscript service, alternative service, or skills development service, members of the Police Force, members of the Corps of Prison and Court Guard of the Slovak Republic or customs officers in actions concerning review of decisions made by relevant authorities under special regulations, and conscripts in disputes concerning registration of persons liable for civilian service;
- creditors and debtors in bankruptcy proceedings;
- aliens in asylum proceedings.

"Exemption under paragraphs 1 and 2 shall also apply to the proceedings on appeals, appeals on points of law, motions for retrial, and enforcement of decisions."

As regards the number and accessibility of courts, the Slovak Republic can be seen as a country with a relatively large number of readily accessible courts. Because of the unfavorable financial situation in the Justice Ministry's sector, political discussions are heading toward a reduction in the number of district courts; this, however, should not have a substantial impact on access to court by inhabitants.

Access to attorneys, in terms of geographical distribution of their offices, can also be considered adequate. Attorneys can be found in every district seat (as of 15 September 2002, the Slovak Republic is divided into seventy-nine districts); compared with the number of inhabitants, their number in larger cities is several times higher than in villages and smaller towns. The number of attorneys in Slovakia as of 15 September 2002 was 1,887.

Under the Code of Civil Procedure, actions can be filed with courts orally, on record or in writing, or electronically with a verified electronic signature, by telegram, or by telefax. Moreover, Section 42, paragraph 2, of the Code of Civil Procedure stipulates that every district court must draw up a record on actions filed, even if the case does not fall under its jurisdiction.
In the next step, the court must refer the action without delay to the competent court. The action has the same effects as if it were submitted to the competent court.

Apart from compensation of travel costs of experts and witnesses in connection with participation in oral hearings, parties to the proceedings may not be reimbursed for their travel costs under the law.

Practical experience shows that, as a result of a shortage of funds in court budgets, some courts may tend to economize on the taking of proposed evidence (such as expert opinions) to avoid higher costs. (Where the party is eligible for exemption from the payment of court fees, the court covers such costs from its own budget.) Neither the law nor the practice of courts or other state authorities involved in civil proceedings lay down any specific rules governing access to courts by the groups of potential parties who experience difficult life situations or are otherwise disadvantaged.

Until recently, the training system for judges and judicial candidates was under full control of the Ministry of Justice. In the last four years, the Ministry partially granted non-state entities some control of the curricula of continued training for judges and judicial candidates. These entities thus got a chance to raise such problems as discrimination, minorities, refugees, or domestic violence in the framework of training organized by the Ministry. However, these sporadic events reached only a small number of judges and judicial candidates.

A similar situation also exists in relation to other groups of legal practitioners, especially attorneys. Training activities that focus on specific issues and problems of individual smaller or disadvantaged groups are offered almost exclusively through non-governmental organizations financed from private sources. It is therefore not possible to affirm that the training organized by the state or professional organizations of lawyers includes a permanent system of sensitizing legal practitioners across the board to specific groups of the population that need legal services.

3.9 Alternative dispute resolution (ADR) and similar schemes

At this time, there is no legal basis in the Slovak legal system to regulate alternative dispute resolution (ADR), although the laws do not rule out the use of ADR, and Section 99 of the Code of Civil Procedure, paragraph 1, even instructs judges to attempt dispute settlement through conciliation. In practice, mediation services are actively provided only by one private agency. An agreement reached through mediation has the form of a binding agreement between parties to the dispute.

Official introduction of the institution of alternative dispute resolution is pursued by the project on “Access to Justice—Mediation,” carried out since 2002 by the Ministry of Justice of the Slovak Republic. The British government provides funding for the project, and the project is run in coop-
eration with a British non-governmental organization dealing with alternative dispute resolution. Its aim is to prepare the legislative environment for the proposal of alternative dispute resolution remedies, which should exist in parallel to judicial dispute resolution remedies, and to give the outcome of ADR the same weight as the decisions of courts in civil proceedings. It has not been decided yet whether the legislation governing this institution will have the form of a separate piece of legislation, or of an amendment to existing legal norms (interview with the project coordinator, director of the department of foreign relations and human rights at the Ministry of Justice of the Slovak Republic, Bratislava, 2 September 2002).

4. **Public Law: Effective Access to the Judicial System for the Indigent in Administrative and Constitutional Cases and Cases Before International Tribunals**

4.1 **Normative Bases**

The constitutional basis for access to court and legal aid in both criminal and civil law, as well as in other legal fields, is provided by Article 46, paragraph 1, and Article 47, paragraph 2, of the Constitution. For this reason, we refer again to the description given in section 2.1.1.

In the administrative justice system, conditions for access to free legal aid are identical with those in civil proceedings (see sections 3.1 and 3.2). Apart from certain specific rules, court procedures in the administrative justice system are governed by the Code of Civil Procedure adhered to by courts in civil proceedings.

Access to the Constitutional Court for individuals is guaranteed in cases where their constitutional rights have been affected. Section 20, paragraph 2, of Act No. 38/1993 Coll. on the Organization of the Constitutional Court of the Slovak Republic, Proceedings before the Court and the Status of Its Judges, states that parties must be represented in the proceedings before the Constitutional Court by an attorney or a commercial lawyer. Besides constitutional articles, access to the Constitutional Court through free legal representation is also provided for in Section 31a, paragraph 2, of Act No. 38/1993 Coll. on the Organization of the Constitutional Court of the Slovak Republic, Proceedings before the Court and the Status of Its Judges. This provision refers, as appropriate, to the provisions of the Code of Civil Procedure and of the Code of Criminal Procedure in the proceedings before the Constitutional Court, save where they are not applicable because of the nature of the case. It is apparent from the case law of the Constitutional Court that in deciding whether to appoint an attorney, the Court takes account of situations where the “applicant does not have sufficient means to compensate expenses of his representative and representation fee,” and of “personal and property circumstances of the applicant.”
The European Court of Human Rights in Strasbourg is the international tribunal to which the citizens of the Slovak Republic complaining of the violation of their fundamental rights and freedoms turn to most often. Pursuant to Article 34 of the European Convention, 30 “The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”

Effective exercise of the rights of applicants before the Court through qualified legal representation is provided for in more detail in the Rules of Court (Rules 36, 91, 92, 93). National legislation of the Slovak Republic does not contain any specific provisions concerning legal aid in the proceedings before international institutions.

4.2 Eligibility criteria

The existing system of administrative justice in the Slovak Republic has the task of reviewing the lawfulness of the decisions and procedures of public administration authorities. This task is conducted either by reviewing the lawfulness of final decisions or, where applicable, through deciding on legal remedies in cases filed to challenge the non-final decisions of administrative bodies. Regarding such administrative proceedings, legislation in the administrative law area does not provide for, and consequently does not allow, free legal aid.

The crucial difference between access to court in administrative proceedings compared with civil proceedings is mandatory representation by attorney or commercial lawyer in cases that involve the review of final decisions of, or procedures before, public administration authorities. Section 250a Code of Civil Procedure provides that “The claimant shall be represented by an attorney or a commercial lawyer, unless he or his employee (member) acting on his behalf before the court have a legal background; this shall not apply to matters where the district court has substantive jurisdiction, matters involving a review of the decisions concerning sickness insurance or pension insurance, or matters involving asylum applications.” In practice, the obligation of mandatory representation applies to most cases.

We stated in the previous section that, as regards to both the law and practice of the Constitutional Court, the key criterion for appointing attorneys in the proceedings before the Constitutional Court is the personal, income, or property situation of the party. In the reasoning to its Ruling I. ÚS 61/2000, the Court holds: “The Constitutional Court carefully examines each application requesting the appointment of an attorney for free representation in the proceedings before the Court; if it establishes that personal and property circumstances of the applicant justify appointment of an attorney to represent the applicant in the
proceedings on a complaint against the breach of a fundamental right admitted for further proceedings, it usually grants such application.” 31

4.3 Procedure for Appointment

There is no substantive or procedural difference between the rules governing the appointment of an attorney providing free legal representation in the system of administrative justice and in civil proceedings. Consequently, we refer again to the rules of civil proceedings described in section 3.4.

