

ACCESS TO JUSTICE
IN CENTRAL AND EASTERN EUROPE

Public Interest Law Initiative • Bulgarian Helsinki Committee
Polish Helsinki Foundation for Human Rights • INTERIGHTS

SOURCE BOOK

Access to Justice
In Central and Eastern Europe

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PUBLIC INTEREST LAW INITIATIVE
Columbia University Budapest Law Center
BUDAPEST * HUNGARY

INTERIGHTS
LONDON * UNITED KINGDOM

BULGARIAN HELSINKI COMMITTEE
SOFIA * BULGARIA

POLISH HELSINKI FOUNDATION FOR HUMAN RIGHTS
WARSAW * POLAND

Now known as



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The Global Network
for Public Interest Law

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PREFACE

Now, at the beginning of the twenty-first century, it can be stated that the access to justice movement has had a long history. More than four decades ago, many human rights activists, legal scholars, and reformers began calling for the transformation of the existing legal systems in various countries around the world. Human rights advocates, international institutions, and different non-government and human rights organizations have made substantial efforts toward advancing and promoting the reforms. Since that time, the right to effective access to justice has gained considerable attention as being of paramount importance among the new individual rights and freedoms.

Indeed, access to justice is a very broad notion. The right to access to justice guarantees that every person has access to an independent and impartial court and the opportunity to receive a fair and just trial when that individual's liberty or property is at stake. Impediments to such access can be numerous: high court costs, restrictive jurisdictional rules, overly complex regulations, ineffective enforcement mechanisms, and corruption. Access to justice is also closely linked with judicial independence and legal literacy. It is generally accepted, however, that the basic access to a competent lawyer's services is a crucial element of access to justice, especially when the state has summoned its legal resources to prosecute an individual.

* * *

The economic and social changes of the last fifteen years in Central and Eastern Europe have produced a situation where the vast majority of people are unable to afford the costs associated with legal proceedings, even if they are aware of their rights and obligations and have some confidence in the use of legal procedures as a means of asserting and protecting rights. Governments have not fully committed themselves to fulfilling their international obligations to provide legal aid in criminal proceedings when the interests of justice so requires, and in certain civil proceedings if the access to court is at stake. 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 Access to Justice Source Book is published within the framework of the project Promoting Access to Justice in Central and Eastern Europe. This project is a partnership of the Public Interest Law Initiative (PILI), INTERIGHTS, the Bulgarian Helsinki Committee, and the Polish Helsinki Foundation for Human Rights, in collaboration with the Open Society Justice Initiative.

The main goal of the project was to access 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 culmination of this project was the European Forum on Access to Justice, which took place in Budapest, Hungary, on 5–7 December 2002. Participating in the forum were representatives of Ministries of Justice, the judiciary, and civil society from Central and Eastern Europe, Russia, Central Asia, and the Caucasus, as well as representatives of international institutions such as the European Union (EU), the European Parliament, the Council of Europe, and the World Bank.

As a companion volume to this Source Book,¹ the project has also published nine country reports on the state of access to justice in the EU accession countries of Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, and Slovakia, commissioned in the summer of 2002 in preparation for the forum. A tenth report, prepared by PILI, compares the laws and practices governing the provision of legal aid in each of the report countries. Drafts of the reports were provided to forum participants, and the results of the studies were formally presented during the European Forum on Access to Justice.

This Source Book is a collection of writings and documents that address the problem of access to justice and the reform of legal aid systems in the countries of Central and Eastern Europe.

Part One contains an overview of the concept of access to justice. This section explains the importance of the concepts of access to justice and free legal aid and standards of international human rights treaties regarding access to justice. Part One also explores legal aid systems in selected countries, the mechanisms for delivering legal ser-

vices to the underrepresented, and strategies for reforming legal aid systems. In addition, it includes a paper on comparative experience in financing a legal aid system.

In **Part Two**, different models of legal aid delivery mechanisms are described and analyzed in further detail by internationally recognized experts. This section provides an overview of the legal aid systems in the Netherlands, South Africa, Israel, France and Ireland, as well as some of the history of their creation and development.

Part Three provides a general understanding of international documents on access to justice, in particular the standards being developed by the Council of Europe and the European Union. Two documents prepared by INTERIGHTS offer a summary of the recent jurisprudence of the European Court of Human Rights on legal aid, as well as excerpts of some of the most important judgments of the same court in this field.

Part Four focuses on two countries, Bulgaria and Poland, in which empirical studies were conducted on access to legal aid as part of the project Promoting Access to Justice in Central and Eastern Europe. The goal of these studies was to gather empirical evidence and thus to open to public debate the issue of access to legal aid, with the involvement of government bodies, the bar, and representatives of the non-governmental sector. The studies also were aimed at helping to promote improvements in the quality and effectiveness of legal aid and increased access to legal aid for persons who cannot afford to hire a lawyer. Part Four of the Source Book presents the results of the Bulgarian and Polish studies, as well as various aspects of the research methodology.

The final section of the Source Book, **Part Five**, provides sample legal aid laws and operational documents on legal aid. This section includes detailed and comprehensive documents on the legal reforms in Lithuania, such as the Law on State-Guaranteed Legal Assistance of the Republic of Lithuania, the agreement establishing the Vilnius Public Attorneys Office (PAO), the statute of the PAO, as well as the legal aid agreement between the PAO and the individual attorneys who provide legal services. This chapter also contains operational documents from the Netherlands and Israel, the Slovenian Legal Aid Act, the Legal Aid Act of Finland, as well as summaries of the legal aid provisions in France, Germany, Sweden, and Finland.

We hope that the Source Book can assist the efforts of scholars, legal practitioners, NGO activists, government and ministry officials, and all those interested in reforming legal aid systems.

NOTES

- ¹ *Access to Justice in Central and Eastern Europe: A Source Book* is part of a series of publications in 2003 that also includes *Access to Justice in Central and Eastern Europe: Forum Report*, *Access to Justice in Central and Eastern Europe: Country Reports*, and *Access to Justice: Problems of Legal Aid in Central and Eastern Europe* (in Russian).

Access to Justice
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A SOURCE BOOK

GENERAL OVERVIEW

This chapter includes:

- Access to Justice: Legal Aid for the Underrepresented, by Edwin Rekosh, Kyra A. Buchko, Daniel Manning and Vessela Terzieva
- Financing a Legal System: Comparative Perspective, by Vessela Terzieva

Access to Justice: Legal Aid for the Underrepresented

by Edwin Rekosh, Kyra A. Buchko, Daniel Manning and Vessela Terzieva

This chapter explains:

- the concept of access to justice and its importance
- the status of Central and Eastern European laws on legal aid
- standards of international human rights treaties regarding access to justice
- selected countries' legal aid systems
- mechanisms for delivering legal services to the underrepresented
- strategies for reforming legal aid systems

1. PROBLEM OF UNEQUAL ACCESS

Surveys conducted in 1999 in Bulgarian and Lithuanian prisons reveal that 20 percent (Lithuania) to 40 percent (Bulgaria) of those convicted had not been represented by a lawyer at trial. Furthermore, the Bulgarian survey reveals that a significant

majority of those convicted without a lawyer are members of the main ethnic minorities in Bulgaria—Roma and Turks—even though the majority of the prisoners surveyed are ethnically Bulgarian. And an especially disturbing finding of the Bulgarian survey is that most of the defendants who complained of police brutality during their detention were not represent-

ed by a lawyer in the criminal proceedings.

Such surveys illustrate some of the problems that the criminal justice systems in Central and Eastern Europe are currently facing. Can trials be considered “fair” if large numbers of defendants lack legal representation and thus cannot participate at trial on an equal footing with the prosecution? Are citizens treated equally before the law when some individuals obtain the expertise of experienced defense lawyers while others may rely only on the good intentions of the prosecution and the court? Any society based on the rule of law must be attentive to these issues.

There are also widespread problems of access to justice for people with civil legal problems. As NGOs in Central and Eastern Europe and other countries have documented, large numbers of people face problems with housing, labor, family matters, property, welfare and social security benefits, immigration, and other such basic concerns. As a result of the economic and social transformation under way in these countries, many of these individuals cannot afford to pay for the services of a lawyer.

The provision of equal access to the benefits and protection of the law is one of the most consistently elusive challenges to democratic legal systems around the globe. How can a government faced with competing social welfare demands and increas-

ingly meager public coffers meet the legal needs of all its citizens?

What makes the problem even more difficult is that the poor are usually excluded from the political process. Impoverished populations are largely underrepresented in the government and insufficiently integrated into the economic mainstream of their societies. Moreover, the legal interests of low-income groups often compete awkwardly in the social agenda with limited governmental funds to cover such acute social needs as medical care, public schooling, and housing assistance, to name only a few.

In fact, access to justice is a very broad notion. The right to access to justice guarantees that every person has access to an independent and impartial court and the opportunity to receive a fair and just trial when that individual’s liberty or property is at stake. Impediments to such access can be numerous, including high court costs, restrictive jurisdictional rules, overly complex regulations, ineffective enforcement mechanisms, and corruption. Access to justice is also linked to judicial independence and legal literacy. But few would contest the idea that the basic availability of a competent lawyer’s services is a crucial element of access to justice, especially when the state has marshaled its legal resources to accuse an individual of a crime, and the defendant risks losing his or

her personal liberty if convicted. As discussed in more detail later in this chapter, international treaties recognize a right to legal representation in criminal cases for precisely this reason.

This chapter will suggest some possible approaches to the challenges of access to justice. First, the chapter will examine the current status of legal aid in Central and Eastern Europe and analyze it in light of applicable international and comparative standards. Then it will describe briefly a number of legal aid systems around the world. Finally, the chapter will present some possible mechanisms for improving the situation and discuss some of the practical issues that may arise in the process of organizing a legal aid system.

2. LAWS ON LEGAL SERVICES IN CENTRAL AND EASTERN EUROPE

The new constitutions of the emerging democracies in Central and Eastern Europe recognize an individual's right to legal representation in litigation before courts and administrative agencies. But these provisions only oblige state authorities not to interfere with the exercise of the rights to counsel, rather than require them to secure legal representation for the indigent when necessary. The constitutions of both the Czech Republic and Slovakia, for

instance, envisage in some circumstances the possibility of free legal aid. Because of the lack of further legal regulation, however, proceeding authorities rarely appoint *ex officio* attorneys to criminal defendants whose cases fall outside the category of mandatory defense or to indigent parties in civil cases.

2.1 Criminal cases

At present, there is no uniform rule in Central and Eastern Europe recognizing indigence alone as a ground for free legal assistance. Legal systems currently distinguish between cases of mandatory defense, in which proceeding authorities are under obligation to appoint a lawyer for defendants, and other cases. For the latter cases, in some countries a lawyer must be appointed to represent a defendant who is indigent, while in others the decision is left to the discretion of the proceeding authorities.

2.1.1 Mandatory defense. In these cases, participation of counsel for the defendant is an absolute condition for the validity of the proceedings. Failing to appoint *ex officio* counsel may lead to a reversal of the conviction on appeal. Although the grounds for mandatory legal representation vary from country to country, the severity of the potential sentence is

one of the grounds recognized throughout the region. As to the specific length of the sentence, the laws vary considerably. While in several Central and Eastern European countries representation is mandatory if the defendant faces a sentence of five years' imprisonment or more, in Bulgaria a defendant is entitled to legal representation only if the crime alleged carries a minimum punishment of ten years' imprisonment.

Moreover, the laws in most of the countries in Central and Eastern Europe require only that the lower limit of the punishment be equal to or above the minimum required for mandatory defense. If the lower limit of the punishment is below the minimum required for mandatory defense, the defendant will not qualify for mandatory assistance even if the upper limit of the punishment is above that minimum. Thus, if the minimum sentence required to trigger the right to mandatory

defense is five years and a defendant is charged with a crime punishable by imprisonment of three to eight years, this person would not qualify for mandatory assistance even if he or she could be sentenced to more than five years of imprisonment.

Other criteria for determining if legal representation is mandatory include the defendant's mental or physical condition, age, and ability to speak the official language used in court, whether the defendant was subject to pretrial detention, and whether the trial is *in absentia*. When an *ex officio* counsel is appointed in mandatory defense cases, the financial status of the defendant is irrelevant, at least in theory. It is necessary only that the case fall into one of the categories that triggers mandatory defense. In practice, though, it is mainly indigent defendants who rely on the *ex officio* provision, because those who can afford the attorney's fees are likely to hire a lawyer on their own.

**Selected criteria triggering mandatory defense
in some Central and Eastern European countries**

	<i>Lower limit of potential sentence</i>	<i>Pretrial detention</i>
Poland	3 years' imprisonment	YES
Czech Republic	5 years' imprisonment	YES
Hungary	5 years' imprisonment	YES
Romania	5 years' imprisonment	YES
Slovakia	5 years' imprisonment	YES
Bulgaria	10 years' imprisonment	NO

2.1.2 Other cases. Defendants whose cases do not fall within the scope of mandatory defense can also apply for free legal assistance. Their chances of success in obtaining no-cost representation, however, vary from country to country. In Central and Eastern Europe, Polish defendants who are indigent may have the greatest likelihood of securing such assistance. Under the Polish Code of Criminal Procedure, defendants can apply for the appointment of *ex officio* counsel if they are charged with any criminal offense and if they lack the means to hire an attorney. The defendant must prove lack of sufficient means on the basis of salary and other income. Once the defendant has satisfied this requirement, the court must appoint an *ex officio* lawyer. In practice, however, no objective indigence test has been established or applied by the courts. According to Polish lawyers and human rights activists, there have been cases in which courts have refused to appoint a lawyer because of the alleged luxurious lifestyle of the accused prior to trial, without examining whether that person can afford a lawyer at the time of trial.

Laws and practices in other countries also envisage appointment of *ex officio* counsel in some cases not included in the scope of mandatory defense provisions. However, the inherent discretion in these provisions and accompanying procedures

provides no guarantee of representation for defendants. In some countries, such as the Czech Republic and Romania, the proceeding authorities have no legal obligation to appoint *ex officio* counsel. Defendants are referred to the local bar association; the decision whether to appoint a lawyer and the procedures for appointment are left to the laws governing the legal profession. In Hungary the final decision whether to appoint counsel is left to the discretion of the relevant officials. They may decide to appoint an *ex officio* lawyer but are not obliged to do so, as Hungarian law does not explicitly recognize the right to free legal representation in other than mandatory defense cases.

The Bulgarian Code of Criminal Procedure was amended in 1999 to require proceeding authorities to appoint *ex officio* counsel to indigent defendants upon the defendant's request, if the interests of justice require the appointment of such counsel. While the amendment adopts specific language from the European Convention on Human Rights, the provision remains inadequate. In the absence of any concrete legislative or judicial guidelines, what constitutes the "interests of justice" is left to officials who are unlikely to be familiar with the case law of the European Court of Human Rights. In the end, the standard remains unclear and

the decision whether to appoint a counsel for an indigent defendant is left again to the discretion of the proceeding authorities.

Attorney's fees in cases of mandatory defense or in the other cases in which *ex officio* counsel is appointed are generally covered by the country's judicial budget. In most countries, however, the appointment of *ex officio* counsel does not relieve defendants from their obligation to pay attorney's fees. Rather, the obligation is merely postponed. If the defendant is found guilty, the state can enforce against the convicted person its claim for all costs and expenses incurred during trial, including the *ex officio* attorney's fees. Moreover, in many countries the budget for *ex officio* attorneys' fees is combined with the general operating budget of the courts, creating powerful disincentives to the discretionary authorization of such fees.

2.2 Civil cases

The provision of legal aid in civil cases in Central and Eastern Europe is regulated almost entirely by the individual countries' laws on the bar. Generally, individuals unable to secure legal representation on their own under these laws may request that the bar appoint a lawyer who will represent them on a *pro bono* basis. These laws, however, do not adequately specify

the requirements and procedures for appointing a lawyer, so that the provisions are widely underused. Moreover, the budgets of bars contain no special funds to compensate appointed lawyers. Since infringements of the provisions of the laws on bar associations are not considered formal procedural violations, potentially annulling a final judgment, these laws generally have much less influence than the codes of criminal procedure or the codes of civil procedure. The laws on the bar thus hardly provide a sufficient guarantee to the right to free legal assistance.

Another approach to legal aid in civil cases in Central and Eastern Europe is to exempt indigent litigants from courts' fees for certain categories of cases such as alimony, labor lawsuits, and family matters. The final decision regarding fees in such cases is left to the courts.

2.3 Appointment of *ex officio* lawyers and quality of the legal services

In cases of mandatory legal representation, authorities are obliged to appoint a lawyer for the accused, but there are no clear rules regarding who can be appointed in these cases. In fact, virtually any lawyer can be appointed no matter what his or her field of specialization, practice,

or experience is. The proceeding authorities may either directly appoint a lawyer from a list provided by the local bar or refer the case to the local bar, leaving bar officials to designate the attorney. In either case, once the lawyer has been chosen, no mechanisms exist for initial or ongoing supervision of the attorney.

Under these circumstances, it is not surprising that the quality of services of the *ex officio* appointed counsels is frequently considered unsatisfactory. In 1996 the Hungarian Helsinki Committee and the Constitutional and Legislative Policy Institute conducted a jail-monitoring program in Hungary to examine the efficiency of the appointed counsel system. The program included 400 people detained pending trial, 60 percent of whom had *ex officio* appointed counsel, while the rest employed lawyers on their own. According to the results of the monitoring, 20 percent of all questioned reported having had contact with their lawyers immediately after their detention. Of those with immediate contact, 90 percent had privately hired lawyers while only 5.2 percent had counsel appointed for them. Nearly 44 percent of the defendants with *ex officio* appointed counsel reported that at the time of the inquiry they had not yet met their lawyers, while approximately 8 percent of the defendants with privately hired

lawyers had yet to meet with counsel.

While informal inquiries among lawyers indicate that the quality of services of *ex officio* appointed lawyers is often unsatisfactory, Central and Eastern European countries currently collect no official statistical information as to the number of the *ex officio* lawyers and the quality of their services. This lack of any data regarding how the appointed counsel system functions is one major obstacle to reforming legal aid systems. Insufficient statistical information makes it difficult to ascertain the extent of the ongoing problem of access to justice and to evaluate future needs.

2.4 Need for standards

The legal systems in Central and Eastern Europe do not appear to provide adequate access to legal services for all citizens. Mandatory defense provisions are generally limited to relatively narrow categories of cases and are not based on the defendant's financial status. For the vast majority of people whose cases do not "qualify" for mandatory defense, no right to legal aid exists even though these defendants face possible imprisonment.

Given that the relevant authorities have an obligation to appoint *ex officio* counsel only in a narrow category of cases, with vague standards regarding the

rest, and that the Central and Eastern European countries are emerging from economic devastation, the lack of more comprehensive legal aid systems is not surprising. Yet officials and the public must press for improvement by clarifying the standards for appointing *ex officio* counsel in other than mandatory defense cases and by devising workable systems for managing the provision of legal aid.