In the recent practice of the Constitutional Court, if the applicant’s petition does not include a power of attorney for representation before that court by an attorney or a commercial lawyer, the court then instructs the applicant in writing to submit the relevant power of attorney within a specified period. Upon request, the Constitutional Court may grant an extension of this period. At the same time, this court advises the applicant that the petition may be dismissed unless he or she submits the power of attorney for the purposes of representation. The Constitutional Court decides on the appointment of an attorney, to represent the applicant in the proceedings before the court, only upon a request from the applicant. The applicant must submit and document the grounds for the request for free legal representation. No special forms are used for filing and documenting the request. The Constitutional Court does not apply a fixed threshold to the applicant’s income, but takes account of his or her general personal and property circumstances.

Based on the application, the court may decide to appoint an attorney paid by the state. The attorney is appointed for the duration of the proceedings before the Constitutional Court. The attorney’s expenses and fees are paid by the state according to the rules set out in Decree No. 163/2002 Coll. on Fees and Reimbursement of Attorneys Providing Legal Services. In addition to the appointment of an attorney at the discretion of the Constitutional Court, the applicant may ask that court to appoint a specific attorney, subject to a previous agreement with the attorney.

No appeal may be filed following the dismissal of an application for the appointment of an attorney to represent the applicant before the Constitutional Court. There is no national legal remedy to challenge the decisions of the Constitutional Court of the Slovak Republic. In specific cases, on which the limited scope of this paper prohibits elaboration, complaints alleging violation of specific articles of the European Convention (in particular, Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms) may be lodged with the European Court of Human Rights.

In proceedings on applications lodged with the European Court of Human Rights, the appointment of an attorney is provided for in the Rules of Procedure of the Court. The European Court of Human Rights does not appoint a specific attorney
to represent the applicant. To this end, applicants retain domestic attorneys of their own choosing.

4.4 A LTERNATIVE (N ON-STATE) M ECHANISMS

Several non-governmental organizations (NGOs) are active in the Slovak Republic in the area of legal advice or legal aid specializing, to a varying extent, in individual fields of law. While most of them provide mainly legal consultations, some mediate legal representation through cooperation with concrete attorneys. Only a very few of the existing NGOs offer, in case of need, complete legal service, including legal representation before the courts. Most NGOs providing legal aid are based in Bratislava but also provide services to people who live outside the capital. There also are certain organizations that operate in the regions of central and eastern Slovakia.

Legal services provided by NGOs focus mostly on specific fields of legal advice or representation. These include, in particular, advice in the areas of social law, help to victims of domestic violence, assistance to victims of crime, protection of the rights of children, representation of the victims of racially motivated offenses, representation of refugees, legal services to the Roma population, assistance for people with disabilities, help to foster families, and advice related to human rights violations. It is, however, not possible to give an exhaustive account of all activities of non-governmental organizations, since there is no central database of all organizations and activities in this field.32

Legal clinics, set up within Slovak law faculties with the aim of providing legal advice and representation, are gradually launching their activities with the support of the Open Society Foundation in Bratislava. Last year, clinics of refugee law started to operate within the Trnava and Košice faculties of law, and a clinic offering legal aid to NGOs was opened in Bratislava. There are plans to open another clinic for NGOs, a refugee law clinic at Košice, and a domestic violence clinic at Trnava in the next academic year, 2003–2004 (interview with the coordinator of legal programs of the Open Society Foundation, Bratislava, 2 September 2002).

4.5 I MPLEMENTATION

Courts do not keep records of the number of attorneys appointed in administrative proceedings. In practice, applications for the appointment of an attorney in administrative justice are very rare. Questions also could be raised in connection with the practice of judges in cases where, although the law prescribes mandatory representation, no attorney provides legal representation. Some judges consider provisions concerning mandatory representation by attorney to be a precondition for commencing the proceedings on merits, and they dismiss actions that are not accompanied by power of attorney (interview with the president of
the Regional Court at Banská Bystrica, Banská Bystrica, 2 September 2002).

It is not possible to say whether this practice is widespread; we assume that, in most cases, the court would invite the party to submit a power of attorney. In general, applications for the appointment of an attorney in civil and administrative proceedings are filed only exceptionally. Available data from the Constitutional Court show that from its establishment (17 March 1993) until September 2002, the Constitutional Court appointed attorneys for free representation in only twenty-seven cases.

5. Organization of the System for Provision of Legal Aid

5.1 Special State Body Authorized to Administer the Legal Aid System

The Slovak Republic has no special entity or organizational unit to administer the provision of free or reduced-fee legal aid. The law vests substantial powers in this area in the courts of general jurisdiction. In civil and especially criminal proceedings, these courts decide on the appointment of an attorney (ex officio, or attorneys appointed upon application) on the basis of criteria defined by law—Criminal and Civil Procedure Codes. In the proceedings before the Constitutional Court, that court performs these tasks.

5.2 Role of the Bar Association in the Administration of the Legal Aid System

The tasks and status of the Bar Association in the system of legal aid, and the rights and obligations of attorneys providing free legal aid, were discussed in sections 2.1.2 and 2.7. The Bar Association may help clients who are denied legal aid, but it does not have the right to decide on free legal representation. The Bar Association does not have a system whereby it could regularly evaluate the effectiveness of legal aid, either in general or as provided by specific attorneys doing pro bono representation. Under the existing legal system, there are practically no concrete data on the provision of free legal aid by attorneys.

On 13 September 2000, the Board of the Slovak Bar Association decided to carry out an analysis of the existing legislation governing free legal aid, including considerations of de lege ferenda. The analysis shows that the existing legislation does not give adequate guarantees for the provision of legal aid to people who do not have sufficient financial means, although this right is protected by the Constitution. It led to the development of a concept that foresees the provision of free legal aid through a special body that would administer state budget funds allocated for free legal aid and, at the same time, decide on eligibility to free legal aid on the basis of precisely formulated criteria. An alternative concept provides for vesting the administration of financial funds, and decisions on the
appointment of an attorney, in local government. The Bar Association has submitted the concept to the Ministry of Justice. However, it has not been yet addressed in any concrete discussions or legislative proposals.

5.3 Role of the Courts

The power to decide on the appointment of an attorney for representation in judicial proceedings in the system of legal aid has been vested in courts. The appointment of an attorney is decided on by the court or a panel of judges competent to hear and decide the case on its merits.

Under the law, courts reimburse attorneys for their costs out of their own budgets. However, courts of general jurisdiction do not decide on the size of their budget or on the share of funds allocated for legal aid. Budgets of individual courts are part of the budgetary chapter of the Ministry of Justice, which allocates budgetary funds to the courts in all of Slovakia.

5.4 Role of the Prosecution and the Police (If Any)

In the area of legal aid, police and prosecution authorities are bodies that have primary responsibility for enabling the exercise of the right to legal aid in criminal proceedings and in proceedings on administrative infractions (misdemeanors). The role of the prosecution includes overseeing the lawfulness of criminal proceedings and proceedings before other public administration authorities, as well as bringing irregularities to the attention of competent bodies. Tasks connected with providing legal aid are fulfilled by investigators or, exceptionally, prosecutors who file motions with courts requesting the appointment of an attorney in cases where the law prescribes a mandatory defense if the defendant does not have an attorney of his or her own choosing. However, as regards the provision of free legal aid, prosecutors have practically no power.

5.5 State Models of Organization of the Provision of Legal Aid

Several models of the provision of legal aid may be identified in the Slovak Republic; they exist in parallel, and some of them have objectives other than providing legal aid. Ex officio private lawyers are appointed in criminal proceedings if the defendant does not have counsel of his or her own choosing and the law provides for a mandatory defense through an attorney (see section 2.2.1). As stated in previous sections, the appointment of an attorney is a relatively problem-free process, thanks to well-defined and rigorous substantive and procedural provisions governing this process. It should be remembered, however, that appointment of counsel does not automatically imply that the defendant will be granted free legal representation in crimi-
nal proceedings. After final conviction of a defendant, the first-instance court decides on his or her eligibility to free legal representation—but not before the sentencing judgment becomes final.

The quality of counsel’s performance is not subject to any monitoring or evaluation. As a result of this lack of monitoring or evaluation, possible shortcomings and breaches of law by appointed counsel become known only if the defendant brings the conduct of the attorney to the attention of the court that is competent to take relevant measures. Defendants may also bring the fact of this conduct to the attention of the Bar Association; however, the Bar Association takes a long time to process complaints and does not have the power to change appointment of counsel.