3. SOURCES OF LAW RELATING TO LEGAL AID

3.1 International treaties and organizations

The right to legal assistance free of charge for indigent criminal defendants is one of the fundamental guarantees associated with the right to a fair trial embodied in international human rights treaties. The right to free legal assistance is explicitly protected by Article 14.3(d) of the International Covenant on Civil and Political Rights and by Article 6.3(c) of the European Convention on Human Rights.

3.1.1 International Covenant on Civil and Political Rights (ICCPR). Article 14.3(d) of the ICCPR states that “in the determination of any criminal charge against him, everyone shall be entitled . . . to have legal assistance assigned

to him in any case where the interests of justice so require and without payment by him in any such case if he does not have sufficient means to pay for it.”

In practical terms, universal human rights treaties like the ICCPR have provided a limited basis for legislative reform on a regional level. Regional treaties such as the European Convention on Human Rights have proved to be more effective in shaping legislation in Eastern Europe so as to comply with established human rights standards. Ratification of the Convention and compliance with its norms is a requirement for admission to the Council of Europe and an important criterion for accession to the European Union.

3.1.2 European Convention on Human Rights (ECHR). Article 6.3(c) of the ECHR states that every person charged with a criminal offense has, among other rights, the minimum right “to defend himself in person or through legal assistance of his own choosing or, if he has no sufficient means to pay for legal assistance, to be given it for free if the interests of justice so require.” The European Court of Human Rights (ECtHR), through its interpretation of this provision, has asserted that a state party’s obligation to provide free legal assistance is based on two types of requirements: those involving financial sta-

tus and those based on the “interests of justice.”

First, a state is under the obligation to provide free legal assistance to a person charged with a criminal offense only if that person lacks sufficient means to retain a lawyer independently. Neither the Convention nor the Court’s jurisprudence indicates a specific monetary figure to define what constitutes sufficient means. While the ECtHR uses certain criteria to determine whether a person falls within this requirement (including the specific circumstances of the case, the person’s background, and the economic situation in the country involved), the burden of proof to demonstrate lack of sufficient means falls on the person charged with the offense. This burden, however, is substantially lower than the standard of proof for criminal cases and may be satisfied by a signed declaration of the person charged.

Second, a state is required to provide free legal assistance to an accused person who lacks sufficient means to hire an attorney only if it is also necessary in the interests of justice. The severity of the potential sentence, or what is “at stake” for the defendant, is one of the factors that can trigger a state’s obligation to provide free legal assistance. In a recent case against the United Kingdom, the ECtHR asserted that the potential deprivation of

liberty alone constituted grounds on which to require a state to provide legal aid. The Court may take other factors into consideration, including the complexity of the case as a matter of law and as a matter of fact, the public importance of the issue, the ability of the accused to understand the case, and the accused’s ability to provide his or her own legal defense.

The Convention does not explicitly provide for the right to free legal assistance in civil cases. However, the European Court held in *Airey v. Ireland* (Series A no. 32, 1979) that in some circumstances the ECHR may require legal aid for indigent litigants in civil disputes (see *Airey v. Ireland*, para. 26). Under Article 6.1, states are required to guarantee to every individual an “effective right” to access to court in determination of his or her “civil rights and obligations.” States may select the method of securing this right, whether by simplifying procedural requirements, by providing legal aid in civil cases, or through other means. The Court indicated that in addition to cases in which domestic law makes legal representation compulsory, legal aid might be required where there are complex legal or procedural issues. In *Airey*, the applicant was seeking legal aid in order to obtain a judicial separation from her abusive husband in a relatively complicated legal procedure.

ECHR CRITERIA FOR LEGAL AID IN CRIMINAL CASES

The European Convention on Human Rights (ECHR) requires states parties to provide free legal assistance to criminal defendants who meet certain eligibility requirements:

Financial criterion

- insufficient means to afford representation (defendant must establish)

“Interests of justice” criteria

- what is “at stake” for the defendant, such as length of imprisonment or severity of the sentence otherwise
- legal and factual complexity of the case
- ability of the defendant to defend himself or herself personally

The European Court of Human Rights may hold a state liable if it determines that the state has failed to provide legal aid to a defendant who has demonstrated financial need and fulfills one or more of the “interests of justice” criteria.

ECTHR CASE LAW ON THE RIGHT TO FREE LEGAL ASSISTANCE

The following cases include opinions of the European Court of Human Rights on the right to free legal representation protected by Article 6.3(c) of the European Convention on Human Rights. The cases are categorized according to the principal issue presented, though some cases may address several issues of relevance.

General state obligation to ensure access to justice

Artico v. Italy, decision of 13 May 1980, Series A no. 37. (1) Whether the lack of legal assistance has prejudiced the actual proceedings is irrelevant for finding violation of Article 6.3(c); (2) states parties are required to take steps to ensure that defendants enjoy effectively the right to free legal assistance.

Quality of legal services provided by the state

Goddi v. Italy, decision of 9 April 1983, Series A no. 76. Not providing enough time and facilities for the officially appointed lawyer to prepare for the case violates a state's obligation to ensure effective right to free legal assistance.

Reimbursement

Croissant v. Germany, decision of 25 September 1992, Series A no. 237-B. The requirement to reimburse the state for the fees for the *ex officio* appointed defense counsel by itself alone does not violate Article 6.3(c). The enforcement proceedings generally follow the criminal proceedings and cannot affect their fairness. The question of post-conviction reimbursement of the attorney's fees by indigent defendants was not decided.

Financial criterion

Pakelli v. FRG, decision of 25 April 1983, Series A no. 64. Applicant is not required to prove lack of sufficient means beyond all doubt; an offer to prove the lack of means in the absence of clear indications to the contrary satisfies the means test of Article 6.3(c).

“Interests of justice” criterion

***Quaranta v. Switzerland*, decision of 23 April 1991, Series A no. 205.** Interests of justice require consideration of the seriousness of the offense, the complexity of the case, and the ability of the defendant to provide his own representation. Free legal assistance should be granted even if there is little likelihood that the three-year maximum potential sentence will be imposed.

***Benham v. U.K.*, decision of 10 June 1996, Reports 1996-III.** Where deprivation of liberty is at stake, the interests of justice mandate legal representation. A potential sentence of three months’ imprisonment, along with the relative legal complexity of the case, triggers the right to free legal assistance.

***Perks and others v. U.K.*, decision of 12 October 1999, not published at time of writing (available on the Internet, at <http://www.echr.coe.int/Eng/Judgments.htm>).** Potential sentence of imprisonment taken together with relatively complex applicable law requires free legal assistance to be granted.

Stages of the proceedings to which the obligation to provide legal assistance applies

***Granger v. U.K.*, decision of 28 March 1990, Series A no. 174.** Whether the interests of justice require legal aid depends on the case as a whole, not only on the facts known when the application for legal aid has been filed, but also on the facts known at the time of appeal.

***Boner v. U.K.*, decision of 28 October 1994, Series A no. 300-B.** The right to legal aid applies to appellate proceedings. Factors to consider in determining whether the interests of justice require free legal assistance on appeal include the nature of the proceedings, the powers of the appellate court, the capacity of an unrepresented appellant to present a legal argument, and the importance of the issue at stake in view of the severity of the sentence.

***Pham Hoang v. France*, decision of 25 September 1992, Series A no. 243.** The right to free legal assistance applies to proceedings before the Court of Cassation if the defendant wishes to appeal the conviction and, if unrepresented, is unable to raise complex issues on appeal.

***Twalib v. Greece*, decision of 9 June 1998, Reports 1998-IV.** The right to free legal assistance generally applies to proceedings before the Court of Cassation. Important factors to consider are the complexity of the Cassation Court proceedings, the powers of the court, and the ability of the defendant to raise alone the complex legal and factual issues on appeal.

Legal aid in civil cases

***Airey v. Ireland*, decision of 11 September 1979, Series A no. 32** Although the ECHR contains no provision on legal aid for civil disputes, Article 6, para. 1, may compel states to provide legal assistance when such assistance proves indispensable for effective access to the courts, either because legal representation is mandatory under domestic law or because of the complexity of procedure or the case.

3.1.3 European Union. Since the 1990s, expansion of the European Union (EU) has emerged as an influential factor in advancing the institutional protection of human rights in Europe. As part of the expansion process, the EU has adopted a number of broadly framed accession criteria for candidate states. Under the political criterion, the EU evaluates the stability of state institutions guaranteeing democracy, rule of law, and the protection of human rights. Although the accession

agreements between the EU and candidate countries do not explicitly refer to access to justice, the extent of the candidate country's legal aid system is certainly one question that the EU considers in assessing the political criterion. In its 1998 report on Bulgaria's progress toward accession, for instance, the European Commission notes that "further efforts will be needed to . . . increase opportunities for legal aid and reduce pretrial detention time to international standards."

Furthermore, current EU laws and policies emphasize access to justice in cross-border cases between current member states. At its October 1999 meeting in Tampere, Finland, for example, the European Council urged member states to adopt measures to make their legal systems easily accessible for all individuals within the EU and to secure legal aid in cross-border cases. Joining the EU probably will require candidate states to meet these requirements and to adopt legal aid systems compatible with the systems of the current member states. The process of accession could therefore be a political tool for improving the legal aid standards. (See also chapter 5, “NGO Advocacy before International Governmental Organizations.”)*

3.2 *Constitutional standards*

The right to free legal assistance is a subject of special constitutional or other legislative protection in many legal systems around the world. The Sixth Amendment to the United States Constitution states: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.” The U.S. Supreme Court has interpreted this provision to require that counsel be provided for accused people unable to obtain representation themselves. In the land-

mark case *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court ruled that this provision—and thus the requirement to provide legal counsel—applies to all criminal cases in both federal and state courts. Article 35(2)(c) of the South African Constitution of 1993 requires that every detained person have the right “to have a legal practitioner assigned to the detained person by the state, and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.” The term “substantial injustice” has been interpreted by the South African Constitutional Court in substantially the same way that the European Court of Human Rights has interpreted the words “in the interests of justice.”

The constitutions of many developed countries guarantee the right to free legal representation not only to indigent criminal defendants but also to indigent litigants in civil cases. The Constitution of the Netherlands, for instance, explicitly requires in Article 18 that the Parliament establish rules concerning the provision of legal aid to people of limited means without restricting such aid to criminal defendants. Similarly, the Italian Constitution, in Article 24(3), entitles indigent people to a proper defense in all court proceedings. Article 29 of the Constitution of Switzerland of 1999 provides indigents with the right to free legal assis-

tance in civil cases unless the case is without merit.

3.3 Legislation

Most constitutions do not explicitly recognize the right to legal aid in civil cases. However, such assistance is often guaranteed by other legal norms, such as special laws passed by the legislature or broad court interpretations of indirectly related constitutional provisions.

Justice Earl Johnson Jr., an American judge on the California Court of Appeals, recently described the results of research he began nearly thirty years ago on legal aid systems throughout the world. He found that most Western European countries adopted legislation guaranteeing the right to counsel in civil cases several decades ago, and some legal provisions to this effect have been in place for more than a century. France and Germany enacted such a law in 1851 and 1877, respectively. The Scandinavian countries and most other northern European nations did so in the early twentieth century. Austria, Greece, Italy, and Spain each enacted a statutory right to counsel in the late nineteenth or early twentieth century. Hong Kong, New Zealand, and some Australian states and Canadian provinces adopted similar provisions in the 1960s and 1970s.

In a 2000 *Fordham International Law Journal* article, Justice Johnson noted that the interpretations U.S. courts have accorded constitutional due process and equal protection guarantees stand in sharp contrast to how high courts in other countries have treated similar constitutional language. For example, in 1937 the Supreme Court of Switzerland considered whether indigent Swiss citizens have a right to free counsel in civil cases. The Swiss Constitution provides that “all Swiss are equal before the law,” similar to the U.S. Constitution’s guarantee that that its citizens will enjoy “equal protection of the laws.” The Swiss Court concluded that poor people could not be “equal before the law” in the regular courts unless they were represented by lawyers like the rest of the citizenry. Thus, the governments of the Swiss cantons were required to provide lawyers at no cost to indigent litigants in all civil cases requiring “knowledge of the law.”

4. SELECTED NATIONAL LEGAL AID SYSTEMS

Current legal aid systems in various countries offer a vast range of different services. Some countries provide assistance only in criminal cases, some provide both criminal and civil legal aid under a single system, and others use independent sys-

tems for criminal and civil matters. No system is ideal. Each country's experience, however, can help inform the decisions of those seeking to reform legal aid. The information below is based on research, current at the time of publication, on the legislation of Australia, England and Wales, Finland, the Netherlands, Scotland, South Africa, and the United States.

4.1 Legal aid authorities

In some legal systems, as in the United Kingdom, the courts decide whether to grant legal aid in criminal cases. In others, such as South Africa and the Netherlands, the decision is made by a special governmental agency established to manage the provision of legal aid. In the United States there are two systems: courts make the decision in criminal cases, and not-for-profit legal aid organizations, operating under government guidelines, decide in civil matters.

Special governmental agencies, such as the Legal Aid Commission in Australia and Legal Aid Board in South Africa, the Netherlands, and Scotland, usually are staffed by government attorneys and may also refer cases to private lawyers. The powers of these agencies vary from country to country. Generally, an agency is responsible for the overall management of the legal aid system, the organization of its

budget, the adoption of quality standards for the legal assistance that the lawyers provide, and the decisions on granting free legal assistance. Many legal aid agencies publish periodic reports about their activities, though in some countries, such as Scotland, agency activities are subject to parliamentary control.

Although the grounds for granting legal aid vary from country to country, the criteria used in most legal systems fall into two general categories: financial and legal. To be eligible for free legal assistance, a person must lack sufficient means to hire an attorney. Relevant factors here are the person's income and property as well as, in some countries, the income of any partners and the size of the person's family. Eligibility for legal aid can be established by a financial statement or declaration of the person, as in the United States; revenue documents and bank statements, as in Scotland; salary slips, as in South Africa; or even documents issued by the municipality, as in the Netherlands. In Finland an applicant for legal aid must submit a form detailing his or her financial situation. The form must be accompanied by evidence of the applicant's income, his or her spouse's or partner's income, taxes, child care payments, and other related information, and validated by the financial office in the applicant's municipality.

In some countries, legal aid may be

granted in whole or in part. There are several categories of legal aid in Finland. People whose incomes fall below a certain level are granted legal assistance at no cost. Those whose incomes are higher yet insufficient to cover all of the costs are granted partial legal aid and required to cover from 25 to 90 percent of the cost of legal services. Similarly, the Netherlands uses a sliding scale whereby the more money a person earns in wages, the more he or she contributes to the payment of lawyer's fees.

Under legal criteria, the principal factor is the nature of the case. Generally, legal aid is granted to defendants in all criminal cases where the interests of justice so require, with the exception of certain criminal infractions punishable by fine. In many countries legal aid is also granted in civil cases. In South Africa and Finland, for instance, legal aid is granted in cases involving divorce, alimony, employment disputes, administrative matters, and pensions.

4.2 Legal aid service mechanisms for criminal cases

Countries have adopted different models for dispensing legal aid services to their citizens accused of crimes. Legal aid experts Robert Spangenberg and Marea Beeman of the Spangenberg Group have

identified three basic models of organization of the provision of legal aid in the United States: lawyers acting as *ex officio* assigned counsel, lawyers contracted to provide legal services, and lawyers employed as public defenders. Similar models have been established in other countries. A country may create a model utilizing one or more of these mechanisms. In addition, certain legal services offered by law school clinics can supplement the representation provided by more comprehensive legal aid schemes.

4.2.1 *Ex officio* assigned counsel system. Probably the oldest of all systems, the *ex officio* assigned counsel system has been adopted today in many countries around the world, including Australia, most of Europe, South Africa, and the United States, though few of these countries have organized their legal aid systems exclusively on this model. Under this model, the courts, the bar, or other respective legal aid agency appoints counsel for indigent defendants, and attorney's fees are covered by state funds specifically allocated for such purpose.

Under the traditional *ex officio* system, the court or the bar appoints an *ex officio* counsel who can be any member of the bar, with no further requirements. In the United States, legal aid lawyers report that the decision to appoint a lawyer some-

times may be based merely on that lawyer's presence in the courtroom at the time of the defendant's first appearance. This factor, in conjunction with relatively low reimbursement rates for *ex officio* appointed lawyers, may explain why this system is often criticized as providing indigents with "marginally competent lawyers" to represent them. Critics of the *ex officio* model point to its lack of control over the qualifications of the appointed lawyers and the quality of services.

The traditional version of the *ex officio* system now has limited significance. Many countries have adopted more refined *ex officio* models, under which attorneys are assigned on a rotational

basis in accordance with their experience, their expertise, and the complexity of the case. In most countries, the enhanced *ex officio* systems require that attorneys meet certain minimum qualification criteria and provide for some form of attorney supervision and professional training. Commentators in the United States contend that the traditional *ad hoc ex officio* system poses a risk that lawyers may become economically dependent on the goodwill of the courts, but that this risk is significantly diminished under the coordinated, rotational model. The procedure for appointing counsel in these cases is strictly regulated by legal aid legislation.

***EX OFFICIO* ASSIGNED COUNSEL SYSTEM**

Pros:

- easy management
- limited administrative burden
- quick appointment procedure

Cons:

- lack of control over appointments
- limited supervision or quality controls
- minimal opportunities for training and professional development
- difficulty in preparing accurate budgets for future
- in some countries, risk of compromise to vigorous client representation due to reliance on the court for appointments

- usually greater expense per case than salaried lawyer or contract lawyer models
- lack of specialization in criminal matters

4.2.2 Contracting system. The contracting system was recently adopted in the United Kingdom. Many states in the United States also have organized their legal aid systems partly or exclusively based on this model. Under the contracting system, the legal aid board, state, county, or municipality enters into a contract with a law firm, a local bar association, an NGO, or sometimes an individual attorney to provide legal assistance in a certain number of cases for a fixed fee per case. Under such contracts, attorneys may provide legal representation for all criminal cases in a given jurisdiction, as in Scotland, or for a specific category of cases, such as cases involving minors or cases that public defender's offices cannot take because of a conflict of interest. The contracts are for specific periods of time, usually one or two years, after which the firm must promptly designate a replacement firm so as to ensure that legal aid recipients continue to have access to assistance in the area. Any law firm or NGO may apply to represent indigent people in a given jurisdiction. In

practice, the legal aid board or the municipality uses bidding procedures to select the contracting law firm on the basis of the law firm's fees, the volume of cases it can handle, and other factors.

The contracts usually contain special clauses guaranteeing the quality of the legal services provided. In 1990 the American Bar Association adopted a regulation requiring that quality control clauses be included in all contracts for free legal assistance in the United States. Similarly, in England the contracts for legal representation of indigent people, negotiated between the Legal Services Commission (formerly the Legal Aid Board) and law firms, should contain certain clauses for quality of services and mechanisms for supervision. In Scotland, in order to qualify for a contract with the Legal Aid Board, a law firm must be registered in advance with the board. To be registered, a law firm must have complied with the standards of the code of professional practice, fulfilling requirements of conduct, files and records maintenance, accountability, and the like.

LEGAL AID CONTRACTING SYSTEM

Pros:

- degree of control over appointments
- some influence on quality of legal services and accountability
- feasibility of advance planning for future budgets and expenses

Cons:

- greater expense than public defender system
- risk of compromise to vigorous client representation due to dependence on government contracts

4.2.3 Public defender system.

Under this system, the legal representation of indigent people is provided by a governmental agency established specifically for this purpose and staffed by full-time lawyers. This system is widely adopted around the world. The first Central or Eastern European country to launch a public defender program was Lithuania in 2000. South Africa introduced a pilot public defender project in 1992, and Scotland launched its pilot public defender program in 1998. In some countries, the public defender system is integrated with the Legal Aid Board, as in South Africa. Legislatures often play a role in supervising the system, as in Scotland, where the activities of the Legal Aid Board are subject to parliamentary

oversight. Regardless of the organizational structure or oversight mechanism, ethical rules and the codes of ethics applied to private attorneys usually are binding on the staff of public defender offices as well.

Both the South African and Scottish public defender projects have provided legal services to a large number of indigent defendants. In South Africa, approximately 200 cases were assigned per defender, so that the ten public defenders handled about 2,000 cases during the first year. In Scotland, the number of cases envisaged for the first year per public defender was around 500. Moreover, the experience of South Africa indicates that the average cost per criminal case in the public defender system is significantly lower than the

average cost in the *ex officio* assignment system. Public defender projects must be careful, however, to ensure that the number of cases handled per defender does not exceed a level that would adversely affect the quality of representation and attention to individual clients.

The South African Constitution gives all detained or arrested people the right to consult with a legal practitioner. As a result, the Legal Aid Board has set up a toll-free telephone number at all police stations and prisons to enable detained and arrested people to consult with lawyers. Yet the South African

board estimates that it does not have enough funds to provide legal aid to all those who require it. At one point, the South African board was considering establishing a subscription telephone legal advice service to raise sufficient funds to pay for its operation costs, but the scheme was never introduced.

To guard against conflicts of interest that may arise, the American Bar Association has urged U.S. state governments to consider organizing their legal aid services based on a combination of models, and not to rely exclusively on the public defender system.

PUBLIC DEFENDER SYSTEM

Pros:

- legal assistance provided by well-qualified lawyers
- good potential for quality control
- possibility of training and professional development
- lower “maintenance” costs
- greater ease in planning future budgets and tracking expenses
- greater likelihood of keeping statistics and ensuring accountability

Cons:

- heavy caseload for staff attorneys
- risk of routine approach in dealing with similar cases
- perception of public defenders as part of the state’s legal apparatus

4.3 Legal aid service mechanisms for civil matters

Legal aid in civil matters often involves a variety of services that may include legal information and referral services, community legal education, counseling and advice for individuals, and mediation services. Such services also include representation in court, public interest litigation on issues affecting many people, and legislative and appellate court advocacy. While sometimes services are provided directly by government agencies, more typically they are provided by NGOs or private attorneys. In many countries, publicly funded services are supplemented with those provided by private charitable organizations. There is a strong and growing emphasis on use of paralegal staff and lay advocates in order to reach as many people as possible.

Ensuring that legal aid and similar social services are provided to the poor, children, victims of violence, and others is a task for an entire community, not legal aid agencies alone. Community organizations are a valuable resource that can be called on to provide advocacy services, emergency housing, food, child care, and counseling, as well as assistance with personal protection orders and the criminal justice process. Such organizations may have particular

expertise and knowledge concerning the needs of a client group, such as abused women, the elderly, the disabled, and others. A legal aid society or lawyer may utilize the resources of these organizations or, if necessary, refer clients to them. In addition, since many legal aid agencies are limited in their actions by the governments that fund them or by a narrowly specialized set of priorities, community organizations can perform a valuable role in identifying and advocating solutions on behalf of the community.

A good example of how organizations connect legal aid to other social services is the New York Legal Aid Society (NYLAS). Established in 1876, NYLAS has changed its role significantly over the years. First launched to provide legal assistance to German immigrants, the organization extended its services to legal consultations to the poor in the early 1900s. Today, NYLAS is one of the largest not-for-profit public interest law firms in the United States. Its staff of 900 lawyers provides much more than legal advice to more than 300,000 individuals with pressing social needs and is an important force for empowering the underprivileged communities in New York City.

There are many models for providing civil legal services, most of which can be

grouped into one of three categories: advice offices and “hot lines,” staff attorney programs, and private attorney programs.

4.3.1 Advice offices and hot lines.

Following World War II, the United Kingdom led the way with the creation of Citizens Advice Bureaux in England, Wales, and Northern Ireland. They were established to provide people with advice and practical assistance on a wide range of problems. Although they were not initially created as legal advice offices, these centers began to provide a substantial amount of advice to people about their rights because so many basic problems, including housing, employment, and family relations, have important legal aspects. The Citizens Advice Bureaux regularly work in collaboration with community legal organizations (see section 4.3.2). Similar organizations called Community Action Programs, which also work closely with local legal services organizations, were established in the 1960s in the United States.

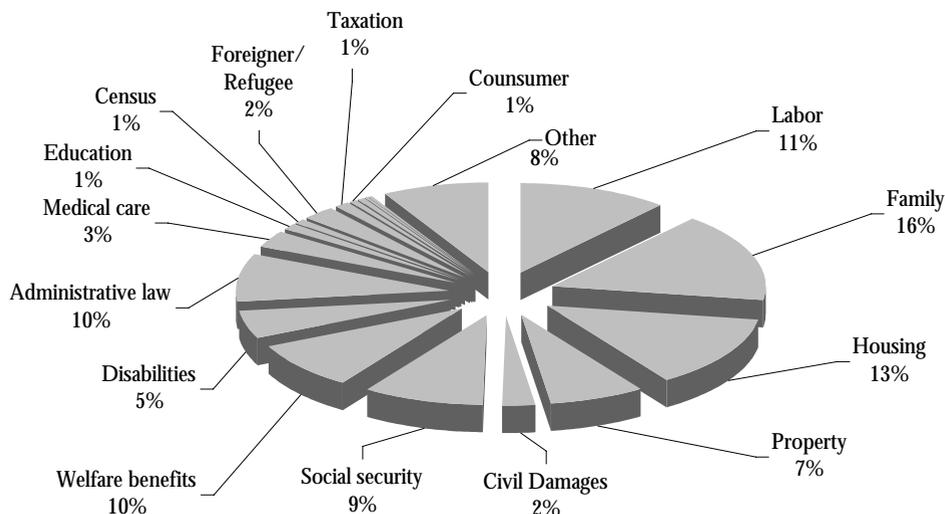
In 1996, the first Citizens Advice Bureaux were established in Poland (Biuro Porad Obywatelskich, or BPO), based on the British model. Currently there are 17 locations (approximately 2,000 operate in the United Kingdom)

and plans to establish more offices. BPO activities are supported and coordinated by the Union of Associations of Citizens Advice Bureaux in Warsaw. A similar operation, also modeled after the British Citizens Advice Bureaux, operates in the Czech Republic.

The principal functions of the BPOs include collecting and disseminating information, conducting educational activities, and encouraging community and individual action. For example, BPOs work to inform citizens about services of local and national institutions and NGOs, maintain an updated information system on citizens’ rights, and disseminate material and data published by regional governments, other public institutions, and NGOs.

The Polish BPOs work effectively to broaden citizens’ awareness by educating individuals about their rights and responsibilities as citizens (for example, explaining housing benefits and procedures). BPOs may also conduct programs or prepare materials that explain certain procedures for asserting individual rights (for example, clarifying rules for submitting official documents or regulations concerning social benefits). BPOs offer citizen advice services to provide support and encouragement to those dealing with issues individually as well as problems common to groups.

**CATEGORIES OF CLIENT MATTERS HANDLED
BY BPOs DURING 2000 (BASED ON
DATA FROM 13 POLISH CITIZENS
ADVICE BUREAUX)**



For more information, please contact Union of Associations of Citizens Advice Bureaux, Związek Stowarzyszeń Biur Porad Obywatelskich, ul. Lwowska 15, VI p, 00-660 Warsaw, Poland; tel: (48 22) 622 55 53; fax: (48 22) 622 55 54; E-mail: zsbpo@zsbpo.org.pl

The BPO philosophy is that citizens must be fully aware of their rights in order to resolve their legal problems. However, BPO advisers do not make decisions on behalf of their clients; rather, they help clarify a range of possible solutions as well as the consequences

of each option. While encouraging the local community to be more active, BPOs also serve the community by equipping individuals with basic knowledge and necessary information. Thus BPOs teach citizens how to solve local problems through social involvement and collabo-

ration. The chart on page 26 illustrates the wide variety of matters handled by thirteen Polish BPOs during 2000.

Legal “hot lines” have emerged as a major component of the civil legal services system over the years, especially in the United States. These organizations

phone call based on the information that the caller provides, without any investigation or agreement to contact third parties. Many hot lines also send written materials by mail. If the caller requires more services, the staff member will make a referral where possible.

ADVICE OFFICES AND HOT LINES

Pros:

- easy access for many people
- coverage of a wide variety of issues
- offers of advice and practical assistance
- good referrals to other services
- no eligibility limits

Cons:

- limited advice in scope and depth
- no representation in court
- no "systemic" legal advocacy

offer basic advice and counsel and referral services by telephone. In many cases they also conduct eligibility screening for staff attorney programs (see section 4.3.2). These hot line programs tend to be NGOs operating with funding provided by the government. Under attorneys’ supervision, paralegals, law students, or lay volunteers provide advice to clients. In some cases, attorneys give the advice directly. Most advice is limited to one

4.3.2 Staff attorney programs.

The primary mechanism for providing civil legal services in the United States is through staff attorney programs. These are private, not-for-profit organizations established for the explicit purpose of providing representation to low-income people on basic issues of family law, housing, employment, government benefits, consumer, and other economic issues. The organizations are often

called neighborhood or community legal services, as a reflection of their goal of having close ties to the client communities they serve. Local boards of directors composed of attorneys and clients govern them. Most of the staff attorney programs are supported financially by the federally funded Legal Services Corporation, which imposes strict limits on client eligibility and other limits on the type of work the organizations can do. As a result of substantial changes in the federal program several years ago, a sizable number of organizations decided to forgo the funding from the Legal Services

Corporation and rely instead on funding from state governments and other public and private sources.

Staff attorney programs are often organized by specialty, such as housing or family law. The primary work of the organizations is to represent individual clients by providing the type of assistance best suited to solving their problems. This often involves holding brief advice sessions, writing a letter, or making a few telephone calls. Such programs focus most of their efforts on providing representation in court or before government agencies, for which the lawyer is committed to seeing the

STAFF ATTORNEY PROGRAMS

Pros:

- strong mechanism for determining local priorities
- visibility in community
- wide range of services
- effective strategic advocacy on major issues
- base for fundraising

Cons:

- less flexibility than private attorney mechanism
- tendency in the start-up phase to have less-experienced staff
- heavy caseloads for individual attorneys

problem through to the end. Many legal services programs also place a great deal of emphasis on advocacy that affects a large number of people. This kind of advocacy may include filing class action lawsuits, handling appeals on significant points of law, drafting legislation, advocating for changes in government regulations, and collaborating with other kinds of organizations working on behalf of the poor.

Organizations similar to U.S. staff attorney programs exist in the United Kingdom, Canada, Australia, and South Africa, among other countries. Funding may be through national governments, local governments, or private donors. The Legal Resources Centre (LRC) in South Africa is an example of an organization that began advocating for civil and political rights during the apartheid era and later shifted its work to encompass economic issues, such as housing and employment, and personal rights issues, including domestic violence. LRC has led the way in demonstrating the value of providing high-quality legal services on civil matters in South Africa, leading to a decision by the Legal Aid Board to approve funding for a network of justice centers that do similar work.

4.3.3 Private attorney programs.

In a number of countries, private attorneys are compensated under government programs to provide civil legal aid. Until recently the United Kingdom provided the prime example of the traditional form of this model. Under this system, the Legal Aid Board evaluated the request of any person seeking no-cost legal assistance, based on individual income and the type of case involved. Once approved, the person obtained representation from a private attorney in the same way as individuals who paid for their services. The Legal Aid Board then paid the selected attorney a fee. In the United Kingdom the program operated as an entitlement, meaning that any financially eligible person who had a qualifying legal problem could receive legal aid. This provided widespread access to legal assistance so long as the problem was one that private lawyers traditionally handled. Many Commonwealth countries such as South Africa have modeled their systems after the U.K. approach, which is often referred to as “Judicare.”

In April 2000 the U.K. Legal Aid Board was replaced with a Legal Services Commission, which created a new civil legal aid scheme. The new system uses a contracting model similar to that described above for criminal cases. For

civil cases, the Community Legal Service (CLS) provides no-cost legal representation to people who qualify for it based on their financial circumstances and the nature of their case. The CLS also assists eligible clients with a variety of legal issues, including divorce and other family law matters, advice on welfare benefits, problems with credit or debt, landlord-tenant disputes, and immigration and nationality issues. Other CLS matters may include challenges to decisions of governmental and other public bodies and challenges to police misconduct.

In addition to government-funded legal aid programs, private attorneys provide civil legal assistance to indigent clients on a voluntary basis. In the United States some legal aid funds are used to pay not-for-profit legal organizations to screen clients and refer them to attorneys who handle *pro bono* cases. Individual states such as Wisconsin and Pennsylvania operate variations of Judicare programs. Such programs also recruit volunteer attorneys, provide them with training on special legal issues affecting the poor, and conduct certain activities to ensure the quality of services. This

PRIVATE ATTORNEY PROGRAMS / JUDICARE SYSTEM

Pros:

- access to skilled, experienced private attorneys
- encouragement of support by the legal community for legal services for the poor
- more choices for clients in obtaining representation

Cons:

- potential to be very costly
- difficulty of ensuring quality of services
- tendency to emphasize litigation over other methods of dispute resolution
- traditionally does not allow for community priority setting

structured approach has led to a significant expansion of volunteer services. At the same time, many bar associations and courts responsible for regulating the conduct of attorneys have strongly encouraged attorneys to offer a certain amount of *pro bono* services, which has also resulted in more legal services being provided on a voluntary basis.

4.4 Legal clinics and Street LawTM programs

In addition to the main mechanisms for disseminating legal aid services, some countries support other approaches to providing legal aid to indigents, such as legal clinics and Street Law programs. Although no country has organized its system exclusively on the basis of these additional approaches, both can serve as supplementary means for providing legal aid.

Legal clinics are a component of legal education through which law students, under the supervision of a law professor or a practicing lawyer or both, work on real cases with individual clients. Legal clinics serve two primary purposes: to train students in fundamental lawyering skills by exposing them to practical experience, and to provide competent advice to indigent people who are otherwise

unable to consult with a lawyer.

South Africa has had an interesting experience in integrating legal clinics into the legal aid system. Like many Central and Eastern European countries, South African law graduates who wish to become lawyers must complete internships with private lawyers after graduating from law school. Also like many Central and Eastern European countries, in the past there was a shortage of placement for such internships. In 1993 this internship requirement was changed to allow law graduates to complete a community service internship with a law clinic or a public interest law firm as an alternative to an internship with a private lawyer. This greatly increased the number of placements available to new graduates. Participating clinics must employ a practicing attorney with sufficient experience to supervise the work of the graduates. These clinics are funded directly by the Legal Aid Board and act as public defender offices for the district courts.

Although legal clinics are important in training students in critical lawyering skills and exposing them to legal aid work, they cannot be more than a partial solution to the problem of access to justice. With the exception of the community service law clinics in South Africa, these clinics are generally not an efficient mechanism for providing legal represen-

tation, since they must balance the needs of legal aid clients with the program's educational goals. For further discussion of university-sponsored legal clinics, see chapter 7, "Clinical Legal Education: Forming the Next Generation of Lawyers."*

Another means for promoting access to justice for indigents is through Street Law programs. Street Law is a form of education for secondary school students and other audiences focused on explaining how the legal system works and providing some basic knowledge on a variety of legal issues that may affect them in everyday life. Street Law programs often function as university-based clinics in which law student instructors are trained to educate their audiences on issues related to criminal law, juvenile law, housing, welfare, and other matters. At the Warsaw University Faculty of Law, for example, Street Law program participants prepare written materials on citizens' rights, which are distributed to many legal aid clients. Street Law programs are a valuable complement to law clinics, as they educate participants about their individual rights and how to obtain legal assistance. See chapter 8, "Public Education about Human Rights, Law, and Democracy: The Street Law™ Model."*

4.5 Funding

Generally, legal aid systems are funded by the national budget. In federal systems, the obligation to provide funding to legal aid systems is shared between the central and the local governments. As government funding may often be insufficient, legal aid programs in many countries must seek funding from alternative sources. One important model for funding legal aid systems is the Interest on Lawyers' Trust Accounts (IOLTA) program. IOLTA programs are now in place in Australia, Canada, New Zealand, and the United States. Through IOLTA, attorneys deposit funds, held in escrow for clients, in interest-bearing bank accounts. The interest generated by IOLTA accounts is given to foundations that provide legal services for indigent clients. Currently all of the IOLTA programs in the United States together generate approximately U.S.\$100 million each year to provide basic legal services to 1.7 million low-income Americans. In South Africa the equivalent of IOLTA funds is used to support legal education and training and accredited university legal aid clinics.

Some states in the United States have adopted other approaches to fund their legal aid systems. In Alabama, for exam-

COMPARATIVE CIVIL LEGAL SERVICES INVESTMENTS

<i>Country</i>	<i>Total government investment in civil legal services (in millions of U.S.\$)</i>	<i>Per capita civil legal services investment (U.S.\$)</i>	<i>Civil legal services investment (per U.S.\$10,000 of GNP)</i>
<i>United States(1998)</i>	<i>\$600 (pop. = 270 million)</i>	<i>\$2.25</i>	<i>\$0.70</i>
<i>Germany (1996)</i>	<i>\$390 (pop. = 80 million)</i>	<i>\$4.86</i>	<i>\$1.90</i>
<i>France (1994)</i>	<i>\$270 (pop. = 59 million)</i>	<i>\$4.50</i>	<i>\$1.90</i>
<i>Netherlands (1998)</i>	<i>\$150 (pop. = 15.5 million)</i>	<i>\$9.70</i>	<i>\$4.20</i>
<i>England (1999)</i>	<i>\$1,350 (pop. = 53 million)</i>	<i>\$26.00</i>	<i>\$12.00</i>

Adapted from National Equal Justice Library, International Legal Aid Collection (visited 13 June 2001), <http://www.equaljusticeupdate.org/comparativestatistics.htm>, cited in Justice Earl Johnson Jr., "Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies", *24 Fordham Int'l L.J.* S83 (2000) at S95.

ple, a special Fair Trial Tax Fund has been established to cover the costs of representation for indigent defendants. In Arkansas, a \$5 fee is imposed in all civil and criminal cases in addition to funding from the state and county for legal aid in both criminal and civil cases. In Kentucky, all people who receive legal aid in criminal cases are required to pay a \$40 administrative fee, though this

fee may be waived for people who are unable to afford it or for people detained who are pending trial. Furthermore, all people convicted of drunken driving are required to pay a service fee of \$200, \$50 of which goes to a legal aid fund. In Montana, funds for legal aid in criminal cases come from a portion of the motor vehicle registration fee.