Other forms of free legal representation include the appointment of an attorney, whose expenses are paid by the state, in civil proceedings, in decision-making on administrative complaints, and in proceedings before the Constitutional Court (see sections 3.4 and 4.3). We believe that, from the procedural point of view, this form is ineffective in terms of both procedure and public information. Parties may apply to be appointed attorneys either after or simultaneously with bringing an action before the court. Thus, there is no effective legal aid in situations where, at the initial stage, the party has no other choice but to turn to the court without having a lawyer. As result of this procedural arrangement, especially in proceedings before the Constitutional Court, petitions are often dismissed on account of non-fulfillment of statutory requirements, even before the Constitutional Court has started to examine the grounds for appointment of an attorney given in the application.33

Only a very limited number of parties to civil and administrative proceedings make use of the option to apply for the appointment of a lawyer; this is due, among other things, to the lack of information.

Both models are financed by the state. The issue of overseeing the quality of provided services was discussed in section 2.7.

Since the second half of 1999, legal aid has also been provided by eight legal aid centers operating in the cities that are the seats of regional courts (see section 3.7). They provide legal advice but do not draw up actions or provide representation before courts or administrative authorities. This model partly addresses the acute lack of accessibility of free legal advice. However, its scope is not sufficient (in most of the eight cities, it is limited to no more than four hours of legal counseling per week), and the lawyers’ community often criticizes this model because it lacks a mechanism to verify the social and financial situation of clients. It has been reported that a number of persons who do not lack financial need reportedly use the services of these centers. Attorneys provide pro bono legal counseling on a rotational basis.

University clinics for special disadvantaged groups of the population gradually started to emerge during the last academic year with the financial support of the Open Society Foundation in Bratislava (see section
4.4. Because of their short existence, it is not possible to assess overall effectiveness and results of work of these recently established legal clinics. The teachers supervising students or staff members of NGOs cooperating with the clinics are legal practitioners who specialize in the given area in their legal practice. This type of provision of legal aid has not yet become a generally accepted form of training at all law faculties, and without the involvement of and financial support from NGOs, its further development is not guaranteed.

Free legal counseling and legal representation also are provided, in parallel, by initiatives and programs of NGOs offering legal aid in cooperation with lawyers or attorneys who work directly in the NGOs, or through external cooperation with attorneys. These legal practitioners should guarantee the quality of provided services. A vast majority of NGOs in this area are supported by foreign donors. They do not receive any financial support from the state. Because this source of funding is gradually declining, NGO activities of this type can be expected to shrink further in the years to come. In fact, given the lack of state support and an underdeveloped domestic donor scene, smaller NGOs will not be able to sustain all of their programs.

Concrete monitoring and evaluation of legal aid is done by donors who provide the funding for individual programs. As a rule, this is done in the form of regular reporting on all project activities and results.

5.6 Evaluation and training

National bodies providing legal aid do not make any statistical evaluation or substantive assessment of the quality and effectiveness of access to legal aid by socially disadvantaged individuals. Besides various single initiatives (such as the establishment of legal aid centers in the seats of regional courts and the initiative of the Bar Association to change the system of the provision of free legal aid), no system of regular examination and assessment has been created in this area yet.

Issues related to changes in the system for providing legal aid and for sensitizing judges and attorneys to the problems and needs of disadvantaged groups were partly addressed in sections 3.7 and 5.2. The greatest contribution to this field is made through the activities of NGOs. These included, last year, interactive seminars on such issues as racism, discrimination, and domestic violence organized for junior judges and judicial candidates by the Ministry of Justice in cooperation with the Center for Environmental and Public Advocacy and the Citizen and Democracy Foundation.

The Center for Environmental and Public Advocacy, based in Ponická Huta, organized a series of seminars in 2001 and 2002 for judges from the central Slovakian region. The seminars were aimed at improving communication between the courts and citizens, and they focused on specific legal problems related to the protection of fundamental rights and freedom problems of
particular groups of the population (such as the victims of racially motivated attacks).

Annually, since 1996, the Bratislava-based Citizen and Democracy Foundation and the Center for Environmental and Public Advocacy have organized a “human rights school for students of law faculties in Slovakia.” At these human rights schools, under the supervision of lawyers from the aforementioned NGOs, students solve cases connected with human rights issues in the broadest meaning of the term. Future lawyers are thus made aware of the barriers in access to justice, and they get a chance to deal with cases that are not commercially appealing. Subsequent activities of the graduates of this program show that this is a very effective tool for motivating young lawyers.

In March 2002, the Budapest-based European Roma Rights Center organized, in cooperation with the Slovak Bar Association, a two-day seminar focusing on access to justice and protection of rights of the Roma. Considering the total number of attorneys practicing law in Slovakia, the number of those who showed interest in this topic was relatively low.

A joint seminar of the Council of Europe and V-4 countries was held on 11–12 December 2000 on providing free legal aid and on fostering equal and effective access to courts. However, neither the content nor the conclusions of the seminar were publicized.\textsuperscript{34}

6. Financial aspects of ensuring effective access to justice for the indigent

6.1 Determination of the legal aid budget

The budget allocated for reimbursing lawyers who provide legal services is part of the budgetary chapter of the Ministry of Justice, which redistributes budget funds down to individual regional and district courts. The budget allocated for reimbursing lawyers providing legal services is part of “operating expenses.” It is not broken down by types of proceedings. This means that neither the amount of funds nor the time these funds are drawn on is strictly defined, and they may be shifted from one category to another as needed. Because of the shortage of funds, including the funds for day-to-day operation of courts, funding designated for legal aid often is used, in case of need, to cover other inevitable operating costs. Thus, it is not unusual for the courts to default on payments to attorneys for legal services for several months (interview with the president of the Regional Court at Banská Bystrica, Banská Bystrica, 2 September 2002, and with the president of a Bratislava District Court, 4 September 2002, Bratislava).

Regarding developments in the area of drawing on funds, described in the next section, the budget that is allocated for payments to attorneys is usually equivalent to its amount in previous years, increased by a moderate amount to be used to repay the debts incurred in the preceding period.
6.2 **Budgetary Information**

Total expenditures from the state budgets in individual years in Slovak crowns (SKK) (1 euro is now 41.5 SKK):

<table>
<thead>
<tr>
<th>Year</th>
<th>Expenditure (SKK)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997</td>
<td>207,999,900,000</td>
</tr>
<tr>
<td>1998</td>
<td>184,800,000,000</td>
</tr>
<tr>
<td>1999</td>
<td>194,900,000,000</td>
</tr>
<tr>
<td>2000</td>
<td>201,808,761,000</td>
</tr>
<tr>
<td>2001</td>
<td>217,764,568,999</td>
</tr>
<tr>
<td>2002</td>
<td>257,919,182,000</td>
</tr>
</tbody>
</table>

Budgets of the Ministry of Justice allocated in previous years to the judiciary, denominated in Slovak crowns:

<table>
<thead>
<tr>
<th>Year</th>
<th>Expenditure (SKK)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997</td>
<td>1,640,536,000</td>
</tr>
<tr>
<td>1998</td>
<td>1,570,475,000</td>
</tr>
<tr>
<td>1999</td>
<td>1,590,713,000</td>
</tr>
<tr>
<td>2000</td>
<td>1,783,733,000</td>
</tr>
<tr>
<td>2001</td>
<td>2,091,424,000</td>
</tr>
<tr>
<td>2002</td>
<td>2,006,750,000</td>
</tr>
</tbody>
</table>

As stated in the previous section, since there are no strict rules regulating the drawing on funds allocated for legal aid provided by attorneys, the available aggregate data show only actual amounts drawn. Neither the budgeting nor the drawing on funds is broken down by type of proceedings. In fact, most payments were made to *ex officio* attorneys in criminal proceedings. In 2002, this budget item also included fees for notaries who perform the tasks of court commissioners. The data are in Slovak crowns. (see page 507)

6.3 **Number of Cases Supported by the State Budget for Legal Aid**

Apart from the above data, neither the Ministry of Justice nor the courts of general jurisdiction carry out statistical surveys regarding the number and type of cases in which attorneys received reimbursements from the state, or the amount of such reimbursements.