5. PROMOTING EFFECTIVE LEGAL REPRESENTATION FOR ALL

Securing effective legal service to the underrepresented remains a critical issue for Central and Eastern European countries. However, there are reasons for optimism about the future of legal aid in the region. In many ways, the campaign to establish better access to standards of justice and create a working legal aid system may not be quite as daunting and difficult as first imagined.

5.1 Strengthening “fair trial” standards through strategic litigation

Currently, most Central and Eastern European criminal procedure codes do not explicitly recognize indigence as a ground for granting free legal assistance. Although criminal procedure codes have established mechanisms for assigning counsel to defendants in certain categories of cases, a vast number of defendants facing possible imprisonment do not fall into any of these categories and thus have no guaranteed right to free legal assistance.

This situation seems overtly contrary to international human rights standards. Recent case law of the European Court of Human Rights indicates

that the failure to provide free legal assistance to defendants facing imprisonment may itself constitute a violation of the right to a fair trial. By bringing alleged violations of a defendant’s right to free legal assistance before domestic courts (using arguments based on ECtHR case law), as well as litigating cases before the European Court, advocates may help promote domestic legislation that complies with the law of the European Convention on Human Rights, thus improving domestic access to justice standards. See also chapter 5, “NGO Advocacy before International Governmental Organizations.”*

5.2 Determining needs through surveys and pilot projects

In most of the Central and Eastern European countries, statistics currently available are insufficient to reveal the actual scope of problems involving access to justice. This makes it difficult not only to assess the current needs of indigent defendants but also to decide on the most appropriate measures for reforming the system. Surveys and pilot projects can be useful tools for determining practical needs. Surveys and pilot projects can also play an important role for lobbying legislators and campaigning more widely for legal reform.

In South Africa, surveys and pilot projects played an extremely important role in reforming the legal aid system.

5.2.1 Surveys. Surveys can be a powerful tool for reforming legal aid systems. Scientifically devised studies with carefully compiled empirical results can help persuade a government to support

a new legal aid system and can offer the government solid empirical support should its decision to overhaul the legal aid system face strong criticism. NGOs in both Poland and Bulgaria have undertaken ambitious system-wide surveys designed to reveal flaws in the current system and point to potential remedies.

BULGARIAN PRISON SURVEY ON LEGAL REPRESENTATION

In 1998 the Bulgarian Helsinki Committee launched a project to establish a Legal Aid Commission. The project included a study of the current state of legal assistance and its effect on the criminal process in Bulgaria. To conduct the survey, the committee distributed a standardized questionnaire in January and February 1999 among 993 male and female prisoners constituting a representative sample of all detainees. The questionnaire was distributed in the form of interviews conducted by psychologists in the system of the Penitentiary Administration on behalf of the Bulgarian Helsinki Committee.

Table 1

Participation of defense counsel at different stages of criminal proceedings

(Percentage of respondents answering “no” to question of whether they had a lawyer)

During the preliminary investigation	54
Before the first instance court	40
During the appeal (excluding answers “there was no appeal”)	43

Table 2
Incidence of torture/ill-treatment during preliminary proceedings

(Percentage of respondents answering “yes” to question of whether physical force was used against them)

	<i>With a lawyer present</i>	<i>Without a lawyer present</i>
During arrest	46	56
Inside police station	48	57
During preliminary investigation	29	42

Table 3
Interethnic differences with respect to the participation of a lawyer in criminal proceedings

(Percentage of respondents answering “no” to question of whether they had a lawyer in the different stages of criminal proceedings)

	<i>Bulgarians</i>	<i>Turks</i>	<i>Roma</i>
During the preliminary investigation	48	58	64
Before the first instance court	35	48	48
During the appeal (excluding answers “there was no appeal”)	36	51	51

For more information, please contact the Bulgarian Helsinki Committee, 7 Varbitsa St., Sofia 1504, Bulgaria; tel/fax: (359 2) 943 4876, (359 2) 465 525, or (359 2) 467 501; E-mail: bhc@bghelsinki.org Web: www.bghelsinki.org

5.2.2 Pilot projects. In some countries, advocates of legal aid reform are initiating pilot projects to test and analyze various approaches to reform. In fact, many pilot projects have proved

successful in initiating legal reform because they allow communities to experience the benefits of new institutions at an earlier stage than they would otherwise, providing the opportunity for pro-

ponents to mobilize public and political support. At the same time, pilot projects may serve as “legislative laboratories”

for exploring the possible disadvantages of a particular program and thereby minimizing the potential negative effects.

LITHUANIAN LEGAL AID PILOT PROJECT

In April 1999 the Free Legal Assistance Program was launched in Lithuania to create a system for providing legal assistance at no cost to indigent people. The first step of the project was to evaluate the existing laws on legal assistance and the need for legislative reform. Then an assessment of the current situation in Lithuania was conducted, based on a survey similar to the one conducted by the Bulgarian Helsinki Committee. The third stage of the project was the establishment of a Public Attorney Office.

On 28 March 2000 the Lithuanian Parliament adopted the Law on State Guaranteed Legal Aid. The law entered into force on 1 January 2001. Under the new law, people whose annual income and property are below the limits set by the Government of Lithuania and people who are eligible for free legal assistance under international law are entitled to free legal representation. Legal aid is provided in criminal, civil, and administrative cases when required by the interests of justice. The state covers the cost of legal assistance on a sliding scale, depending on the person’s income.

Free legal service is provided by private attorneys after a referral by a local government office. Public institutions such as the Public Attorney Office or a legal clinic may also provide legal assistance in a procedure approved by the Ministry of Justice. These public institutions are funded by donations in accordance with the law on charity and donations and by in-kind or cash contributions from state and local governments. The funding available for the first year of operation of the new legal aid system is expected to be around 8 million Litas, or U.S.\$200,000. It is likely that additional funds will be necessary to implement the program on a permanent basis.

A pilot Public Attorney Office supported by the Open Society

Fund–Lithuania and the Constitutional and Legal Policy Institute was launched in March 2000 in the city of Siauliai, with five staff attorneys. The results of the first eight months of operation of the Siauliai Public Attorney Office were extremely encouraging. At the trial stage, the five staff attorneys handled approximately 50 percent of cases where legal representation is required. The other 50 percent were handled by thirty-four private attorneys appointed *ex officio*. During the preliminary investigation, the Siauliai Public Attorney Office represented approximately 80 percent of the parties requiring legal defense.

The Public Attorney Office is a new concept for Lithuanian law and an institution without precedent in the legal traditions of Central and Eastern Europe. Despite its unfamiliarity to many, it seems that the Public Attorney Office quickly has become an indispensable part of the law enforcement system in Siauliai. According to interviews with judges, prosecutors, and police investigators in Siauliai, conducted after the first eight months of the program, most of them responded that they could not imagine returning to the old system and were looking forward to further program developments.

For more information, please contact Open Society Fund–Lithuania, Didzioji St. 5, Vilnius LT-2001, Lithuania; tel: (370 2) 685 511; fax: (370 2) 685 512; E-mail: fondas@osf.lt; Web: www.osf.lt

5.3 Toward a new system of legal aid

Effective implementation of the right to free legal assistance for indigent criminal defendants, as required by international human rights treaties, will likely increase substantially the number of people who rely on a system of state-assigned counsels. Furthermore, the right to legal assistance is a right to *effec-*

tive legal assistance; compliance with international human rights standards will require adoption of some mechanisms that will guarantee efficiency and quality of services provided by appointed lawyers.

The existing procedures for appointing counsel in cases of mandatory defense may be inadequate to handle the increased workload or to provide sufficient control over the quality of

the legal services. Adoption of new forms of organizing the provision of legal aid probably will be an inevitable consequence of the overall changes in the legal system. Choices concerning the most appropriate forms of organization and management of the legal aid system and how to finance such a system will depend on the particular circumstances in a country. There are some common questions, however, that many activists for legal aid reform will encounter.

5.3.1 Establishing indigence. One issue that is central to the existence and continued support of legal services programs is the ability of organizations to provide objective documentation of clients' indigence. In the austere economic climate of the region, it will be difficult for a legal aid system to support its existence at government expense if it is vulnerable to claims that it squanders its labor and other resources on clients who are not needy. To that end, legal aid programs should consider how to preempt such attacks by requiring some indication of the client's income (1) demonstrating a likelihood that the client is indeed indigent, and (2) reflecting an effort by the program to ensure that it provides its services to those who need them most.

5.3.2 Choosing a model. Establishing a new or modified system of organization of legal aid will require the coordinated efforts of different organizations: the Ministry of Justice, the organized bar, the Ministry of Finance or relevant financial state agency, and nongovernmental organizations. The views of these actors may differ considerably, but the success of any legal aid reform will depend on the involvement of all of them.

In order to make an informed, balanced determination regarding which legal aid system may be the most appropriate for a given community, decision makers should consider the following issues:

- the expected number of cases that the legal aid system will manage per year
- the likely budget for the legal aid system
- the type of organizational forms that will be most effective given the particular needs and budget
- existing legal traditions and expectations of citizens regarding access to justice
- legislative amendments necessary to make the new system workable
- procedures for accountability and control over the legal aid system

In countries where most people traditionally have not enjoyed the benefits and protections of the laws, whether because of poverty or because of the arbitrary exercise of power, law has little meaning. Legal services can empower disaffected people and enhance the position and impact of law on society by asserting the benefits of law on behalf of individual clients. Legal aid lawyers must work diligently for their clients by clear-

ly explaining the laws and their protections and by putting pressure on legal, administrative, and judicial systems to recognize and safeguard individual rights and freedoms.

No amount of legal aid by itself will suffice to bridge the gap between society and legal structures. But it can make a dramatic contribution to reducing the widespread social alienation that breeds contempt for government and law.

PROMOTING ACCESS TO JUSTICE IN CENTRAL AND EASTERN EUROPE

In 2000, four NGOs active in Eastern Europe—the Bulgarian Helsinki Committee, the Helsinki Foundation for Human Rights in Poland, INTERIGHTS, and the Public Interest Law Initiative (PILI) at Columbia Law School—joined forces to launch a region-wide project to promote legal aid reform and access to justice. In two pilot countries, Poland and Bulgaria, the project partners are undertaking empirical studies and holding national forums of stakeholders, to be followed by a regional conference. As a result of the project's activities, a coalition of human rights lawyers, judges, bar association leaders, and justice ministry officials devoted to strengthening legal aid is beginning to emerge in the region.

As part of the access to justice project and in cooperation with the Association of the Bar of the City of New York, PILI administers a Web-based forum on access to justice that offers several distinct features for public interest lawyers, scholars, and activists from around the world. The Access to Justice Forum consists of a resource bank; a virtual, decentralized archive where materials can be freely posted and retrieved; and an on-line discussion section, where members can exchange information about new developments and con-

sult one another regarding issues related to legal aid and other aspects of access to justice.

For more information about the project on access to justice in Central and Eastern Europe, please contact Public Interest Law Initiative, Columbia Law School, 435 West 116th St., MC 3525, New York, NY 10027, USA; tel: (1 212) 851 1060; fax: (1 212) 851 1064; E-mail: pili@law.columbia.edu; Web: www.pili.org. To enter the Access to Justice Forum, please go to www.pili.org/access

RESOURCES

Readings

Access to Justice Web site
<www.pili.org/access>.

An electronic meeting place consisting of a resource bank, where materials related to access to justice issues can be freely posted and retrieved. Includes an on-line discussion section where members can exchange information about new developments.

Access to Legal Aid for Indigent Criminal Defendants in Central and Eastern Europe, *Parker School Journal of East European Law*, Columbia University, Vol. 5, Nos. 1–2 (1998), New York.

Contains five country reports on access to legal aid in criminal cases in Central and Eastern Europe, a paper on the jurisprudence of the European Court of Human Rights on legal aid, and a paper overview of the obstacles to access to justice in a broader international context. This issue is available on request from the Public Interest Law Initiative.

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Eleventh Annual Philip D. Reed Memorial Issue Symposium, Partnership across Borders: A Global Forum on Access to Justice, *24 Fordham Int'l L.J.* (2000), New York.

Summary of the proceedings of the conference, organized by the Association of the Bar of the City of New York on April 6–8, 2000, in New York. The papers presented at this conference focus on access to justice in civil cases in several regions around the world.

Equal Justice Network Web site:
<<http://www.equaljustice.org>>.

An on-line information source and contact mechanism for lawyers and other advocates involved in efforts to provide civil legal assistance to low-income people in the United States.

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<http://www.pili.org/library/access/striking_the_balance.htm> (last accessed on July 26, 2001).

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Scott, R., *Initiatives in Scotland*, a conference paper for the International Legal Aid Conference, Edinburgh, June 1997.

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Sesickas, L., Access to Justice in Lithuania, *24 Fordham Int'l L.J.*, S159–S182 (2000), New York.

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ments that are likely to bring a change in the provision of legal aid in Lithuania.

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Trustees of Boston University, *Case Comment: Philips v. Washington Legal Foundation: The Future of IOLTA*, 79 B.U.L. Rev. 1277 (1999).

Focuses on functioning of the IOLTA (Interest on Lawyers' Trust Accounts) system in the United States.

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A paper on the evolution of the concept of access to justice and its place in the context of reforming judicial institutions.

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A book, consisting of writings by sixteen different authors, that discusses the limits and the potential of legal aid for achieving criminal justice for defendants in the United Kingdom.

Organizations

Bulgarian Helsinki Committee

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Bulgaria
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or (359 2) 467 501
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Web: www.bghelsinki.org

Promotes respect for human rights and stimulates legislative reform to bring Bulgarian legislation in line with international human rights standards. The Bulgarian Helsinki Committee is a partner in the project on Access to Justice in Eastern Europe, which seeks to promote legal aid reform.

Equal Justice Update/National Equal Justice Library

Washington College of Law
American University
4801 Massachusetts Avenue, NW
Washington, DC 20016, USA
Tel: (1 202) 274 4320
Fax: (1 202) 274 4365
E-mail: nejl@wcl.american.edu
Web: www.equaljusticeupdate.org

Contains materials about legal aid and related issues in the United States and around the world.

Helsinki Foundation for Human Rights in Poland

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Fax: (48 22) 828 69 96
E-mail: mailto:hfhr@hfhrpol.waw.pl
Web: www.hfhrpol.waw.pl

Promotes respect for human rights and encourages legislative reform of international human rights standards. The Helsinki

Federation for Human Rights in Poland is a partner in the project on Access to Justice in Eastern Europe, which seeks to promote legal aid reform.

INTERIGHTS

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Web: www.interights.org

Supports and promotes the development of legal protection for human rights and freedoms worldwide through the effective use of international and comparative human rights law. INTERIGHTS is a partner in the project on Access to Justice in Eastern Europe, which seeks to promote legal aid reform.

Legal Aid Board in South Africa

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Legal Services Commission Board of England and Wales

Legal Services Research Centre

85 Gray's Inn Road,
London WC1X 8TX
United Kingdom
Tel: (44 207) 759 0000
Web: www.legal-aid.gov.uk

An executive nondepartmental public body created under the Access to Justice Act of 1999 to replace the Legal Aid Board

in England and Wales. It is responsible for the development and administration of the criminal and the civil legal aid schemes in England and Wales.

Lord Chancellor's Department of England and Wales

Selborne House
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E-mail: general.queries@lcdhq.gsi.gov.uk
Web: www.lcd.gov.uk/index.htm

The Lord Chancellor's main departmental role is to secure the efficient administration of justice in England and Wales. The Web page on access to justice contains laws

and regulations on legal aid in England and Wales.

**Związek Stowarzyszeń Biur Porad Obywatelskich
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E-mail: zsbpo@zsbpo.org.pl

Network of offices that collect and disseminate information, conduct educational activities, and encourage community and individual action. Similar programs exist in Armenia, the Czech Republic, and Ukraine.

NOTES

* This article is part of "Pursuing the Public Interest: A Handbook for Legal Professional and Activists" edited by Edwin Rekosh, Kyra A. Buchko, and Vessela Terzieva; Copyright © 2001 by the Public Interest Law Initiative. All mention of chapters in this overview refers to chapters in this publication.

Financing Legal Aid: Comparative Perspective

by Vessela Terzieva*

Through the years, the right of the indigent to free legal assistance in certain categories of criminal and civil cases has become a right protected by the positive law. Constitutions and specific legal aid laws in many developed countries as well as international human rights treaties call for an affirmative state action to provide free legal representation to all indigent defendants and to the parties in civil proceedings when the interests of justice so require. This action must guarantee effectively, not merely formally, the right of an indigent person to be represented by a competent attorney before the court. Therefore, the question of financing the legal aid system is not a question of charity but a matter of positive state obligation.

The biggest challenge to the successful implementation of the state obligation to secure a functioning legal aid system is the problem of limited state resources. In both developed and developing countries, demands for legal aid are almost always higher than the available resources. In their efforts to solve this problem, governments in many countries around the world have established a number of methods that make it possible for them to provide legal aid to their needy constituencies at a low

cost. Some of these methods could be implemented in the Eastern European context—and probably quite successfully. The purpose of this paper is to provide brief information about some of the methods to reduce the costs of a legal aid system and to examine their applicability in Eastern Europe. For its purposes, these will be divided into two main groups: (1) methods involving cost-effective policy of state regulation of legal aid, and (2) methods involving creation of new funding sources.

1. METHODS INVOLVING COST-EFFECTIVE POLICY OF STATE REGULATION OF LEGAL AID

1.1 Adoption of a cost-effective legal aid delivery method

A state can build its legal aid system on a variety of legal aid delivery models. In comparative perspective, three main legal aid delivery models have been established: private attorney programs (also known as *judicare* for civil cases), staff attorney programs (also known as public defender programs), and contracting programs. In the

first model, legal aid is provided by private attorneys appointed *ad hoc* by the court. The staff attorney (or public defender) program is a delivery model in which the legal aid service is provided by lawyers employed as full-time staff members by a special institution (public defender) or directly by the legal aid plan. Under the third model, the contracting system, a law firm or a non-governmental organization (NGO), after submitting bids, enters into a contract with the state agency authorized to spend legal aid funds and undertakes to provide legal representation either to a specific category of defendants or to all defendants in a given jurisdiction.

Special governmental agencies—commonly known as the Legal Aid Board or Legal Aid Commission—are responsible for the overall management of the legal aid system, the organization of its budget, and the adoption of quality standards for the legal assistance that the lawyers provide; in some countries, they also make the decisions on granting legal assistance.

Surveys, research, and analyses in countries where these three models have been adopted suggest that the legal aid delivery models have differing effects on the cost of the legal aid system. All surveys reviewed show a significant decrease of costs after the adoption of the staff attorney delivery model.

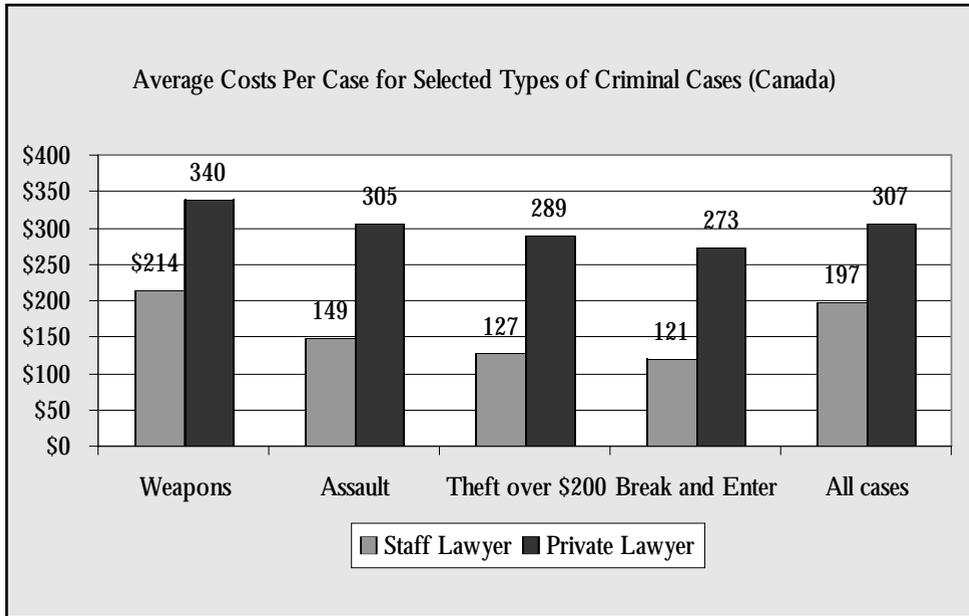
1.1.1 South Africa. South Africa introduced a pilot staff attorney (public defender) program in 1991, for an initial period of two years. The public defender program, staffed by ten full-time attorneys, dealt with about 2,200 cases in the first year of operation and with about 2,800 in the second. The results of the first two years of operation of this model reveal that the average cost per case for the public defender program was lower than the cost for the private attorney program. While the average cost per criminal case in the private practitioners model was about 976 Rands (or approximately USD 295 as of December 1992), the total budget of the Public Defender's Office was 2.5 million Rands,¹ or approximately 570 Rands (USD 187), per case taken by the Public Defender's Office.

1.1.2 Canada. Canada has adopted three main legal aid delivery models for criminal cases: the *judicare* system, in which lawyers in private practice provide legal aid and then are reimbursed by the state upon the issuing of special certificates); the staff attorney model; and the mixed delivery model, which utilizes both staff lawyers and private lawyers.

In the 1980s, the Canadian government initiated a series of surveys on the costs of the legal aid system in its different provinces.² These surveys found,

among other things, that the staff attorney program is less expensive than private attorney programs, and that similar pro-

below compares the average cost per case for specific categories of cases using private attorney and staff attorney models.⁴



portions of staff and private bar cases result in convictions (therefore, the quality of representation is similar). In 1987, the Canadian Bar Association produced a report on legal aid delivery models, in which it also stated that in criminal cases the data show that the staff model is capable of delivering the same outcome for lower costs than the judicare model, or slightly better outcomes for the same cost.³

Although the average cost per case varies in different provinces and different counties, all of the surveys cited above reveal that the staff attorney programs seem to be more cost-effective. The table

1.1.3 United States. The results are similar for several surveys of the cost-effectiveness of legal aid delivery models in civil cases conducted in the United States in the early 1970s. One survey in particular compared the costs of judicare (or the compensated private counsel program) and the staff attorney program for certain specific categories of civil cases in Wisconsin and Michigan. The survey found that the cost per case for a divorce case in the compensated private attorney program was almost five times higher than the cost of a divorce case handled by the staff attorney program. Similarly, the average cost per case for

a bankruptcy case in the private counsel system was almost six times higher than a bankruptcy case handled by the staff attorney office.⁵

Surveys on the cost-effectiveness of the different types of legal aid models were conducted also in Connecticut. In a rural and less populated region of Connecticut, a staff attorney program and a judicare program were opened at the same time for a trial period of twenty-nine months. Despite the fact that the staff attorney project did not reach its full capacity for the trial period because of the relatively small group of clients in that region, the average cost per case still was significantly lower than the average cost for the judicare system. The results are shown in the table below.⁶

ally, lawyers in the staff attorney programs do not have to incur. In order to build up a clientele of well-paying clients, for example, a private lawyer has to maintain an expensive office in a more upscale neighborhood, attend expensive lunches and dinners, wear expensive suits, maintain expensive cars, etc. Private lawyers pay their own social security, medical insurance, and benefits, which are further costs to be included in their fees. In addition, private lawyers employ assistants and pay their salaries and benefits, which also results in higher fees.

In contrast, the lawyers working for a staff attorney program do not have to incur most of these expenses, because—

Type of case	Rates for staff attorney program		Rates for judicare
	USD 18.08	USD 48.90	USD 16
Divorce, annulment, separation	117.70	318.34	399.29
Welfare	49.54	139.99	109.44
Sales, contracts	32.36	87.53	140.64
Bankruptcy	132.53	358.44	145.51
Landlord-tenant	48.45	131.05	115.29

There could be a number of explanations for the higher average costs per case of the private attorney programs compared to those of the staff attorney models. Private attorneys have to build into their fees specific costs that, gener-

unlike private attorneys—they do not have to be worried about maintaining a rich clientele. In addition, staff attorney programs allow for further reduction of costs through employment of efficient management techniques. The nature of

the work of a staff attorney program allows for specialization of lawyers in different types of cases. This may lead to less time spent per case, probably better quality of work, proper division of labor, better use of assistants and other support staff, and effective management of cases.⁷ All of these factors probably explain why in practice the staff attorney programs prove to be more efficient than the compensated private attorney programs.

1.2 Better use of the legal education system

South Africa has had an interesting experience in integrating legal clinics into the legal aid system. As in many Central and Eastern European countries, South African law graduates who wish to become lawyers must complete apprenticeships after graduating from law school. In 1993, the South African Attorneys Act was amended to allow law graduates to obtain practical experience under articles of clerkship by undertaking a period of community service apprenticeship with a legal clinic or a public interest law firm as an alternative to an internship with a private lawyer.⁸ Participating clinics must employ a practicing attorney with sufficient experience to supervise the work

of the graduates. These clinics are funded directly by the Legal Aid Board and act as public defender offices for the district courts. According to data of the South African Legal Aid Board, for the period from 1 July 1994 to 31 December 1996 these law clinics handled 24,513 criminal and 12,997 civil cases, and the average cost per case was 433 Rands, which is less than half of the average cost of 976 Rands per case charged under the *judicare* system.⁹

The South African experience proves that post-graduate apprenticeship programs can be successfully integrated into the state's system of providing legal aid.

2. METHODS INVOLVING CREATION OF NEW FUNDING SOURCES

In addition to decreasing the costs by using cost-effective models, states develop new funding sources to cover the increased needs of their legal aid systems. For the purposes of this presentation, the potential new funding sources are divided into three categories: (1) sources created by governmental action, (2) sources requiring government approval, and (3) private sources, depending on governmental cooperation.

2.1 Sources created by governmental action

The experiences of other countries reveals that funds for legal aid services can be collected by allocating a proportion of court fees, administrative fines, or other payments to the budget of the legal aid system. Often these funds are accumulated in a special fund. Some examples of possible revenue sources for the legal aid budget are cited below.¹⁰

2.1.1 Fair trial tax: A portion of the court filing fee or assessment charge on criminal convictions. This method is widely used in the United States to generate state funds for the legal aid system. For instance, in Alabama, a USD 7 filing fee for civil cases without a jury, and a USD 10 fee for civil cases with a jury, go to the local fair trial tax fund. In addition, a USD 7 tax for all criminal convictions goes to the local fair trial tax fund, which covers part of the trial-related legal aid expenses in criminal cases.

In Arizona, a USD 5 tax on all civil cases and criminal convictions goes to the local legal aid fund. In Louisiana, a USD 25 assessment charge on all criminal convictions goes to the budget of the local legal aid fund. And in Ohio, the state collects a USD 11 assessment

charge on every criminal conviction, except for minor traffic offenses, and a USD 11 charge on the bail premium of all defendants.

2.1.2 Fines and administrative payments. Some states in the United States allocate a portion of the administrative payments and fines collected by the state agencies to the local legal aid funds. In Kentucky, all individuals who receive legal aid are required to pay a USD 40 administrative fee, though this fee may be waived for those who are unable to afford it or who are detained pending trial.

Portions of administrative fines may also go to the legal aid fund. Thus, in Kentucky, for instance, all persons convicted of drunk driving must pay a service fee of USD 200, of which USD 50 goes to the local legal aid fund.

2.1.3 Other sources: Motor vehicle registration fee and abandoned property fund. In Montana, a portion of the motor vehicle registration fees goes to cover costs for legal aid representation in felonies, appeals, and juvenile delinquency cases. In some states in the United States, the income generated through the abandoned property fund is also added to the fair trial tax fund.

2.2 Sources requiring governmental approval

2.2.1 Bar association membership fees and other contributions. In the United States, many state and local Bar Associations, as well as some divisions of these associations, allocate money to the local legal aid fund. The money might be a result of fundraising by the Bar Association specifically for the purpose of supporting the legal aid fund, or it may come from *ad hoc* revenue sources, such as sold property.

In many states of the United States, the Bar Associations also allocate portions of their membership fee, or attorneys' registration fee, to the local legal aid fund.

2.2.2 Legal aid insurance and prepaid legal services plans (for civil cases). Under these plans, subscribers agree to pay a small monthly sum (under the prepaid plan offered by the American Bar Association, this is between USD 9 and 25) in exchange for legal aid advice and consultation by phone or in person, review of simple legal documents, preparation of wills, and other legal services such as writing letters or making phone calls to the adverse party. There are various plans, covering different types of services or limited to particular lawyers. Some plans

may also offer comprehensive coverage for trials. Coverage may be provided for administrative, consumer, family, real estate, and financial matters as well as sometimes for non-felony criminal charges.

The prepaid plans are becoming increasingly popular in America. The number of people covered by all types of prepaid legal plans has risen from approximately 13 million in 1987 to 152 million in 2000.¹¹

Legal expense insurance for civil matters also exists in the member states of the European Union. They may cover specific categories of cases (such as traffic accident liability, for instance) or have a broader scope, and they are provided by general insurance providers. In some countries, legal expense insurance also can cover liability to pay certain fines. Most of these plans cover liability in cross-border cases, i.e., for cases arising in EU jurisdictions different from the jurisdiction of the insured person.¹²

2.2.3 Interest on Lawyers' Trust Accounts (IOLTA). IOLTA programs exist in Australia, Canada, New Zealand, the United States, and other countries. Through IOLTA, attorneys deposit funds, which are held in escrow for clients in interest-bearing bank accounts. The interest generated by IOLTA accounts is given

to foundations that provide legal services for indigent clients. Currently, all of the IOLTA programs in the United States together generate approximately USD 100 million each year to provide basic legal services to 1.7 million low-income Americans and are the second-largest source of funds for legal aid.¹³ In South Africa, the equivalent of IOLTA funds is used to support legal education and training and accredited university legal aid clinics.

2.3 Private sources

2.3.1 International financial institutions. In the last several years, most international organizations have adopted the view that a fair and working judicial system is an important basis for economic development. Many international development agencies focus increasing attention on improving the work of the judiciary and the legal system in developing countries as a precondition for a stable market economy. These developments suggest that multinational donors may be willing to support the first years of operation of a new state-sponsored legal aid system, provided there is political will on behalf of the government to implement legal aid reform. For example, in 1996 the World Bank launched a judicial reform project in Ecuador. Among other activ-

ities, the World Bank has supported “Pro Justice” (Projusticia), an Ecuadorian NGO, which offered free legal aid to low-income women in the capital, Quito, and in two locations in the provinces. In the two years of operation of the project, legal aid was rendered to 11,623 low-income women in matters of family law, domestic violence, and “youth law.”¹⁴

2.3.2 Private donors. Private foundations may also be interested in supporting the first years of operation of an expanded legal aid plan. The Constitutional and Legal Policy Institute¹⁵ and the Open Society Fund-Lithuania thus supported the efforts of the Lithuanian government to improve its legal aid system. The Lithuanian government adopted a new legal aid law that broadened the scope of people eligible for legal aid and allowed for the adoption of different legal aid delivery models, among other things. COLPI and OSF-Lithuania provided the major part of funding for the pilot public attorney’s office in Šiauliai. The Lithuanian Ministry of Justice also made a contribution to this project and committed to increase the funding it provides in the following years. With the success of the project, the two donors committed to support a new public attorney’s office

project in the Lithuanian capital, Vilnius.

An important factor for attracting private funding sources—whether it is donations from international or national foundations, from multinational donor organizations, or from private individuals within the country—is whether the domestic law stimulates these donations and creates conditions

for developing such projects. These conditions may include conferring special status or preferential tax treatment to private individuals willing to donate money to the legal aid system, as well as political will on behalf of the government for cooperation with international institutions wishing to develop legal aid projects in the country.

NOTES

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- ¹⁴ For more information, see Alicia Arias, "The Importance of Legal Aid in Judicial Reform," http://www.pili.org/cgi-bin/a2j?_show.name=resource&_show.file=resources/27.xml; see also Maria Dakolias, "Legal and Judicial Development: The Role of the Civil Society in the Reform Process," *Fordham International Law Journal* 24 (2000).
- ¹⁵ COLPI, now Open Society Justice Initiative.

Two

MODELS OF ORGANIZATION OF A LEGAL AID DELIVERY SYSTEM

This chapter includes:

- Promoting Access to Justice in Central and Eastern Europe, by Roger Smith
- The System of Legal Aid in the Netherlands, by Peter van den Biggelaar
- The Legal Aid Board and the Delivery of Legal Aid Services in South Africa, by David McQuoid-Mason
- Israel's Office of Public Defender: Lessons from the Past, Plans for the Future, by Moshe Hacohen
- Legal Aid Reform in France and the Republic of Ireland in the 1990s, by Mel Cousins

Promoting Access to Justice in Central and Eastern Europe

by Roger Smith*

EXECUTIVE SUMMARY

This paper reviews the various considerations in ways of organizing publicly funded legal services, making reference to the experience of various jurisdictions. An appendix contains a description of the Community Legal Service in England and

Wales¹ as an example of developments in a well-funded jurisdiction and the detailed issues that are current.

The implication of the paper is that the following are the key questions to be answered by policy-makers evaluating any

particular model of organization in their jurisdiction:

1. What mandatory duties does your jurisdiction accept in relation to publicly funded legal services under
 - the European Convention on Human Rights;
 - European Union (EU) mutual assistance provisions;
 - your domestic law?
2. What discretionary services do you wish to provide?
3. What criminal services do you wish to provide? In particular, what services do you wish to provide prior to a suspect being charged and during interrogation by the police?
4. In relation to civil cases, how much of family, private, public, and poverty law claims do you wish to cover?
5. How do publicly funded services interrelate with other forms of funding services or different ways of resolving a dispute?
6. Do you wish legal services to extend beyond representation, to advice?
7. Do you accept a need to provide information and public legal education?
8. Do you wish to incorporate funding for public interest litigation and case-work? If so, how?
9. What test of means do you envisage for criminal cases?
10. What test of means and merit do you envisage for civil cases?
11. Who will administer the tests of means and merit? Do you trust the providers sufficiently to do this, or do you want some form of third-party certification?
12. How do you envisage criminal services being delivered? Do you favor private practitioners, salaried practitioners, some form of “public defender organization,” or some combination of delivery? What are the advantages and disadvantages of each system?
13. Whatever your means of delivery for criminal cases, does it meet the determinants of good services set out in the paper?
14. How do you envisage civil services being delivered? Do you favor private practitioners, community law centers, national agencies, or some other model?

15. What body will manage publicly funded legal services?
16. How will responsibilities for management and policy be divided?
17. Which government department will be responsible for legal aid policy, and how will you ensure that it obtains sufficient information about what is the effect of policy on the ground?
18. What will be the mechanisms for accountability of the managing body?
19. Do you value the cooperation of the existing legal profession—and if so, how will you obtain it?
20. What provisions do you envisage to assure quality?
21. How will you ensure that your policy on legal services integrates within a wider access to justice policy?
22. How big is the budget? And how will you demonstrate value for money?

1. INTRODUCTION

The organization of publicly funded legal services in different countries is affected by local culture and history. These differ enormously. For example, the United States and the United Kingdom have very different experiences, even though both have common law jurisdictions. The United States has made much more use of salaried lawyers employed by legal services and public defender organizations; U.K. provision has been dominated by private practitioners. In the United States, civil legal services have been seen, at least in part, within a highly politicized context that has been largely absent from the United Kingdom. I am con-

scious that, within Central and Eastern Europe, there will be different traditions that dictate different levels of available resources, different priorities in provision, and different preferences in the type of provision.

Different experiences breed different prejudices and a somewhat parochial support of the local model. Most countries with well-developed systems of publicly funded legal services tend to believe that they have the best model. A number might even make that claim with a degree of reasonableness—especially if they had a small amount of additional resources. They include the Netherlands, the United States, the Canadian province of Ontario, Scotland, England and Wales,

and Sweden, among others. Yet practice is very different in these jurisdictions. The lesson is that there is no single right answer, only optimum provision for individual circumstances.

There is only one constant: good public legal services equate with high levels of funding. This is, alas, inescapable. In the 1970s, the Canadian province of Quebec probably had the best system in the world.² By the 1990s, eligibility and resources had fallen so low that coverage was relatively minimal. Similarly, resources have been stripped out of legal aid in Australia, reducing provision in once relatively well-funded states such as New South Wales and Victoria. Many jurisdictions, even some of the best-funded ones, face angry practitioners who assert that levels of payment have fallen unacceptably low. Dutch lawyers have been on strike; Ontario's legal aid lawyers have recently been in dispute over payment with their government; English lawyers have threatened to give up legal aid work with sufficient credibility to raise the concern of the Legal Services Commission, which reported in its last annual report: We are picking up intelligence . . . that up to 50 per cent of firms are seriously considering stopping or significantly reducing publicly funded work.³

The price of maintaining good services is eternal vigilance against understandable governmental pressures to reduce or maintain costs.

1.1 Access to justice

There is one further preliminary point. This forum is based around the notion of "access to justice." It is worth noting that, in origin, "access to justice" was developed as a motivating concept in the late 1970s by those arguing that more money for legal services was too narrow a response to injustice. Two of them prefaced a world study of the provision of access to justice by explaining:

The access to justice approach tries to attack . . . barriers, comprehensively, questioning the full array of institutions, procedures, and persons that characterise our judicial systems.⁴

The idea of an access to justice approach has a concrete lesson in terms of the mandate of the body managing legal aid. It should be sufficiently wide to encourage a broad view of the services it should provide. The failure to do this was, for many years, a deficiency in the management of legal aid by

the Law Society in England and Wales. Valuable feedback on the provision of other government services can be obtained from monitoring the subject matter of publicly funded cases.