6.4 **Lawyers’ Fees**

Decree No. 163/2002 Coll. on Fees and Reimbursements of Attorneys Providing Legal Services stipulates that attorneys are entitled to a fee for individual steps performed in the framework of legal service. The steps include bringing the case to a conclusion or providing legal services of a certain scope or for a certain period of time (Section 4, paragraph 1). The decree further provides that attorney’s fees may be construed as a contractual fee (based on the number of hours, a flat-rate fee, or a share in the value of the case) or tariff fee defined on the basis of the decree (based on the value or type of the matter or of the right, and on the number of steps performed in the provision of legal service). The attorney may reduce the tariff fee set out in the decree by up to one-half, or increase it up to three times if the case is demanding in terms of time and expertise.
The attorney may agree with his or her client on the method of calculation and amount of the fee. However, such agreement cannot be contrary to good morals. Because of the lack of uniformity in the determination of attorneys’ fees, and the shortage or even absence of statistical data, it is very difficult to identify average fees charged by attorneys for individual steps of legal services.

Section 18 of Decree No. 163/2002 Coll. provides that, in addition to their fees, attorneys are entitled to be reimbursed for expenses they effectively and demonstrably incurred in connection with the provision of legal services. In particular, such expenses include court and other fees, travel and telecommunication expenses, costs of expert opinions, translations and copies, and compensation for lost time. The attorney may agree with the client on the type of expenses and their amount, or on a flat-rate reimbursement of certain expenses. The client may also be held liable for reimbursing the costs of telecommunications, in the amount equivalent to up to one hundredth of average monthly salary of employees in the Slovak economy. It is calculated on the basis of the average monthly salary of employees in the Slovak economy in the first semester of the preceding calendar year, reported by the Statistical Office of the Slovak Republic. Average monthly salary currently amounts to SKK 11,693.

When legal service is provided in a place situated outside an attorney’s registered office, the attorney is entitled to reimbursement for time lost traveling to that place and back. The reimbursement amounts to one-twenty-fourth part of the average monthly salary of employees in the Slovak economy per half hour of travel, even if not full (Section 20, paragraph 1).

The attorney may agree on a tariff fee with the client according to Decree No. 163/2002 Coll. At the same time, the tariff fee is used as the basis to determine payments to state-appointed attorneys in criminal and civil proceedings, in administrative justice, and in proceedings before the Constitutional Court. The court also uses the tariff fee as the basis for determining costs of the proceedings payable by the party that lost the case.

Certain forms of legal service were iden-
tified already in chapter 2.5. Individual steps performed in the framework of legal service, such as taking over the case, preparing representation in the case, making legal analysis, filing appeal or retrial motions, participation in the proceedings before the court, etc., are covered in their entirety. Payments for such steps, including participation in a hearing other than the hearing at which a ruling on the merits was issued, lodging an appeal regarding a decision not based on the merits, filing a motion to commence a decision enforcement proceeding, or other less demanding services, amount to one half of the tariff fee.

The basic rate of the tariff fee is determined according to the value of the cause of action or of the right, or according to the type of proceedings, and is paid for every step performed in providing legal service. If the value of the cause of action, or of the right, cannot be expressed in pecuniary terms, or cannot be established without inappropriate difficulties, the basic rate of the tariff fee payable per one step in the provision of legal service is one-tenth of the average monthly salary of employees in the Slovak economy.

Section 13 of Decree No. 163/2002 Coll. sets the basic rates of the tariff fee payable per one step performed in the provision of legal service according to the value of the case or of the right, as follows:

<table>
<thead>
<tr>
<th>Category</th>
<th>Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>up to SKK 5,000</td>
<td>SKK 500</td>
</tr>
<tr>
<td>SKK 5,000 to SKK 20,000</td>
<td>SKK 500</td>
</tr>
<tr>
<td>+5% of the amount exceeding SKK 5,000</td>
<td>SKK 1,250</td>
</tr>
<tr>
<td>SKK 20,000 to SKK 200,000</td>
<td>SKK 6,650</td>
</tr>
<tr>
<td>+3% of the amount exceeding SKK 20,000</td>
<td>SKK 14,650</td>
</tr>
<tr>
<td>SKK 200,000 over SKK 1,000,000</td>
<td></td>
</tr>
<tr>
<td>+1% of the amount exceeding SKK 1,000,000</td>
<td></td>
</tr>
<tr>
<td>+0.2% of the amount exceeding SKK 1,000,000</td>
<td></td>
</tr>
</tbody>
</table>

If the attorney represents an applicant before the Constitutional Court in a matter in which the cause of action cannot be expressed in pecuniary terms, the fee per one step (specific procedural act) is one-third of the average monthly salary of employees in the Slovak economy. The basic fee per one step performed in providing legal services in cases involving custody of minor children, adoption, foster care, legal capacity, guardianship, or declaring a person dead is one-twenty-fourth of the average monthly salary of employees in the Slovak economy.

The fee for conducting a defense in criminal proceedings or representing a client in misdemeanor proceedings is determined on the basis of a maximum sentence of imprisonment applicable to the criminal offense concerned. It ranges from one-fif-
teenth (maximum imprisonment of one year) to one-third of the average monthly salary of employees in the Slovak economy in cases of offenses punishable by not less than ten years of imprisonment.

Court-appointed attorneys are, in addition to a fee, entitled to be reimbursed for such expenses as travel costs, costs of legal opinions, translations, and copies, as well as a flat-rate reimbursement of telecommunication costs (postal fees and telephone charges) and of local transportation costs; this reimbursement amounts to SKK 100 per one step performed by the attorney, or SKK 60 per one step performed by the attorney appointed to act as ex officio defense counsel. Costs of international postal service and long-distance and international telephone calls are charged separately.

Decree No. 163/2002 Coll. on Fees and Reimbursements of Attorneys Providing Legal Services took effect on 1 April 2002; some of its provisions (such as tariff fees for attorneys in criminal proceedings) were to take effect on 1 January 2003. A new decree on remuneration of attorneys has significantly raised the level of fees payable to state-appointed attorneys in all cases. In some cases, it is a multiple of previous rates (e.g., in criminal proceedings and proceedings before the Constitutional Court). Compared with the past situation, the new decree has made representation through appointment by courts financially attractive for attorneys.

6.5 Support for non-state initiatives

No real institutional or other state support is provided yet in Slovakia to the centers or NGOs that provide legal advice, directly procure attorneys for legal representation, or perform other related activities. However, there is one form of indirect support, although it is not sufficient to fulfill the needs of NGOs that are active in the provision of legal advice and similar fields. This indirect support is the exemption of most NGOs from payment of income tax, provided that their revenues generated in the taxation period (one year) do not exceed SKK 300,000. NGOs also are granted exemption from the payment of gift tax, which enables them to fully use grants from private sources.

Under the 2002 amendment to Income Tax Act No. 366/1999 Coll., individual taxpayers in the Slovak Republic may assign 1 percent of paid taxes to non-governmental organizations. This indirect support is granted to a broad spectrum of NGOs, and is not limited only to those providing legal service.

7 Data collection

As stated and presented before, there is partial data that was not primarily collected for the purpose of monitoring and meeting the needs of the population in terms of access to free legal aid. However, there is no comprehensive information available in Slo-
vakia on the existing mechanisms in this area. Considering the present situation, data should be collected—in addition to information on the total number of cases brought before courts—at least on the number of applicants for legal aid, the number of appointed attorneys (calculated separately for civil, administrative, and criminal proceedings as well as proceedings before the Constitutional Court), and the amount of funds allocated for these services.

The data on the number of cases in which attorneys provide free or reduced-rate legal aid on account of social or other adverse circumstances should be monitored by the Bar Association. Under the existing legislation, which leaves the provision of free legal aid up to the discretion of the attorney, there is practically no available data on the number of cases where such help was actually provided.

### 8 Recommendations

The above analysis of legislation and its implementation shows that the existing legal norms do not sufficiently guarantee the exercise of the constitutionally guaranteed right of every person to seek the protection of his or her right to a hearing before an independent and impartial court, the right to legal aid in the proceedings before courts, and the right to defense through counsel.

On the whole, legislation governing the practice of appointing *ex officio* attorneys in criminal procedures for defendants who do not have counsels of their own choosing sufficiently protects the defendant's rights. But in other cases, there is practically no statutory or practical mechanism in place for ensuring that free legal aid is provided. Consequently, there is no adequate guarantee of a free defense to those who are not entitled to mandatory defense, or for defendants whose cases require a mandatory defense and who have counsels of their own choosing. Many defendants do not properly understand the advice they receive when they are indicted regarding the eligibility of indigent defendants to a free or reduced-fee defense.