The stress on an access to justice approach to publicly funded legal services is a reminder that these must always be considered together with legal procedures and, indeed, the substantive law. For example, one of the United Kingdom's important pieces of legislation in relation to criminal justice was the Police and Criminal Evidence Act of 1984. This regularized police powers to hold a suspect in custody before charge; regulated interrogations and pre-charge treatment of suspects through the introduction of codes of practice; changed the administrative arrangements within the police station; led to the introduction of tape-recording of interviews (initially opposed by the police but subsequently appreciated); and also led to statutory funding for solicitors and their representatives who attended to suspects in the police station prior to charge. It was actually an almost textbook example of legislation following a holistic "access to justice" approach—though, at the time, it was widely seen as highly controversial.

2. MANAGING LEGAL AID: THE VALUE OF A COMMISSION/BOARD/ CORPORATION

Most governments have found it helpful to establish an intermediate body, closely linked but formally independent of government, to administer legal aid. The advantage of such an arrangement is that it helps to preserve the independence of decision-making in individual cases and distances the government from political attack in cases that are controversial, e.g., the grant of legal aid to a person accused of grisly serial murders. The Netherlands was one of the last large jurisdictions to come into the fold, creating regional legal aid boards in 1994. In the United Kingdom, the three domestic jurisdictions were among the first to establish national legal aid schemes after World War II; they were initially managed by the Law Societies (the professional bodies for solicitors), which had conceived the idea. However, in England, the Legal Aid Act of 1988 replaced the Law Society in this role with a Legal Aid Board, which was "to achieve a central strategic role for legal aid."⁵ The board had a membership that included nominated places for various stakeholders, particularly the professional bodies. In its turn, it was replaced by a Legal Services Commission set up

under the Access to Justice Act of 1999.

A commission or board is a wide-spread mechanism used to manage legal aid. Quebec has its Commission des Services Juridiques, formed after the model of the Legal Services Corporation in the United States (though this has only a civil engagement). Ontario, where legal aid was managed by the legal profession until transferred to Legal Aid Ontario by the Legal Aid Services Act of 1998, may have been the latest to switch. Most provinces in Canada have similar arrangements. The same is true in Australia, while South Africa has a Legal Aid Board.

The “commission model” involves a government department responsible for resources and policy; an independent but government-appointed commission responsible for implementing that policy to a greater or lesser extent, depending on local circumstances; and practitioners who are paid directly or indirectly by the commission. Jurisdictions take different views about the appointment of commissioners or board members. Some create reserved places for stakeholder groups, as was the case with the English Legal Aid Board. Others give greater discretion. The provisions in the English Access to Justice Act of 1999 are a good example of wide powers given to the appointing minister:

- (3) The Commission shall consist of
 - (a) not fewer than seven members, and
 - (b) not more than twelve members;but the Lord Chancellor [minister of justice] may by order [change either number.]
- (4) The members of the Commission shall be appointed by the Lord Chancellor; and the Lord Chancellor shall appoint one of the members to chair the Commission.
- (5) In appointing persons to be members of the Commission the Lord Chancellor shall have regard to the desirability of securing that the Commission includes members who (between them) have experience in or knowledge of
 - (a) the provision of services which the Commission can fund as part of the Community Legal Service [effectively civil legal aid] or Criminal Defence Service [effectively criminal legal aid];
 - (b) the work of the courts;
 - (c) consumer affairs;
 - (d) social conditions; and
 - (e) management.⁶

The high point of direct stakeholder representation probably came in the Legal Aid Commissions of New South

Wales and Victoria in the early 1990s. Their constitutions allowed places for the professional bodies, consumer groups, legal centers, etc. Both were, however, wound up and replaced by smaller bodies with members appointed by government with less strings. A tighter approach is evident in Israel's Board of Public Defender, which has five members: the minister of justice, a retired Supreme Court judge, a criminal lawyer selected by the national Bar Association; a criminal lawyer appointed by the minister of justice with the consent of the chair of the Bar Association, and a criminal law scholar.

A compromise between executive power of appointment and some degree of professional input can be seen in the provisions for appointment to Legal Aid Ontario (the Law Society of Upper Canada is the Bar Association for the province):

The board of directors of the Corporation shall be composed of persons appointed by the Lieutenant Governor in Council as follows:

1. One person, who shall be the chair of the board, selected by the Attorney General from a list of persons recommended by a committee comprised of the Attorney General or a

person designated by him or her, the Treasurer of the Law Society or a person designated by him or her and a third party agreed upon by the Attorney General and the Treasurer of the Law Society or persons designated by them.

2. Five persons selected by the Attorney General from a list of persons recommended by the Law Society.
3. Five persons recommended by the Attorney General.

Non-voting member

The president of the Corporation shall be a non-voting member of the board.

The commission model works relatively well. There are, however, two potential areas of friction. First, there can be circumstances when the membership of the commission is not appointed by the current legislature or government and this leads to controversy. There was a difficult time in the United States when the membership of the Legal Services Corporation was appointed by the Clinton administration but encountered antagonism from the legislature. Second, whatever the formal arrangement of powers between the sponsoring government department and the commission, there can be a degree of rivalry between

them. The commission always has the advantage of being close to developments, because it is micro-managing the system. The government department has a broader view of the government's objectives but less knowledge of the details. There has been a little of such rivalry in England between the Legal Services Commission/Legal Aid Board, which really has been the motor for policy development rather than the Lord Chancellor's Department. This never reached a level, however, where it could not legitimately be described as a genuinely creative tension.

There may be jurisdictions where it is helpful to engage the legal profession in the management of legal aid, despite the recent trend in well-developed legal aid jurisdictions away from this model. The engagement of the profession has, for example, very much helped the emergence of at least a very basic form of legal aid in the developing country of Bangladesh. It has encouraged practitioners to provide low-cost services as a professional duty where otherwise they might have not been prepared to do so.

2.1 Legal aid: Which government ministry?

As far as government is concerned, there are a variety of arrangements as to which department has the policy responsibility

for legal aid. In England and Wales, it is the Lord Chancellor's Department; in Ontario and federal Canada, the Ministry of the Attorney-General, both being roughly equivalent to a Ministry of Justice. In the United States, the picture is different. For example, responsibility for criminal legal aid services does not fit easily within the doctrine of separation of powers into legislature, executive, and judiciary, and there is some variation of practice. For example, in the state of Oregon, funding comes via the judiciary. In other jurisdictions, such as that covering Seattle in Washington State, funding comes through an Office of Public Defense located within the executive. Federal jurisdictions, such as Canada and Australia, present further problems of responsibility with split funding and responsibility.

2.2 Governmental responsibilities under the European Convention on Human Rights

Civil and criminal services raise rather different issues of policy. In the United States, they generally are delivered completely separately. In the United Kingdom, the difference is indicated by the as-yet-notional creation of a separate Criminal Defence Service and a Community Legal Service. All European jurisdictions that have accepted the European Con-

vention on Human Rights will acknowledge, at least in theory, the requirements of Article 6 (3) and particularly 6 (3) (c):

Everyone charged with a criminal offence has the following minimum rights:

...

To defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

Thus, all European countries should all have legal aid systems for criminal cases. There is no express equivalent in the Convention for civil cases, though it has been inferred by the European Court of Human Rights where the assistance of a lawyer is “indispensable for effective access to court” either because legal representation is compulsory or because of the “complexity of the procedure or of the case.”⁷

It may be worth spelling out the implications of this analysis of the European Convention:

- Criminal legal aid should be available for the defense of all criminal offenses.
- There may be a means test for crim-

inal legal aid so that it can be refused if a defendant has sufficient means.

- A defendant who has insufficient means must receive criminal legal aid free and without payment of contributions (English practice was, until recently, in breach of this provision).
- There should be legal aid in civil cases where it is effectively indispensable, allowing a test both of means and of merits.

3. CRIMINAL LEGAL AID: HOW TO DELIVER IT?

Criminal legal services can be delivered in a number of different ways, according to the demands of culture and/or resources. The main alternatives are:

- private practitioners—employed on a case-by-case basis and often known by the U.S. term “judicare”;
- salaried practitioners employed by the legal aid authority/commission, often referred to as “in-house duty counsel”;
- practitioners employed by an independent legal services organization, often called a public defender office, which may or may not double as the funding agency, known as the staff model.

There are, however, a myriad of variations on these three models.

Historically, commentators have divided provision between staff, salaried models, and *judicare*. Increasingly, this is becoming more complicated, for two particular reasons. First, jurisdictions with advanced legal aid schemes, such as Canada and England/Wales, are attracted to a “mixed model” of provision incorporating elements of more than one, or even all three. Second, there has been an increasing amount of interest in contracting services through a variety of different providers. This began in the United States, in ways that were often (though not always) criticized as funding low-cost, low-quality schemes. However, contracting has been developed by the Legal Services Commission in England and Wales quite precisely as a way of raising quality by incorporating quality assurance criteria into the contract.

There is no right answer as to the delivery of services. As can be seen from the appended paper, the English Legal Services Commission deploys a variety of delivery mechanisms in relation to civil cases.

3.1 Different models of delivery: Pros and cons

Each mode of delivery has its advantages and disadvantages; additionally,

there are advantages in having a mixed model. This gives policy-makers an opportunity to cross-check costs and effectiveness. It also provides an element of competition among providers. The establishment of other forms of delivery can be politically contentious where *judicare* is well established. Both Scotland and England have recently set up pilot public defender organizations. These are small groups of salaried staff effectively employed directly by the Legal Services Commission or the Scottish Legal Aid Board. In both jurisdictions, the public defender offices are taking only a relatively small proportion of cases. In these jurisdictions, there is some disdain and a lot of suspicion by private practitioners toward public defenders.

The advantages and disadvantages of different types of provision include:

Judicare

Definition: Delivery by way of private practitioners funded on a case-by-case basis, often through some form of validated certificate.

Advantages: Funding by case so each decision can be strictly controlled; tends to need a large bureaucracy to approve and process; does involve the private profession in the criminal justice

system and, thereby, gives it a concern with basic civil liberties and human rights; can be combined with rights for the defendant to choose his or her own lawyer and governing the availability of representation.

Disadvantages: There can be quality control problems if quality is left to practitioners; is usually the most expensive form of provision; can be difficult to control costs.

In-house duty counsel

Definition: Staff lawyers directly employed by the legal services authority to undertake duty representation.

Advantages: There can be cost advantages where a staff lawyer can be deployed to take on a lot of cases at one time, e.g., the duty lawyer at a busy court.

Disadvantages: There can be quality problems because of the low status and interest of the work; can be difficulties for clients over splitting representation between different lawyers.

Public defenders

Definition: Delivery by salaried lawyers employed by the legal services authority or other agencies

who undertake full representation of defendants.

Advantages: There can be cost advantages over judicare; can build up a high spirit and provide excellent services beyond court case-work.

Disadvantages: There can be low esteem in this profession; can be subject to low funding; can lead to routine representation rather than high quality; rarely attracts real “stars” of criminal defense work who prefer to work outside a bureaucracy; may not be much cheaper than judicare if properly funded; difficult to give incentives for speed and efficiency.

Contracted services

Definition: Services provided by practitioners or by organizations employing practitioners under a contract with the legal services authority, i.e., any of the three models above.

Advantages: This has been used to raise quality but needs express quality assurance criteria; makes cost control easier; gives service provider some certainty of funding; can be used to encourage services otherwise unavailable.

Disadvantages: This can be used to

drive down costs; can lead to lower quality; can encourage routine representation.

The important determinant of how to deliver services is local culture. Some delivery mechanisms are more accepted in one country than another. Criminal legal aid services in England and Wales are now provided by way of contract to quality-approved providers, but on the basis of an open budget and no restriction as to numbers. Such a model makes sense for England, with a long history of engagement in legal aid by a large number of private practitioners. It probably appears massively overcomplicated for a jurisdiction that is beginning to develop services. However, it may be interesting to look at the areas in which the English Legal Services Commission has been developing quality criteria (see the appendix).

Those jurisdictions establishing a new criminal legal aid scheme, or reviving an old one, may be attracted to using private practitioners or salaried lawyers. The latter are generally cheaper per case, except perhaps in rural areas where numbers of cases may be relatively low. Salaried lawyers, in general, are better suited to running relatively routine or predictable cases, because they can be better handled

within a bureaucracy. The large number of negotiated plea bargains in the United States relative to the United Kingdom would seem to be one reason why public defender organizations have thrived in the United States but have only recently been deployed in the United Kingdom (albeit that another reason is the relative dominance of the private profession in legal aid). There may, however, be some advantage in using the private profession in terms of getting its cooperation and support.

A word of caution is needed over the phrase “public defender.” It can mean very different things. In Israel, the Office of Public Defender contracts with private practitioners. In England and Scotland, public defender offices are small experimental groups of salaried lawyers employed by the Scottish Legal Aid Board and the Legal Services Commission. They have been devised to be a totally different method of provision from private practice. In San Francisco, the public defender is elected by the people. In New South Wales, the post is a prestigious one concerned only with higher-level advocacy. In many U.S. states and in the United States federally, it generally means an independent organization that employs salaried criminal practitioners.

3.2 Criminal services: Indicators of quality, whatever the delivery system

Whatever delivery system is deployed, the following determinants of good criminal legal aid services can be deduced from looking at examples of provision:

- High-quality services need a high level of resources (see above).
- Contracting is best suited to routine caseloads and tends to lead to cases being treated as routine.
- The best schemes incorporate overflow arrangements for excess workloads.
- Disbursements and expert fees should come from a separate fund from representation.
- The best results require a cooperative environment between funders and providers.
- There should be objective standards of quality control and, perhaps, caseload maxima.
- Care must be taken to provide for conflicts of interest.
- Similarly, care must be taken to protect practitioners from undue media or political interference.
- Jurisdictions take different views of the client's right to choose a lawyer.

- Strong professional support is required to defend legal services against cuts in resources and improper political interference.

These are lessons taken specifically from a study of some criminal schemes in North America in the late 1990s.⁸

4. CIVIL LEGAL AID

Civil legal aid schemes tend to cover four particular areas of work:

- family, including divorce and domestic violence;
- public law claims, e.g., in relation to enforcing rights under the European Convention on Human Rights;
- private law claims, e.g., for personal injury;
- poverty, administrative, or social welfare law.

A particular issue arises over “public interest” litigation—i.e., litigation in an individual case designed to test or to change the law for the benefit of the poor specifically or the public generally. In the United States, because of the history of legal services in the 1960s, this has, at least until recently, been seen as a major function of civil legal ser-

vices (though it has led to fearful political debate). In the United Kingdom, there was historically no public funding for a public interest case as such—though an individual litigant might take a case with a high public interest. England now has a provision that allows legal aid to be granted where there is a sufficiently high public interest, and a special committee of the Legal Services Commission, the public interest applications panel, considers these and publishes its decisions on the commission's Web site.

A very efficient way of funding a degree of public interest litigation in a jurisdiction with limited funds is to provide the resources for a key agency that carries out this function. Thus, the South African Legal Aid Board provides funding for the Legal Resources Centre, one of the most impressive legal advocacy non-governmental organizations in the world.

The need for legal aid in relation to these categories will be different between jurisdictions and at different times. Traditionally, English legal aid focused on private law and family claims. However, as can be seen from the appendix, it is re-orienting itself toward public and social welfare law cases. Other systems, particularly those that made more use of community legal

centers in one form or another, give more attention to social welfare law. Thus, this has been the case in the Netherlands, Australia, and Ontario.

The extent to which family matters requires representation will vary according to local law and procedure. Legal aid was withdrawn in England and Wales from divorce in the late 1970s, though it remains for ancillary matters such as custody of children and maintenance. Some jurisdictions may require a lawyer's involvement to obtain a divorce; others will not. In almost all jurisdictions, it will be hard to avoid legal representation for domestic violence cases, though some have tried to shift these into criminal courts by a policy of mandatory prosecution.

Some jurisdictions allow contingency fees or variants of them. These allow a lawyer to act on a "no win, no fee" arrangement when the result of a case is likely to be a sum of money. These are routine in the United States for monetary claims. In England, they have been unlawful until recently. England also has cost-shifting rules that have deterred the development of such arrangements (i.e., the loser has to pay the winner's costs of litigation). However, conditional fees (permitting not a percentage of damages but an uplift of a set percentage on costs otherwise

allowable) are now allowed. As a result, conditional fee arrangements in combination with insurance arrangements that allow a litigant to cover potential liability to the other side (and sometimes disbursement costs) have now thrived and are a major source of income for lawyers in, for example, personal injury cases.

One way in which civil cases differ from criminal ones is that a citizen may find it harder to realize that he or she has legal rights that need to be enforced. There is a need for the supply of information and advice short of representation. Different jurisdictions address this problem in different ways. Some have always put considerable resources into public legal education of one kind or another. A leader in this field has been British Columbia in Canada, where there is a Law Courts Education Society designed to publicize the courts; a People's Law School as an independent educational organization; and the Legal Services Society (the "commission" managing legal aid), which has continued the funding of public legal education despite fairly major recent cuts.⁹ England and Wales have only belatedly accepted the need for this kind of activity (see the appendix). An interesting development with future potential is the use of Web sites both to identify

providers of assistance and to give preliminary information on the law. The statutory powers of the Legal Services Commission are widely drafted in a way that goes beyond the simple provision of representation and provides a reminder of the wider brief that is desirable. The commission may concern itself with:

- the provision of general information about the law and legal system and the availability of legal services;
- the provision of help by the giving of advice in particular circumstances;
- the provision of help in preventing, or settling or otherwise resolving, disputes about legal rights and duties;
- the provision of help in enforcing decisions by which such disputes are resolved;
- the provision or help in relation to legal proceedings not relating to disputes.¹⁰

In addition, it has power to plan or coordinate services and to set standards (see the appendix).

A system of civil legal aid, as opposed to criminal legal aid, needs to concern itself with two tests: of means and of merit. Many jurisdictions agree that a small amount of legal advice should be free of both tests—see the entitlement,

for example, for a free half hour of advice in the Netherlands. Beyond that, the means test is for each jurisdiction to set at an appropriate level for its resources and needs. The merits test has been taken to some degree of sophistication in England (see the appendix), measuring the percentage likelihood of success against estimates of cost. However, this is probably too complicated for most Central and Eastern European countries. The former test used to be “the private paying client test”—i.e., whether a private paying client would take a case in such circumstances. If there is to be a test of means in criminal cases, then the court may present a good body to take responsibility, since it will have an interest in minimizing delay. In relation to civil cases, the managing body for legal aid provides the obvious source of approving means and merits testing. If you trust your legal aid providers, then the test can be devolved to them.

Many jurisdictions take the view that those with poverty/social welfare law cases are automatically entitled to assistance without a means test, particularly those who employ law centers or law clinics, such as those in South Africa, Australia, or Ontario, as a delivery mechanism. The payment of contributions would contravene the ethos of the clinic or center.

A number of jurisdictions have found that community law centers (as in the United Kingdom), law clinics (Ontario), or legal centers (Australia) provide a good delivery model for civil services. Their big advantage to funders is that they are funded by grants fixed in advance and should not run over. With community boards or management, they are attuned to the needs of their communities and well capable of maximizing the use of their resources. In addition, they can operate as a magnet for other funds or for free legal services provided by members of the legal profession.

5. CONCLUSION

From the above emerge a number of questions to be answered by anyone devising a legal aid scheme, which it may be helpful to make explicit because this process will encourage debate. These are set out in the executive summary at the beginning.

The contradictory pressures of modern existence within Europe play themselves out in legal aid, as elsewhere. The European Union is making increased demands for state assistance with representation in relation, for example, to cross-border cases or criminal cases where the development of a European Arrest Warrant requires mutual recogni-

tion of procedures and, thereby, agreed minimum standards. On the other hand, all states are hit by pressure on their resources.

All states in Europe need effective systems of legal aid. The form that these can take will vary considerably. The bad news is that history shows that jurisdictions, like Quebec, that were once at the forefront of the delivery of service can suffer deteriorating services so that they fall significantly behind those that they

once led. The good news is that the opposite can happen as well. As Bob Dylan once sang: “Those that are last will later be first, for the times they are a-changin’.”

JUSTICE (www.justice.org.uk) is a British-based law reform and human rights organization that is also the British section of the International Commission of Jurists.

APPENDIX

THE COMMUNITY LEGAL SERVICE IN ENGLAND AND WALES

This appendix describes in some detail civil legal aid services in England and Wales as they are now. It is too specific to include within the body of the report, but it gives an indication of the detail of services in a jurisdiction that has had a very developed legal aid system for some time. The detail will, I hope, be interesting, but the primary value of the paper in the context of developments in Central and Eastern Europe is in some of the ideas—for example, quality assurance and the division of services into different categories. One euro is currently worth 63 pence, of which there are 100 to 1 pound. Therefore, all costings in pounds can be translated roughly into euros by adding a further half; e.g., 1 million pounds is roughly 1.5 million euros. It gives an example of how a jurisdiction, admittedly with a much more developed legal aid scheme than would be usual in Central and Eastern Europe, is developing its answers to the questions for policy-makers posed in the executive summary of the paper.

The Community Legal Service (CLS) was established in England and Wales on

1 April 2000 under the provisions of the Access to Justice Act of 1999. There were three distinct influences behind it, which, though deriving from different sources, were interestingly largely agreed to between Conservative and Labour white papers issued in the late 1990s:¹¹

1. financial—the capping of the budget;
2. administrative—the introduction of quality assurance measures in relation to a smaller range of providers, where both quality and expenditure could be better controlled;
3. social/political—the redirection of expenditure to “social welfare law” and a wider range of providers.¹²

The CLS was developed from civil legal aid and pre-existing forms of legal assistance with civil cases, but it has three distinct components:

1. contracts with providers of services to defined quality criteria;
2. the quality mark, which includes but extends beyond contracted services to those provided other than by the commission;
3. a range of innovative projects designed to explore improved methods of delivery.

1. STATUTORY BASIS

The statutory basis of the Community Legal Service (CLS) is set out in Sections 4–11 of the Access to Justice Act. The service is to be administered by the Legal Services Commission, the successor to the Legal Aid Board, but there is power in the Act (Section 2) to establish two successor bodies—one for the Community Legal Service and the other for the Criminal Defence Service.

The CLS is a very different concept from the old legal aid scheme. The commission has statutory duties to deliver a wider range of services than individual advice, assistance, and representation, including:

- “the provision of general information about the law and the legal system and the availability of legal services” (Section 4 (2) (a));
- planning and “facilitating the planning by other authorities,” etc., of services (Section 4 (6));
- power to set, monitor, and accredit standards (Section 4 (7–8)).

1.1 Role of the Lord Chancellor

Under the act, the Lord Chancellor

- decides what the CLS will cost in any

year (Section 5 (2)). Thus, funding for legal services for civil case is capped, as opposed to the previous situation where expenditure was demand-led—a position that still holds for crime. Capping is undertaken by the Lord Chancellor in some detail. For example, the direction for 2001–2 set the level to be spent on “controlled work” (see below); contracts with not-for-profit providers (minimum 20 million pounds); the Partnership Innovation Budget; other grants and loans; and no more than 4.5 million pounds on high-cost cases likely to cost more than 25,000 pounds. The criminal budget is not capped, and a major strategic weakness of the CLS is the vulnerability of its budget. For a variety of reasons—not least the appointment of additional police officers—the cost of criminal work continues to rise faster than inflation. This has an impact on the civil budget if the whole legal aid budget is regarded as capped with preference to demand-led crime. This is what is currently happening

- approves a Funding Code, which is then to be approved by Parliament (Section 8);
- may give directions and guidance—

both in relation to individual exceptional cases that should be funded and generally as priorities for funding;

- is responsible for laying regulations on means tests.

1.2 Legal Services Commission

The CLS is administered by the Legal Services Commission (LSC). Contracting was very much the development of the LSC in its former guise as the Legal Aid Board. In the early 1990s, it developed the idea of “franchising,” originally conceived as “non-exclusive,” i.e., optional contracts for quality-assured services in relation to legal advice. An early document presciently predicted a major reduction in providers, to something like 3,000 solicitors’ offices with what were then termed “general practice franchises.” This was the figure of offices receiving more than 40,000 pounds a year in 1988–89;¹³ in the ensuing furor, the proposal was hurriedly dropped, but there has been a major reduction in providers—though not yet quite of the magnitude initially contemplated.

The LSC does not come cheap. Its total cost in 2001–2 was around 70 million pounds. Ten years ago, its cost was just over 40 million pounds. These figures also cover administration of the Criminal

Defence Service and cannot be separately provided for just the CLS.

1.3 Statutory exclusion

Some matters are statutorily excluded from assistance under the CLS by Schedule 1 of the Act, although the Lord Chancellor has issued a direction¹⁴ that modifies these exclusions. Matters excluded include personal injury, boundary disputes, defamation, etc. But authorization is, for example, importantly given “to fund excluded services . . . in proceedings which have a wider public interest, other than proceedings arising out of the carrying out of the client’s business” or “where the liberty of the client is in issue.”

2. THREE ELEMENTS TO BE EXAMINED

This paper reviews the CLS in the following sections:

- contracting of services;
- development of a quality mark;
- funded projects.

2.1 Contracting

The contracting of legal services as part of the CLS has introduced a whole new element to publicly funded legal services—

and a hitherto unknown degree of complexity. There are two versions of contracted work, with two types of provider for seven levels of help in fifteen categories of work. Contracting has spawned a whole new jargon in which discussion of legal services is now conducted—from “legal help” to “tolerances.”

One must bear in mind that the aim of contracting was to attain the holy grail of policy-making: better services at a cheaper price within a fixed cost. A skeptical initial prediction might have been that, in the short term, this might be possible as providers were squeezed to be more productive. In the longer term, it was always likely that increased calls on the criminal budget, where policy and human rights grounds understandably prioritize payment, would squeeze civil expenditure and reduce savings.

Civil contracts cover fifteen categories of work, fourteen of them civil (along with crime):

- family;
- personal injury (of declining importance);
- clinical negligence;
- housing;
- immigration;
- welfare benefits;
- employment;
- mental health;

- debt;
- consumer and general contract;
- actions against the police, etc;
- public law;
- education;
- community care.

The fifteen spawn a shadowy sixteenth—everything not listed above, i.e., residual matters.

The fourteen civil areas are covered by seven types of services:

- legal help—formerly green form advice;
- help at court;
- approved family help—either help with mediation or general family help;
- family mediation;
- full legal representation (once basic civil legal aid);
- investigative legal representation (to assist in ascertaining merits for full representation);
- support—i.e., a contribution toward very expensive cases otherwise funded privately or under a conditional fee agreement, which in turn may be investigative or litigation support.

In practice, the main two categories are legal help and legal representation.

Finally, contracts are either for:

- controlled work, i.e., legal help, help at court, and “controlled legal representation” (before the Mental Health Review Tribunals and the immigration adjudication authorities);
- licensed work, i.e., legal representation in the categories above, approved family help, and support funding.

Controlled work involves strictly delimited work, devolved decision-making to the supplier, and an agreed estimated payment over the year, which is paid monthly and subject to retrospective variation to suit events. Permission is given for a stated number of “matter starts.” Of these, a specified number must be within the approved categories of work with a “tolerance” of unspecified types of case. This varies with local conditions, often being larger in rural areas, where there is a scarcity of solicitors. Overall, the tolerance level tends to be around 10 percent.

The Lord Chancellor sets the total for controlled work in any one year. About two-thirds is taken up by paying off cases begun in previous years. The remaining third are allocated by the Legal Services Commission on the basis of Lord Chancellor priorities; regional legal services committees advice; and requests from community legal service partnerships (see below).

Current contracts come to an end on

31 March 2003. The Legal Services Commission has announced that existing contracts with solicitors will basically be renewed for one year, while a new contract will be introduced for not-for-profit organizations. Regional Legal Services Committees will produce analyses of the need for contracts in their areas, taking account of the Lord Chancellor’s directions and priorities (see below). They will also factor in, against available resources, estimates of unmet need and the possibilities of a regional rather than local solutions, e.g., through some form of partnership arrangement of providers.

In 2001–2, the largest group of contracts for controlled work went to family work (3,760 out of the total of 8,936 contracts¹⁵). In descending order, the numbers in other categories were:

Personal injury	1,494
Housing	707
Welfare benefits	588
Debt	515
Immigration	591
Mental health	352
Employment	316
Clinical negligence	300
Consumer	113
Actions against police	71
Education	52
Community care	49
Public law	28

The Legal Services Commission has deliberately encouraged not-for-profit providers to obtain contracts for legal help, under controlled contracts. They now account for 19 percent of expenditures on controlled contracts. Overall, contracting has been good for the not-for-profit sector, which now receives around 40 million pounds from the commission in total payments.

Special arrangements and extra payments were made for immigration contracts in 2001–2 to meet exceptional need.

The controlled work contract provides the mechanism for rationing services within a capped budget. It is revealing anomalies. The commission is at pains to say that it is still authorizing more potential cases than are actually taken up. This also seems to be the experience of most solicitors. Some not-for-profit organizations report, however, that their work is limited by their contractual number of starts.

Solicitors (outside the fields of mental health and immigration areas) seem to be commencing lower numbers of cases in social welfare law areas (down 10 percent from 2000–2001). The average cost per case, however, is soaring—up 15 percent in family mat-

ters and 21 percent in social welfare law cases. The rise overall is 20 percent (excluding immigration). The commission has a variety of possible explanations and research projects under way but, *prima facie*, faces a situation where more and more appears to be funding less and less. The most benign explanation is that more experienced advisers are now undertaking controlled work and are working longer hours to take cases to a higher level. Firms with a contract for controlled work now have devolved powers to extend authorization on cases for extended payment.

The number of solicitors' offices with controlled work contracts is now 4,543, with 389 not-for-profit organizations. In 1991–92, by way of illustration, more than 8,000 solicitors' offices received payments for matrimonial payments in the county courts and a similar number for other civil cases. The LSC is concerned about the current attrition rate in its supplier base: reduction may have gone too far. Some 6 percent of all suppliers dropped out just before the start of the financial year in 2002, and the commission acknowledges that it is:

Picking up intelligence through our regional offices that up to 50% of

firms are seriously considering stopping or significantly reducing publicly funded work. . . . We believe that this is overwhelmingly because of remuneration and profitability. Our studies show that at current legal aid rates many firms are at best marginally profitable.¹⁶

Contracts for licensed work included 389 additional solicitors' offices that did only licensed and not controlled work. Licensed work still takes the lion's share of the resources. Applications for licensed work are considered by the Legal Services Commission by the same sort of procedure as applied legal aid, i.e., by individual application, though decisions are governed not by regulations but by the Funding Code (see below).

In 2001–2, net payments from the CLS fund were 734.5 million pounds, made up of the following:

- civil representation 476.2 million pounds
- legal help for immigration 58 million (special allocation)
- legal help 187 million
- grants, projects, etc 13 million

For providers, everything hangs on the contract. This incorporates various requirements designed to assure quality. There terms vary slightly for not-for-

profits and solicitors in relation to such matters as business planning. Firms are audited on the basis of a number of criteria, including:

- documentation of procedures;
- business plans;
- financial controls;
- reference materials;
- employment policies, e.g., job descriptions, staff appraisals, equal-opportunity policies, personnel supervision, etc.
- file management and review;
- quality of cases measured through “transaction criteria” (specified procedures for each type of case);
- supervisor skills, measured—among other means—by membership of Law Society accreditation schemes, where appropriate.

Quality criteria have now been incorporated with the LSC's quality mark structure at the specialist level.

An interesting comparison is between the level of new work for legal help and legal representation (broadly, what was formerly green form and civil legal aid). This reveals the domination of immigration in advice work and housing in representation among non-family matters. Miscellaneous matters are excluded from both lists.

Legal Help	New starts	Representation	New certificates
1. Family	317,903	1. Family	128,723
2. Immigration	134,238	2. Housing	12,788
3. Housing	84,502	3. Clinical negligence	7,309
4. Welfare benefits	80,633	4. Personal injury	2,910
5. Debt	48,751	5. Immigration	2,513
6. Mental health	25,931	6. Actions vs. police	1,067
7. Employment	10,916	7. Consumer	999
8. Consumer	9,239	8. Public law	943
9. Personal injury	7,265	9. Education	764
10. Actions vs. police	5,348	10. Debt	504
11. Clinical Negligence	4,800	11. Community care	425
12. Education	3,371	12. Mental health	199
13. Community care	2,136	13. Welfare benefits	143
14. Public law	1,412	14. Employment	133

The figures show interesting trends in non-family litigation. Housing is numerically superior to clinical negligence. The number of public law cases will be swelled by those in other categories, such as community care and education, that are likely to represent judicial review or other proceedings against public authorities.

The representation figures can be compared with those for legal aid a decade ago. The number of new certificates issued for matrimonial matters has declined from 146,437 to 128,723, especially striking since the latter figure appears to include some matters formerly classified as non-matrimonial. The number of non-matrimonial matters has slumped from 190,864 to 33,172. This

decline is of such a magnitude that it must reflect the fact that some work formerly undertaken on certificates is now included under legal help. It will also indicate the effect of cuts to scope imposed on civil legal aid when it became the CLS.

More useful in indicating shifts of expenditure may be a comparison of how the top ten matters have changed over the decade. Compared with the list above for legal representation, the top ten in 1991–92 were:¹⁷

1. Contract	25,060
2. Personal injury (other)	24,757
3. Road accidents	19,637
4. Accident at work	19,042
5. Clinical negligence	18,666
6. Other negligence (general)	16,497

7. Landlord and tenant	15,415
8. Tort (general)	14,227
9. Lands	5,210
10. Professional: legal	2,740

This list has a very different flavor, reflecting the impact of conditional fee agreements, the exclusion of property matters from legal aid help, and the growth of public law actions.

2.1.1 Contracting: The client's view. The type of client has, thus, shifted under the CLS. Out is going the personal accident victim against an insurance company. In is coming the person with a case against a public authority. The extent to which the demise of legal aid funding for personal injury cases is a good thing is a large and debatable subject. In fact, the average cost of personal injury cases was quite low and might have been reduced by a different route from the wholesale injection of funding under conditional fee agreements. There could have been payment of an administrative fee by a solicitor wishing to discharge a legal aid certificate. Solicitors routinely did this when it became clear that a settlement was available that would otherwise pay costs at a higher level. The sum total of damages payable by insurance companies might therefore have been reduced, along with the somewhat

unseemly rush of agencies seeking to take a cut from the prospects of litigation. It is arguable, however, that clients have benefited from the rush to sign them up and that access to dispute resolution for accident victims is better than ever.

Clients have been moved from legal aid where entitlement was based on statutory regulation of means and merits tests (the reasonable private paying client) to criteria set out in a somewhat intimidatingly large loose-leaf volume published by Sweet and Maxwell on behalf of the commission, which contains the LSC's Funding Code. This introduces a percentage calculation of the prospects of success to be made by the service provider ranging from very good (81+ percent) to good (61–80) to medium (50–60). The old civil legal aid private paying client remains for non-damages claims but is replaced by a cost-benefit calculation where money is at stake. Damages in a very good case must be worth the likely costs; damages in a good case must be worth twice the costs; damages in a medium case must be worth four times the costs. Very expensive cases of 25,000 pounds or more are dealt with separately.

A major improvement has been introduced, along the lines of favoring public law cases, by allowing legal aid even

where the cost-benefit is unclear or borderline, if the case has a significant wider public interest. Advice on this is given by a separate Public Interest Advisory Panel, largely composed of NGO representatives under a chair who is a member of the commission.¹⁸ Its advice is published on the commission's Web site: <http://www.legalservices.gov.uk>. One of the pressure points that became manifest in public interest applications was, to some extent, addressed by the Lord Chancellor in a direction in November 2001 that broadened the circumstances in which legal aid was available for inquests.

The Lord Chancellor has given the commission directions as to priorities. Top priority is to go to children's proceedings and civil proceedings where the client is at real and immediate risk of loss of life or liberty. Among other cases, priority is to be given to

- social welfare law area "that will enable people to avoid or climb out of social exclusion" (e.g., housing, debt, employment, welfare benefits cases);
- domestic violence proceedings;
- welfare of children cases;
- "proceedings against public authorities alleging serious wrong-doing, abuse of position or power or significant breach of human rights."¹⁹

Thus, political direction of the CLS is much clearer than that of legal aid. Another Lord Chancellor might have different priorities and, if the discourse of social exclusion fell out of fashion, then it would be entirely possible for the CLS to be pulled into a new direction. For now, the reforms seem desirable. The problem is that anyone familiar with U.S. experience must fear for the potential impact on legal services of a government in the Reagan/Thatcher mold. President Reagan tried to wind up the U.S. Legal Services Commission because it allegedly funded a whole series of causes and people with whom he politically disagreed.

2.2 Quality and the CLS quality mark

The development of the CLS quality mark (QM) has allowed the Legal Services Commission to extend its reach into services that it does not itself fund. Some 10,000 organizations, based across the length and breadth of the land, have signed up for a QM at one of the five levels: self-help information, assisted information, general help, general help with casework, and specialist. The CLS's quality empire has even extended to the Bar, where its General Council has ceded its parallel "Barmark" scheme as part of the

QM scheme. Down at the information point level, we have East Anglian libraries, Cheshire's police stations, and all county courts. The commission has gone so far as to test some of these with "mystery shoppers."

The QM initiative has taken the commission into developing a number of projects with distinct groups of providers, such as the Commission for Racial Equality, and even an inclusive quality project designed for those "working for smaller minority groups and excluded communities who may experience difficulty in achieving the [full] equality mark."

Thus, the commission has developed its quality remit well beyond those services delivered by solicitors. However, at the heart of contracting and its forerunner, franchising, was a concern with the quality assurance of its suppliers.