Although the law provides for the right to legal aid of individuals apprehended and detained by the police even before they are indicted, it does not stipulate how this right could be exercised through free legal aid. Because the law does not explicitly provide for how those who are apprehended and detained by the police may use legal aid, police authorities tend to proceed in an arbitrary manner and, in most cases, do not grant the right to a lawyer at the moment of restriction of one's liberty.

It is evident from the wording of the Code of Criminal Procedure that the law does not provide for the right to seek free legal aid for the victims of crime whose rights were infringed as a result of crime. The existing situation, in which a decision concerning the appointment of an attorney in civil proceedings, administrative court proceedings, and Constitutional Court proceedings is not issued until after an action
has been brought to the court, appears to be unsatisfactory. (Although the law does not explicitly rule out the possibility of appointing an attorney prior to filing an action, determination of eligibility in such cases is problematic, and this possibility is therefore hardly used in practice.) Thus, the existing model for the appointment of an attorney does not fully enable the exercise of one’s right to legal aid in judicial proceedings “from the outset of the proceedings.” This procedure can, especially in the administrative judiciary and in proceedings before the Constitutional Court, result in the dismissal of a petition even before the court starts to examine the applicant’s request for free legal aid.

Ironically, although the facts point to the existence of a considerable need for free legal aid in civil and administrative proceedings, applications for the appointment of an attorney in the proceedings before general jurisdiction and administrative courts are relatively rare. In our opinion, this situation is a result of the very low degree of awareness of the population concerning access to free legal aid. There is no law requiring that parties to non-penal judicial proceedings be informed of this possibility by the courts, and no alternative type of active information policy exists. Individuals seeking legal representation are more likely to turn to other institutions (such as the Slovak Bar Association or the public defender of rights), but these entities do not possess the power to provide free legal aid.

Evaluation of the needs and of the situation in the provision of legal aid is also rather difficult because of the absence of appropriate monitoring and statistical surveys at the national level. The above confirms that, besides systematic statistical surveys of applications for legal aid and of the funds allocated for its provision, new legislation is needed in such areas as eligibility for, staffing, financing, and monitoring of the quality of free legal aid.

An appropriate solution would be to remove the power to decide on eligibility to free legal aid from the control of the judiciary. In return, a separate body can be created that would administer state budget funds allocated for free legal aid. This body would make decisions regarding eligibility for free legal aid on the basis of lawfully defined criteria.

Notes

2 Act No. 564/2001 Coll. on the Public Defender of Rights, Zákon o verejnom ochrančovi práv.
4 Article 7, paragraph 5, of the Constitution that entered into effect on 1 July 2001, as amended by the latest amendment in February 2001 by Constitutional Statute No. 90/2001 Coll. Until then, the superiority of international law on human rights over the national law was guaranteed only if the international law provides for “broader constitutional rights and freedoms” than the laws.

5 Legal status of “advocates” is governed by provisions of Act No. 132/1990 Coll. on Advocacy.

6 Legal status of “commercial lawyers is regulated in Act No. 129/1991 Coll. on Commercial Lawyers.

7 Article 12, paragraph 2, of the Constitution.


10 According to Article 51 of the Constitution, to pursue (claim) some subjective rights (among others the right to the court) is possible only within the limits of the statutory law.


13 Published as Decree of the Ministry of Foreign Affairs No. 120/1976 Coll. on the International Covenant on Civil and Political Rights.


15 Section 13, para. 2, of Advocacy Act No. 132/1990 Coll.: “The attorney shall protect the rights and legitimate interests of the person he represents, act in good conscience, make use of all available statutory means, and do everything that he deems beneficial in conformity with the instructions of his client.”


20 Act No. 195/1998 Coll. on Social Help, Zákon o sociálnjej pomoci, Sections 13 and 68.


22 Arto v. Italy, ECHR, decision of 13 May 1980, Series A-37, p. 16.


26 Section 241, paragraph 1, of the Code of Civil Procedure.


29 Ruling of the Constitutional Court I. ÚS 61/2000, Zbierka nálezov a uzenýchí Ústavného súdu Slovenskej repub-
In the Slovak Republic, the Convention was promulgated as “Oznamenie Federálneho ministerstva zahraničnej vecí č. 209/1992 Zb. o dojednani Dubovom o ochrane ľudských práv a základných svobôd a Protokole na tento Dubový nátlážujúci” (Communication of the Federal Ministry of Foreign Affairs No. 209/1992 Coll. on the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols relating thereto”).


It is possible to name The Foundation The Citizen and the Democracy—Minority Rights Group (Nadícia Občan a demokracia—MRG) in Bratislava, Charta 77 in Bratislava, The League of Activists for Human Rights (Liga aktivistov pre ľudské práva) in Bratislava, the Alliance of Women (Aliancia Zien) in Bratislava, the Center for Environmental and Public Advocacy (Centrum pre podporu miesteho aktivizmu) in Ponická Huta, the Association of Young Roma (Združenie mladých Rómov) in Banská Bystrica, the Center of Legal Defense of Roma (Centrum právnej ochrany Rómov) in Košice, and Fenestra in Košice.


www.justice.gov.sk (last accessed on 12 September 2002).
**Schedule I**

Objectives: The access to justice country reports are intended to assess the state of provision of legal aid in each of the following countries: Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, and Slovakia.

PROMOTING ACCESS TO JUSTICE IN CENTRAL AND EASTERN EUROPE

**Access to Justice Country Reports**

**Guidelines**

The country reports on access to justice are commissioned within the framework of the project on Promoting Access to Justice in Central and Eastern Europe, a collaborative effort of INTERIGHTS, the Public Interest Law Initiative at Columbia Law School, the Bulgarian Helsinki Committee, and the Helsinki Foundation for Human Rights in Poland. The project is funded by the European Community and the Constitutional and Legal Policy Institute (COLPI).

The goal of this project is to define the real dimensions of the problem with respect to the widespread lack of effective access to legal aid, to draw the attention of the stakeholders in the countries in the region to this issue, and to promote law reform initiatives in the field.

In order to generate empirical data regarding the deficiencies of current legal aid systems, the project undertook a number of surveys based on court files and interviews with prisoners as well as with judges and other legal professionals in Bulgaria and Poland. In these two countries, the project is holding national access to justice forums for the legal community, representatives of the government, and other national key stakeholders. The first national forum was held in Bulgaria in April 2002 and the second in Poland in June 2002.

The access to justice country reports are intended to assess the state of legal aid provision in nine of the European Union candidate countries in Central and Eastern Europe: Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, and Slovakia.

These reports will be presented at the Regional Forum on Access to Justice in Central and Eastern Europe taking place December 5–7, 2002, in Budapest, Hungary. The conference—the culmination of this phase of the regional access to justice project—will bring together independent and governmental experts, representatives
of the judiciary and representatives of the civil society from the countries in Central and Eastern Europe, the Balkans, Ukraine, Russia, and the Caucasus, as well as representatives of international institutions, such as the European Union, the Council of Europe, and the World Bank, to seek regionwide strategies for improving access to justice in the region.

**Methodology**

The access to justice country reports will be based on a single methodology. Every report should follow the structure outlined below and should comply with the requirements in this methodology, the enclosed style sheet, and the timeline. The reports’ methodology, structure, style sheet, and timeline are an integral part of the contract between the Public Interest Law Initiative (PILI) and the reporter. Reports must be submitted in conformity with these documents to be considered in fulfillment of the contract.

**Scope and Sources**

The access to justice country reports should examine the existing laws and judicial and administrative practice, and they should research any available empirical data (such as surveys, statistics, and studies conducted by state agencies, research institutes, or non-governmental organizations) that might help to evaluate the actual situation of access to legal aid in their country. Any proposals for amendments to the existing laws, draft laws, draft regulations, and any other legislation in the pipeline should be briefly reviewed in the relevant section of the questionnaire and summarized at the end of the report under “Legal developments.”

The reports should cover every topic outlined in the enclosed report’s structure and should answer every question. Each answer should be complete, should cover all legislative and jurisprudential developments up to 1 September 2002, and should be supported by references to relevant legal norms, books, articles, official reports, briefs, commentaries, unpublished papers, symposia materials, statistical data, policy statements, interviews, and other sources. Descriptions of actual practices that are not regulated by law or that are deviating from the legal norm should be substantiated by reference to verifiable sources, such as interviews, commentaries in legal periodicals, relevant materials in the media, polls of opinion, etc., or supported by sound arguments. The accuracy of the information should be beyond doubt.

**Fieldwork**

Reporters are expected to visit individuals and institutions and to try to obtain any relevant statistical data, collected by the relevant state institutions (e.g., Ministry of Justice, statistical institutions), professional organizations (such as the Bar Associa-
tions), private research organizations (for example, in the field of criminology), or specialized non-governmental organizations (prisoners’ rights groups, women’s rights groups, etc.). Interviews and data should reflect the situation throughout the country, not only in the capital.

**Analytical approach**

The country reports on access to justice should be both analytical and descriptive. The reports should analyze the relevant laws, especially actual practices in each country, and try to identify the real obstacles to effective access to justice for all. On the basis of their findings, the reports should articulate possible ways to improve the situation, which may include proposals for legislative amendments, changes of state budget policy, or any other measures that the reporters find appropriate in the specific context.

**Length and enclosures**

The reports should be as detailed as possible. The suggested number of pages is for indicative purposes, and the reporters should feel free to exceed this number if a topic requires more information.

Copies of relevant laws, court decisions, administrative and other regulations, and any other relevant documents should be enclosed with the first draft of the reports, in the original language and, where applicable, in English. The reporters may be asked to upload electronic copies of these documents to the project Web site. Detailed instructions about this process will be distributed in the beginning of September.

**Definitions**

*Legal aid:* the right of an indigent person to be provided with the services (including legal advice and legal representation) of a qualified lawyer, completely or partially free of charge for the recipient and paid for by the state.

*Mandatory legal representation:* legal representation in cases for which defendant is required by law to be represented by an attorney.

*Free legal advice:* legal counseling or information (excluding representation) provided free of charge for the recipients by lawyers or non-lawyers and sponsored by the state or private funds.

**Structure and requirements**

*Note:* Not all of the following sections appear in all reports, and therefore the numbering in a particular report might not be exactly the same as the numbering in these guidelines.

**Executive summary** (2 pages)
Please recapitulate here the main findings of your report.
1. **Introduction (1–1 1/2 pages)**

The authors should feel free to design for themselves the introductory part of their reports. A suggested introduction may include, for example, an outline of the legislative framework of the right to free legal assistance, or a review of the legislative developments in the last five years (if any), or an outline of possible new state policies on legal aid.

Please also include a mention of the main relevant international treaties that have entered into force.

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2. **Criminal Law: Effective Access to the Judicial System for the Indigent in Criminal Cases (12–14 pages)**

2.1 **Right to counsel**

2.1.1 **Constitutional guarantees of the right to counsel and the right to legal aid**

2.1.2 **Right to counsel in criminal proceedings** (codes of criminal procedure, police laws, police instructions, circulars, and other relevant sources of law)

The reports should describe the legal norms that guarantee the right to counsel in the different stages of the criminal proceedings: initial detention (first twenty-four or seventy-two hours), preliminary investigation, trial stage, stage of appeal, and cassation, if applicable.

The reports should describe the scope of the right to counsel at each stage, including the specific procedural safeguards of this right, and whether the same guarantees apply to both retained and *ex officio* appointed counsels. The reports can comment on how the right to counsel interrelates to other rights of defendants in criminal proceedings (e.g., the right to be released on bail pending trial, the right to appeal the lawfulness of their detention, the right to appeal the acts of the prosecution and the courts, the right to cross-examine witnesses, etc.).

Application of the right to counsel in practice should be covered: How are these norms applied in practice? Does the judicial implementation of the right to counsel provide for sufficient guarantees to this right at every stage of the criminal proceedings?

2.1.3 **Right to counsel and right to legal aid in non-criminal proceedings when deprivation of liberty is at stake**

Please describe the legal guarantees to the right to counsel and free legal aid in the following types of cases:

- minors in connection with proceedings for placement in special schools (laws on the protection of the rights of the children, criminal codes, relevant instructions, ordinances, and other operational regulations);
- people with psychiatric diseases in connection with proceedings for place-
2.2 Right to legal aid: Eligibility criteria for granting legal aid in criminal cases

2.2.1 Substantive criteria

Here the report should address the substantive grounds for receiving legal aid, such as severity of the potential sentence, whether the defendant has been detained pending trial, the complexity of the case, etc.

2.2.2 Financial criteria

The reports should discuss questions such as whether there is a financial threshold for qualifying for legal aid, the type of documents (if any) that defendants need to present in order to be granted free legal aid, whether the decision to grant legal aid on this ground is subject to appeal, and whether there are any ramifications for legal aid if the defendant is found guilty.

2.2.3 Other eligibility questions

This part of the reports should discuss other issues relevant to the question of eligibility, including but not limited to:

- whether legal aid is available for non-citizens;
- whether and in what ways the eligibility criteria take into account and strive to break down the barriers to the use of the law and the justice system faced by those with particular difficulties (for example, people with disabilities; people from minority ethnic groups; women in vulnerable situations; people without sufficient command of the language, such as illiterate people, immigrants, and refugees; people living in socially or economically depressed or rural areas).
2.2.4 Legal aid for victims of crimes

The reports should discuss whether legal aid is available to victims of crime, the grounds for receiving legal aid in such cases, the procedure, and any related issues.

2.3 Other cases

Please describe the means for free legal representation (if any) available to the defendants who do not meet the eligibility criteria described above.

2.4 Procedure for granting legal aid

Reports should provide a detailed description of the procedure for granting legal aid and should address, among others, the following questions:

• Is there an obligation (upon the police, the courts, other agencies) to inform the accused/detained person of her or his right to free legal representation? Orally or in writing?
• Is legal aid granted upon request of the defendant or ex officio?
• What authority makes the decision to grant legal aid? Does the defendant appear in person before this authority?
• How is the legal aid lawyer selected? Can the defendant choose her or his lawyer?
• Are the decisions to grant legal aid subject to appeal, and if so, to what body, and in what procedure?
• Can the decision to grant (or refuse) legal aid affect the stability of the conviction?

2.5 Scope of legal aid

The reports should address, among others, the following questions:

• What kind of legal services are covered: advice, trial representation, writing legal briefs, private investigation, hiring expert witnesses, travel costs?
• Is legal aid provided for all stages of the criminal proceedings?
• Is there legal aid for initial advice only?
• If there is a right to legal advice from the outset of custody, which is different from the right to legal representation, is there a concomitant right to legal aid from that point?

2.6 Application of the legal aid norms in practice

How are the legal aid norms applied in practice? Does the procedure for granting legal aid described in section 2.4 provide for sufficient guarantees to the right to legal aid? Is legal aid granted in all cases when it is required by law?

Is the scope of the legal aid services broad enough to guarantee an effective right to legal representation?
2.7 Quality of free legal representation

Please include a discussion of the following questions:

• Is there a mechanism in place to secure the quality of the free legal representation in criminal cases?
• What mechanism exists to monitor the legal steps taken by the lawyer?
• Can defendants file a disciplinary complaint if they are not satisfied with their legal aid lawyer’s performance?
• What body decides on these complaints, in what procedure, and what is the weight of its decision?
• Are there any surveys, studies, or data collected by state institutions, NGOs, or research entities on the quality of legal representation for the indigent defendants in the last five years? Are there any systems in place to evaluate the functioning of the legal aid system in criminal cases?

• constitutional guarantees to the right to access to court and free legal representation in civil cases;
• guarantees provided by the relevant procedural rules (codes of civil procedure or similar laws);
• other relevant laws (e.g., labor laws, family laws, laws on the Bar Association, etc.).

3.2 Civil cases for which legal representation is mandatory

Are there any categories of cases for which the parties are required by law to be represented by an attorney (e.g., cases of minors, persons under guardianship, etc.)?

Are there any stages of the civil proceedings for which legal representation is mandatory (e.g., proceedings before the court of cassation, etc.)?

3.3 Eligibility criteria for granting legal aid in civil cases

3.3.1 Substantive criteria

The report should address the substantive grounds for receiving legal aid in civil cases (if any) such as whether legal aid is available for specific categories of cases (e.g., alimony, cases of minors, etc.) and other material grounds for granting legal aid.
3.3.2 Financial criteria

The reports should discuss such questions as whether there is a financial threshold for qualifying for legal aid, the type of documents (if any) that the parties need to present in order to be awarded free legal aid, whether the decision to grant legal aid on the financial criteria is subject to appeal, and whether there are any ramifications for legal aid depending on the outcome of the civil proceedings.

3.3.3 Other eligibility questions

This part of the report should discuss other issues relevant to the question of eligibility, including but not limited to:

- whether legal aid is available for non-citizens;
- whether and in what ways the eligibility criteria take into account and strive to break down the barriers to the use of the law and the justice system faced by those with particular difficulties (for example, people with disabilities; people from minority ethnic groups; women in vulnerable situations; people without sufficient command of the language, such as illiterate people, immigrants, and refugees; people living in socially or economically depressed or rural areas).

3.4 Procedure for granting legal aid

Reports should provide a detailed description of the procedure for granting legal aid and should address, among others, the following questions:

- What authority makes the decision to grant legal aid?
- Are the decisions to grant legal aid subject to appeal, and if so, to what body and in what procedure?
- How is the legal aid lawyer selected? Can the parties choose their legal aid lawyer?
- Can the decision to grant (or refuse) legal aid affect the stability of the court decision?

3.5 Scope of legal aid

The reports should address, among others, the following questions:

- What kind of legal aid services are provided?
- Is legal aid provided for all stages of the civil proceedings?
- Is legal aid provided in the proceedings for execution of the judgments?
- Is legal aid provided for initial advice only?
- What other costs are covered (expert witnesses, translators, etc.).
3.6 Quality of free legal representation

Please include the following questions (if the procedure is the same as in criminal cases, please make a reference to this effect but don’t provide details):

- Is there a mechanism in place to secure the quality of the free legal representation in civil cases?
- What mechanism exists to monitor the legal steps taken by the lawyer?
- Can the client file a disciplinary complaint if he or she is not satisfied with his or her legal aid lawyer's performance?
- What body decides on these complaints, in what procedure, and what is the weight of its decision?
- Are there any surveys, studies, or data collected by state institutions, NGOs, or research entities on the quality of legal representation for the indigent in the last five years? Are there any systems in place to evaluate the functioning of the legal aid system in civil cases?

3.7 Application of the right to legal aid in practice

How is the right to legal aid in civil cases implemented in practice? If data is available, how many people annually receive legal aid or free legal assistance in civil cases, including state provided, and provided pro bono by

the Bar Association or by individual attorneys?

3.8 Other barriers to effective access to courts in civil cases

Please comment on the following issues:

- Court fees: How are the court filing fees determined? What other court taxes exist? Are they a significant burden on the parties, considering the average income in the country? Is a waiver available, and if so, in what cases (substantive and financial criteria)? What is the procedure to obtain a waiver?
- Accessibility: Are the courts located within a reasonable distance from every inhabited place? Are the Bar Associations distributed equally within the country? Is there a reimbursement of travel expenses if a person has to travel to reach the courthouse?
- Vulnerable groups: Are there any special regulations to facilitate the access to courts of groups that might be in a more difficult situation regarding their access to justice (such as ethnic minorities living in isolated and remote districts, linguistic minorities, women victims of domestic violence, disabled people, or other similar groups)? Does the state provide special training, or are there any state policies for sensitizing judges and lawyers to the social and cultural specificities of these groups?
3.9 **Alternative dispute resolution (ADR) and similar schemes**

Are there any ADR or similar schemes for solving civil disputes in place? Please describe their legal basis and comment on their effectiveness in practice.

4. **Public Law: Effective access to the judicial system for the indigent in administrative and constitutional cases and cases before international tribunals (2–3 pages)**

4.1 **Normative basis**

Please describe here the relevant provisions of the constitution and other laws.

4.2 **Eligibility criteria**

Please describe here all criteria for receiving free legal aid, following the scheme outlined above in sections 2.2 and 3.3.

4.3 **Procedure for appointment**

If special administrative procedural law exists, please describe here the procedure for appointment of a free lawyer (if any), including the body that makes the decision for appointment, whether this decision is subject to appeal, whether this decision has any implication on the final court’s act, and how the specific lawyer is selected.

4.4 **Alternative (non-state) mechanisms**

Are there any non-governmental organizations, university legal clinics, or other institutions providing free legal services in such cases?

4.5 **Implementation**

How are the right to counsel and the right to access to justice implemented in the administrative proceedings? Please include data on the number of administrative cases filed per year and the number of people who have received some form of legal assistance, if available.

5. **Organization of the system for provision of legal aid (4–7 pages)**

5.1 **Special state body authorized to administer the legal aid system**

Is there a special entity—state agency, department of the Ministry of Justice, or municipal body—with a mandate to administer the legal aid system? Please describe its mandate, composition, powers, role in the formation of the legal aid budget, and generally its role in the management of the legal aid system.

If the law does not provide for a special body, please describe the relevant practice.
5.2 Role of the Bar Association in the administration of the legal aid system

Please summarize here the main functions of the Bar Association in the administration of the legal aid system, including powers to appoint legal aid lawyers, to determine honoraria for legal aid, to monitor the quality of legal representation, etc.

5.4 Role of the prosecution and the police

Please describe whether the prosecution and the police have any role in the administration of the legal aid system, and what their powers are.

5.5 State models of organization of the provision of legal aid

If applicable, please specify which of the models below has been adopted in your country, describe it briefly, and comment on its efficiency:

- *ex officio* appointed private lawyers;
- public defender/staff attorney programs (attorneys employed by a state institution to provide legal service in the cases requiring legal aid);
- contracts with law firms and/or non-governmental organizations after a bidding procedure (the contracting model);
- advice centers providing free legal advice in some civil and administrative cases, but not legal representation;
- university-based legal clinics;
- other.

If staff attorney projects or legal advice centers exist, how is it ensured that they
provide legal aid to vulnerable groups (ethnic and linguistic minorities, women victims of domestic violence, disabled people) adequately? What is their organizational and personnel structure, and what are the main sources of their funding?

The models described above can be funded by the state or privately. If the funding is mixed, are there any mechanisms to secure their sustainability, and what are the explicit state commitments? If the funding is entirely private, please see section 6.5.

5.6 Evaluation and training

How do the relevant authorities evaluate the effectiveness of any system set up to ensure effective access to the law and to justice for the indigent, and assess the needs for change and improvements?

5.7 Role of non-governmental organizations in the process of evaluation of access to justice

What is the role in any such evaluation of non-governmental organizations with particular expertise in this area?

5.8 Steps to increase the awareness and help of the legal profession

What steps are taken in your jurisdiction to ensure that the members of the legal profession are aware of the needs of the indigent within society? In what ways are lawyers encouraged, supported, and trained in order to assist such people more effectively? Please include details, if available, of initiatives undertaken either by state authorities or by NGOs, including lawyers’ associations and organizations.

6. Financial aspects of ensuring effective access to justice for the indigent

6.1 Determination of the legal aid budget

Does the state track the budget allocations for legal aid? How is the budget allocation for legal aid determined? Is it defined by a projection of demand based on past use? How has it been secured that the legal aid budget allocations will reflect the actual need for legal aid?

6.2 Budgetary information

Where data is available, please provide the following information about the state budget, over a five-year period if possible, or for as many years as information is available:

- the total state budget;
- the amount that was allocated to the judicial system;
- the amount that was allocated to legal aid;
• the amount that was allocated to criminal legal aid;
• the amount that was allocated, if any, to civil legal aid;
• the amount that was allocated, if any, to other means of providing immediate access to free legal advice.

6.3 Number of cases supported by the state budget for legal aid

If data is available, how many criminal cases before the first-instance courts, courts of appeal, and cassation courts were supported per year by the amounts allocated to criminal legal aid reported in section 6.1? What was the total number of cases per relevant year before the first-instance courts, courts of appeal, and cassation courts? If possible, please provide information on the average number of hours of criminal legal aid work per case in a given period (for example, annually over a five-year period).

6.4 Number of civil cases supported by the state budget for legal aid

How many civil cases were supported per year by the amounts allocated to civil legal aid reported in section 6.1? What was the total number of civil cases per relevant year?

6.5 Lawyers’ fees

Are fees of legal aid lawyers awarded per case, per hour spent in court, per hour spent preparing and conducting the case, or by another method? By what criteria are fees set, and who decides on their amount? Are these considered adequate by the respective lawyers?

How are the lawyers’ fees generally determined—per hour, per case, per time spent in court, per stage of the proceedings? What is the minimum rate for lawyers (per specific type of case or specific activity), the average lawyer’s rate (if available), and the average wage in the country?

If the fee is determined on the basis of time spent, is the time spent on visits, telephone calls, and correspondence to people in custody included? Is travel time to prisons/remand facilities included? Are incidental expenses included, such as fares, costs of telephone calls, etc.?

Please be as specific as possible, and attach relevant fee schedules if applicable.

6.6 Support for non-state initiatives

Where legal advice centers or similar initiatives are run by non-governmental organizations, are they given any direct funding by the state in the form of, for example, grants or subsidies? Please give details of such support where it exists.

Where legal advice centers or similar initiatives are run by non-governmental
organizations, are they given any indirect funding, for example, provision of premises or office equipment? Do such organizations receive tax relief?

7. DATA COLLECTION

What kind of management information is routinely available about the legal aid system, in terms of the population of needy persons and existing mechanisms for delivery?

In your opinion, what kind of information regarding the management of the legal aid system should be collected systematically? Please take into account your answers to the questions above, more specifically to the questions in sections 2.6, 3.6, 4.5, and throughout sections 5 and 6.

8. LEGISLATIVE DEVELOPMENTS

Please summarize here all proposals for amendments to existing legislation, draft laws, or draft regulations that relate to your answers to previous questions.

9. RECOMMENDATIONS
(1–2 pages)

What are your recommendations for changes to the existing system?
PUBLIC INTEREST LAW INITIATIVE
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PILI works to promote Access to Justice through reform of state-supported legal aid systems in Central and eastern Europe, Russia, Central Asia and Mongolia. Columbia Law School launched PILI in 1997 with the support of the Ford Foundation. In 2002, PILI established its new headquarters at the Columbia University Budapest Law Center. A wide variety of information and resources relating to public interest law can be found on PILI’s web site. PILI’s programs include:

• Clinical Legal Education

With its partner, the Open Society Justice Initiative, PILI has helped establish Clinical Legal Education programs in law schools in over two dozen countries and continues to assist the development of new and existing university-based clinics. PILI organizes teacher training workshops, and other conferences, conducts program evaluations and develops resource materials for clinics throughout Central and Eastern Europe, Russia, Central Asia and Mongolia.

• Access to Justice

PILI works to promote Access to Justice through extensive activities to help establish state-supported legal aid systems in Central and Eastern Europe, the Balkans, Russia and Central Asia. PILI’s programs aim to broaden the availability of legal aid, improve the quality of legal aid representation, promote alternative legal aid delivery models, and strengthen civil legal aid mechanisms.

• Training and Education

In its Training and Education programs, PILI works with lawyers and activists to convey the principles, strategies and methodologies of public interest law. With Open Society Justice Initiative, PILI sponsors the Public Interest Law Fellows Program for lawyers from CEE and NIS regions to spend a year studying at Columbia Law School and working in internships at US public interest law and human rights
organizations, followed by a year working for sponsoring NGOs in the fellows’ home countries. PILI also hosts interns from Columbia Law School, Central European University and other institutions of higher education. PILI’s publications under this program include Pursuing the Public Interest: A Handbook for Legal Professionals and Activists (in English, Russian, Ukrainian and Spanish).

• Law and Governance

PILI’s law and Governance program focuses on the gap between laws as written and their implementation, focusing especially on access to administrative remedies, freedom of information and freedom of association. Under this program, PILI has published Enabling Civil Society: Practical Aspects of Freedom of Association (in English and Azeri).

• Legal Practice

In its Legal Practice programs, PILI assists in the development of the legal profession in the region by promoting pro bono work, the development of public interest law firms and sound ethical practices in the profession.

‘An international human rights law centre promoting the effective use of law to protect human rights and freedoms worldwide’ INTERIGHTS, the International Centre for the Legal Protection of Human Rights, is an international human rights law centre established in 1982 to support and promote the development of legal protection for human rights and freedoms worldwide through the effective use of international and comparative human rights law.
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INTERIGHTS

• assists lawyers, judges, non-governmental organisations and victims in the preparation of cases before national, regional and international tribunals;
• submits amicus curiae briefs in cases raising important issues concerning the interpretation of fundamental rights;
• offers representation before regional and international tribunals;
• conducts workshops and seminars on the techniques associated with the use and interpretation of human rights law;
• publishes materials to ensure that developments in human rights law are widely known; and
• maintains a specialised public library on international and comparative human rights law.

INTERIGHTS holds Consultative Status with the United Nations’ Economic and Social Council, with the Council of Europe and with the African Commission for Human and Peoples’ Rights and is authorised to present collective complaints under the European Social Charter.

A registered charity, INTERIGHTS is dependent on grants from foundations and on donations from individual supporters.
BULGARIAN HELSINKI COMMITTEE

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The Bulgarian Helsinki Committee (BHC) is an independent non-governmental organization for the protection of human rights, founded in July 1992. The BHC is a member of the International Helsinki Federation for Human Rights, based in Vienna, which represents forty-one independent human rights organizations in Europe, the former Soviet Union, and North America.

The objectives of the committee are to promote respect for the human rights of every individual, to stimulate legislative reform to bring Bulgarian legislation in line with international human rights standards, to trigger public debate on human rights issues, to carry out advocacy for the protection of human rights, and to popularize and make widely available human rights instruments.

The backbone of the committee’s activities is systematic monitoring of the human rights situation in the country. It gives us information on the state and development of human rights in the country and supplies our legal defense program with cases of human rights violations for litigation before the domestic and international courts. In addition, the committee reports on human rights violations, with a special emphasis on the rights of ethnic and religious minorities, refugees and asylum-seekers, rights of the child, protection from torture and ill-treatment, freedom of expression and association, problems of the criminal justice system, and mental disability rights. The BHC offers free legal help to the victims of human rights abuses. The committee also works in the sphere of human rights education and organizes conferences, workshops, public actions, and other forms of public activities aimed at bringing the concept of human rights to the attention of the general public.

The BHC activities are carried out in the framework of several programs, for example, the Legal Defence Programme, Closed Institutions Programme, Institutional Support Programme, Legal Protection of Refugees and Migrants Programme, and other projects and initiatives. The committee publishes two periodicals, Obektiv and The Refugees Today and Tomorrow, as well as specialized publications (books) with our findings.
HELSINKI FOUNDATION FOR HUMAN RIGHTS

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HFHR is an organization that is independent from the state, apolitical, and non-profit; it has been carrying out its activities since 1989, in continuance of the preceding seven years – of work of the Polish Helsinki Committee in the conditions of the underground.

Mission
To assist the building of rule of law and respect for human rights and freedoms, and to propagate the constitutional and human rights culture in Poland, in the post-communist world, in other regions, and in the global community.

Areas
The target areas of our activities for the scheduled period will include Poland and the Community of Independent States, as well as regions new to the HFHR where pilot activities will be undertaken (Latin America, other regions of Asia, and Africa).

Strategies and Goals
I. Empowering for Civil Movements Acting on Behalf of the Values Defined in Our Mission Statement

a. Human resources development for civil society
   i. Training for leaders of the civil movements acting on behalf of the values defined in the HFHR mission statement;
   ii. Preparation of NGO activists involved in these movements.

b. Support for summary (temporary) unions of national or international organizations and people organized toward the solutions to specific problems.

c. Support for the emergence of local and topical human rights movements independent of the Foundation but based on graduates of the Foundation’s Human Rights Schools.

d. Exchange of experiences and information among people and organizations.

e. Expert consulting for organizations or groups of organizations on their projects.

f. Material assistance to non-governmental activities for human rights.

II. Adjustment of the Law and Its Application to Human Rights Standards
a. Theoretical and practical human rights education for public officials and members of rights-sensitive professions.
b. Monitoring of national and local legislation as it pertains to human rights; preparation of expert opinions to secure adequate protection for human rights in legislature.
c. Monitoring of human rights violations in selected areas within society.
d. Public Interest Law Actions

III. Public education

a. Educating societies toward awareness of their rights and their options for protecting those rights.
b. Actions aimed at educating young populations toward living in a law-governed democracy.

Sponsors

The funds for the Foundation’s activities are raised from large foundations such as the Ford Foundation, Open Society Institute, Charles Stewart MOTT Foundation, Stefan Batory Foundation, German Marshall Fund, Friedrich Naumann Stiftung, Freedom House; from our NGO associates, such as the International Commission of Jurists, Swedish Section, and the Netherlands Helsinki Committee; from international institutions such as the Council of Europe, OSCE/ODHIR; from the European Union and the UN; and also from private sponsors.