The commission is developing its ideas on quality. Originally, it placed great reliance on transaction criteria (see above). More lately, it has set up peer review of files on a random basis as a way of measuring quality. This approach, also being followed by the Office of the Immigration Services Commissioner (concerned with the standards of advice in immigration and asylum cases), represents a significant advance of thinking, moving beyond

the transaction criteria approach, which could sometimes descend to the mechanical and trite—though it was probably a useful first step at a time when the forerunner of the commission could realistically have done little more.

The QM approach potentially has major ramifications at the regulatory level. It is likely to continue the undermining of professional self-regulation by taking the quality initiative away from the professional bodies (particularly the Law Society) and requiring adequate regulation of quality on a proactive rather than retrospective basis. The Law Society has, after an initial period of uncertainly, embraced specialist panels as the way of balancing regulation with independence. This provides a way of retaining professional control over standards while satisfying the commission that these are of a sufficient rigorous nature. Whether this balance is sufficient to stave off further assault on the Law Society's regulatory autonomy is to be seen.

The QM approach also begins the process (still in its early days) of weaving local agencies into a national structure. The commission has the option of seeking to make this work self-funding. This can probably be anticipated in the near future as funds are progressively tightened.

2.3 Projects

Contracting has allowed the commission to carve out the funds for various one-shot projects. Though taking a relatively small amount of the budget, these have included a number of innovative projects that are testing out new ways of delivering services.

The commission has taken over from the Lord Chancellor's Department the operation of the JustAsk! Web site. This is an impressive undertaking, located at <http://www.justask.org.uk>. It has a directory of CLS providers, plus advice sections. These are the really interesting parts in terms of the potential of using the Web as an information resource. The Web site also contains copies of about thirty leaflets drafted by the Consumers Association on aspects of the law. The information is written and the site does not use video, unlike some of the interactive video kiosks in the United States. However, it is available via any personal computer, and it does have enormous potential as access to the Internet broadens.

The commission has a number of interesting pilots in relation to delivery. It recently entered into a contract with a commercial company running a call center, Capita, to operate a telephone advice project. It has previously run much less

ambitious telephone advice projects in relation to welfare benefits, debt, and immigration advice. At the other end of provision, it has established funded a number of specialist support pilots in the fields of community care, employment, immigration, housing, human rights, and public law. These have involved contracts with a number of national NGOs, including Liberty, Shelter, and the Public Law Project.

The not-for-profit sector has benefited considerably from the establishment of the CLS. The commission maintained the direct funding of nine law centers, though these are now being resourced—along with others—through contracts. The commission has supported the central costs of the Law Centres Federation and the Advice Services Alliance. This has provided a welcome boost for these organizations and has been so unproblematic that the potential conflict involved in campaigning organizations being tied to a funder that they might wish to criticize has not, seemingly, been a problem. It is to be seen whether this will continue to be the case if funding is cut back.

The commission has also allocated considerable funds to a pilot project evaluating Family Advice and Information Networks (FAINS). These seek to deliver family services through a partnership

of different agencies that are the successors to the ill-fated attempts under the Family Law Act of 1996 to introduce mandatory information meetings and drag people into mediation. The FAINS are an attempt to put together a more subtle package of services from which those approaching divorce may choose, with solicitors as the gatekeepers to a range of services—most of which are not funded by the commission, e.g., mediation (which may be), counseling, money advice, etc. About 12,000 cases annually are now going to mediation, of which two-thirds are said to be successful, at a cost significantly reduced from what would otherwise have been predicted.

The commission has undertaken work at a considerable depth on legal needs through the research department that it has established, the regional legal services committees that it inherited, and “community legal service partnerships” established more locally. The latter are a good example of the commission’s impressive capacity to get, as North Americans might say, “more bang for their buck.” These bring together local providers in the area. For this work, the commission received Government Beacon status for promoting “joined up” government, no doubt a thoroughly commendable recognition of its achievement in a difficult area.

The commission is not above a nicely

calculated political gesture. Indeed, it has done rather well in this regard. Most recently, unable to raise remuneration rates for solicitors because this is a government decision, it has announced that funds will be made available for up to one hundred scholarships on the Legal Practice Course and one hundred training contracts. These are allocated by regional assessment of need (with London the highest area, with a maximum of fifteen of each) on the following priorities:

- rural and smaller urban areas where access to legal services is an issue;
- social welfare areas of law and crime;
- areas where future supply is at risk (only one supplier or suppliers withdrawing);
- areas where duty solicitors schemes have too few members;
- the potential benefit to those from ethnic minorities and less privileged backgrounds.

This does underline the extent to which publicly funded solicitors are becoming a very distinct group within the profession—very much in contrast with the position until the early 1990s, when almost every solicitors’ office (except in the very large commercial practices) would undertake a legal aid case at some time in the year.

3. CONCLUSIONS

So, what are the conclusions? We can make the following statements:

- In the short term, the CLS has redirected expenditure to areas of public and social welfare law.
- The CLS has provided a structure in which much decision-making previously undertaken by the Lord Chancellor's Department has been devolved to the Legal Services Commission, with a corresponding increase in speed, on the one hand, and, on the other, a shift from objective regulation to bureaucratic fiat.
- The effect on clients has probably been, overall and as yet, beneficial.
- The effect on providers has been, in some cases, traumatic as solicitors have had to upgrade their systems—though this upgrade has been desirable.
- The effect on the legal profession may have been to hasten the end of self-regulation—on which observers will take different positions.
- Not-for-profit providers have been included in the CLS in a way that they never were in legal aid, and it has provided them with a funding bonanza.
- There is a danger that low payment

rates and high bureaucracy will lead to a loss of solicitors' firms from the top end of provision.

- The quality mark could make a real difference to quality of advice and assistance beyond that funded by the commission.
- The CLS has begun to develop the partnerships and links between different types of providers.
- There is a level of innovation over the delivery of services that is including various forms of outreach and, in particular, accommodating to the use of the Internet as an information resource of growing relevance even to poor people (though there may need to be some research into usage patterns).
- The Achilles heel remains funding—will the growth of criminal costs bear down on civil so that much of the exciting new work is cut back? There is a related uncertainty. The commission and the pre-existing Legal Aid Board have been run by an exceptional chief executive, Steve Orchard. Much of the commission's success is to be attributed to his personal vision and dynamism. He retires next spring, however, and the identity of his replacement will be crucial.

Overall, is the CLS better than the old ways of civil legal aid and green form legal advice? Yes, but, in the words of an old song revived by recent adver-

tisements for an insurance company, “There may be trouble ahead.” Where, however, is there not?

NOTES

* Director, JUSTICE, U.K.

¹ Hereafter shortened for ease to England or English, though incorporating Wales.

² See Legal Action Group, *A Strategy for Justice* (1992).

³ Legal Services Commission, *Annual Report 2001/02* HC949, paragraph 2.7.

⁴ Cappelletti and Garth, *Access to Justice: Volume 1* (Sijthoff and Noordhof, 1978), p. 124.

⁵ *Hansard HL Debates* 15 December 1987, col. 607.

⁶ Section 1, Access to Justice Act, 1999.

⁷ K Starmer, *European Human Rights Law* (Legal Action Group, 1999), p. 365; *X and Y v. Netherlands* (1975) 1 DR 66—an obligation may arise in certain circumstances; *Airey v. Ireland* (1979–80) 2 EHRR 305—may be required to guarantee rights to court determination practical and effective (divorce case).

⁸ See R. Smith, *Legal Aid Contracting: Lessons from North America* (Legal Action Group, 1998).

⁹ See, e.g., Gordon Hardy, “Pioneers in Public Legal Education,” in R. Smith (ed.), *Shaping the Future: New Directions in Legal Services* (Legal Action Group, 1995).

¹⁰ Section 4 (2), Access to Justice Act, 1999.

¹¹ Legal Aid Board, *Second Stage Consultation on the Future of the Green Form Scheme*, May 1989, paragraph 33 (i) (a).

¹² *Striking the Balance: The Future of Legal Aid in England and Wales*, Cm 3305, MSO, 1996, with a Conservative Party vision from Lord Mackay of Clashfern; *Modernising Justice*, Cm 4155, HMSO, 1998.

¹³ Or, as the Legal Action Group presciently argued in *Strategy for Justice*, LAG, 1992, “The focus of publicly funded legal services must change from the legal profession as the provider of legal aid to the client as the consumer. . . .”

¹⁴ 2 April 2001.

¹⁵ Many firms and not-for-profits have contracts in more than one area, leading to a greater number of contracts than contractors.

¹⁶ As above, paragraph 2.7.

¹⁷ Comparisons are from the Legal Aid Board, *Annual Report 1991–92*, 50, HMSO, 1992. The list omits the 15,610 certificates in cases relating to adoption, custodianship, guardianship, and wardship.

¹⁸ On which I declare an interest as a member.

¹⁹ Direction, 1 February 2001.

The System of Legal Aid in the Netherlands

by Peter van den Biggelaar

INTRODUCTION

The Dutch legal aid system is a mixed model in which legal aid is provided by private lawyers and by lawyers employed by the Legal Aid and Advice Centres (known in the Netherlands as the Bureaus Rechtshulp). The system originated in the 1950s, when a very rough form of service to citizens was made available. The high point of the attempt in our country toward optimum social services in the 1970s was actually the time when the foundation was laid for the current system. In the first instance, it was the providers of legal aid themselves who initiated the offer of legal aid for the poor. Legal provisions were then made in the Legal Aid Act for people with a small income, which guaranteed the constitutional right to legal aid for all citizens

A substantial rise in costs and the corresponding exceeding of the Ministry of Justice budget were sufficient reasons for the government to take measures and implement dramatic changes in the system. In addition, there was no budget control regarding

legal aid, and a lack of adequate supervision; therefore, the impression of abuse persisted. These subjects were the main issues dealt with by the Parliament. This radical change in the system, which occurred in 1993, involved clearer legislation and better monitoring of the expenditures of the authorities, as well as the need for organized quality and the guarantee of equilibrium between supply and demand. Legal Aid Boards were set up for this purpose, and they had to play a coordinating role in the achievement of the legal objectives.

The new Legal Aid Act (LAA) came into force in January 1994 with four main objectives:

- to enable those who have insufficient financial capacity to call on government-funded legal aid;
- to provide a sufficient supply of legal aid providers funded by the government;
- to focus on the (financial) management of the system;
- to modernize the administrative organization in order to be able to

implement control and supervision over the system.

The first objective is of course the most essential one. Implementation of the LAA secures the right of Dutch citizens to legal aid, which is anchored in the Dutch Constitution. The other three main objectives should be seen as derivative instrumental goals directed at realizing the first objective.

1. THE MODERNIZED ADMINISTRATIVE ORGANIZATION

The final responsibility over legal aid in the Netherlands is with the minister of justice, who delegates responsibility to the head of the Legal Aid Department of the Ministry of Justice. He is the only funder of the system.¹

The Dutch Legal Aid Act creates a scheme or program for providing legal aid, including both legal representation and legal advice, to people who are entitled for it. The expense is paid partly out of the Legal Aid Fund, financed by the state, and partly by a means-tested contribution of the individual client. This latter contribution might be zero.

The administration and expenditure of the Legal Aid Fund, as well as policy-related issues, are entrusted to five

Legal Aid Boards (called *Raden voor Rechtsbijstand*). These Legal Aid Boards were introduced in 1994. This management structure is the most important innovation in the LAA. The Legal Aid Boards are set up as independent management bodies. They took over the assessment of applications for legal aid from the Legal Aid and Advice Centres, the assessment of declarations from the court administration, and the funding of the Legal Aid and Advice Centres from the Ministry of the Justice. The boards were also assigned the power to admit lawyers to the system and to enter into agreements with third parties. The boards have simultaneously taken over responsibility for the emergency defender service (duty solicitors).

Finally, the boards are directly involved in IRIS (a foundation responsible for ICT, software and hardware for the Legal Aid Boards and the Legal Aid and Advice Centres), and they have played an important role in setting up the Legal Aid and Advice Centres for asylum-seekers.

Originally, the emphasis of their activities was on supervision and accountability. After an evaluation in 1998 showed that the system was in order in terms of accountability, the boards were able to concentrate more

on other fields of policy, such as monitoring and controlling supply and demand, quality, and alternative forms of settling disputes.

The legal aid and advice are provided by seventeen Legal Aid and Advice Centres, staffed by 250 lawyers, and by 8,000 lawyers in the private practice who fall under the scheme, out of a total Dutch population of 16 million people.

The majority of private lawyers offer legal aid in some way to citizens who have a small income. The motivation for this and the extent to which it happens vary sharply.

2. THE STRUCTURE OF THE LEGAL AID SYSTEM

The right to legal aid is based on the Dutch Constitution, stipulating that those who cannot afford the costs resulting from needed legal services are entitled to rely on the provisions of the Legal Aid Act. According to the most recent estimations, some 48 percent of the Dutch population is entitled to do so. The LAA specifies three types of services for which clients can apply.

First, all kinds of legal problems can be put before staff lawyers of the Legal Aid and Advice Centres. During what are called the consultation hours, they

can provide a half-hour of free legal aid. The decision as to whether the applicant falls within the limits set by the law is based only on a marginal means test by the centers' staff.

About 180,000 citizens obtained advice and information in this way during the year 2001 from the members of staff of the Legal Aid and Advice Centres. To a limited degree, private lawyers also provide this type of service (currently about 2,000 cases per year), but those who do this need a specific agreement with the Legal Aid Board in their district.

If a legal problem needs more than a half hour of legal services but is expected to be solved relatively soon, the Legal Aid and Advice Centres' lawyers can provide legal aid for a further three hours. The applicant is required to pay a financial fee of 13.5 euros. Access to these services is based on means testing, but in a very marginal way.

In the year 2001, about 33,000 citizens used this type of service, provided only by the Legal Aid and Advice Centres.

When solving a problem needs a minimum of three hours, applicants are enti-

tled to legal aid based on what is called a certificate. For this, the client has to provide extensive documentation with regard to income as well as other assets. Based on those documents and a qualification of the legal problem given by the lawyer, the board has to decide whether to grant the application. If that is done, the applicant is required to pay a financial contribution based on his or her income. The amounts range from a minimum of 61 euros to a maximum of 532 euros. In exceptional cases, exemption from this contribution is possible, particularly in criminal and asylum cases. If the applicant needs a second certificate within a period of six months, the required financial contribution will be reduced.

The decision on a request is made formally and is accompanied by legal guarantees for the citizen seeking justice as well as for the legal aid provider. This certificate procedure applies to long-term legal aid by lawyers from the Legal Aid and Advice Centres, but also to such aid by solicitors in particular.

When a case has been completed, the lawyer bills the Legal Aid Board for the hours spent. Lawyers are paid a fixed fee, according to a scheme that differentiates lawyers' reimbursement, taking into consideration the type of problem as well as the type of services provided (advice or procedural assistance). In addition, how

labor-intensive the case has been is taken into account. The current (2002) average hourly tariff is 83 euros.

About 300,000 certificates were issued to solicitors in 2001 (150,000 in civil law, 100,000 in criminal law, and 50,000 in asylum cases). Some 7,500 certificates were issued to staff lawyers employed by the Legal Aid and Advice Centres. There were also 75,000 duty solicitors certificates.

Private lawyers handle by far the most legal aid certificates. Actually, approximately 70 percent of the Dutch bar (which comprises 11,600 lawyers) take part into the legal aid system, though most of them on a very modest scale.

Of the participating lawyers in the system,

- 32 percent do less than ten certificates per year,
- 40 percent do between ten and fifty certificates per year,
- 15.5 percent do between fifty and one hundred certificates per year,
- 10.5 percent do more than one hundred certificates per year.

Private lawyers provide relatively little short-term legal aid, which is predomi-

nantly given by the staff lawyers employed by the Legal Aid and Advice Centres. Private lawyers' predominance in handling these certificates is partly because they specialize in family law, contract law, criminal law, and asylum law, and partly because of their required representation for various procedures in the District Courts, Courts of Appeal, and the Supreme Court. There are only a few limitations in legal fields where legal aid by a lawyer is not possible.

Although the Legal Aid and Advice Centres provide all types of legal aid, they specialize in short-term legal aid services. They are almost exclusively occupied with legal aid to citizens with medium and low incomes. They have mainly concentrated on the social legal fields.

Approximately 95 percent of their cases can be dealt with during their running hours in a way that they call "one touch, one play." These centers have become specialized in a number of fields of social law, e.g., labor law, social security, housing, immigration law, and consumer law. These Legal Aid and Advice Centres employ approximately 250 staff lawyers.

In addition, approximately 100 staff lawyers are employed by three asylum Legal Aid and Advice Centres, which, of course, focus on providing legal aid to asylum-seekers. They work on the same

basis as the Legal Aid and Advice Centres, but only in this specific legal area.

The staff members in the Legal Aid and Advice Centres are professional solicitors, who in terms of education and expertise are comparable with the legal profession. These solicitors are also increasingly joining the legal profession. This makes it possible in principle to extend the services offered, to some of the several legal procedures that are legally reserved for lawyers in the Netherlands.

The Legal Aid and Advice Centres are special phenomena for various reasons. They are low-threshold organizations with a good geographic spread. The professional solicitors can quickly solve many simple problems, and they effectively refer the other problems to specialized lawyers.

The Legal Aid and Advice Centres are initially financed by the Legal Aid Boards on the basis of formation places related to expected production, and since 2001 on the basis of achieved output.

Since 1998, the Legal Aid and Advice Centres have fulfilled what is known as the public function in the system. This function is intended to guarantee an initial inclusion in the system, whereby the citizen is shown his or her way in the system and, if necessary, referred to the legal aid function. The Legal Aid and Advice

Centres receive separate funds for the public function, which is currently the subject of discussion in the Netherlands.

In total, there are about 600,000 applications a year for legal aid in the Netherlands. The provision reaches about 6.1 million citizens. The extent to which this corresponds to the actual demand in the target group is not completely known. The Legal Aid Boards will further investigate this in the near future, including a determination of latent demand and how this can be mobilized. This information is indispensable for a good assessment of the system. It is important that there are virtually no exclusions in our system for legal aid. Certainly in the Legal Aid and Advice Centres, all questions of legal relevance can be submitted for advice.

3. LEGITIMACY AND BUDGET CONTROL

The introduction of the Legal Aid Act originally went hand in hand with complaints about the large number of checks. Many measures have been introduced, and adapting the regulation made possible the attempt by Legal Aid Boards to reduce burdens for both the clients and the lawyers, for instance by improving communication.

In cooperation with the Ministry of Justice, boards are searching for simplifi-

cations. In addition, the use of new technology is certain to provide more and better opportunities.

It became very clear that the checks are successful. The expenditures are under control. Overall performance is good, and the confidence of the politicians has strongly improved. Control has undoubtedly led to the situation where legal aid is no longer regarded as a subject in which there is frequent abuse or improper use. Therefore, many improvements have been realized and others are still possible.

As an evaluation report about the LAA, presented to the Parliament at the end of 1998, puts it: "The general conclusion must be that the LAA meets the goals set at the time, that existing problems can be solved in practice by amending regulations but at the same time, amendments are still desirable and are possible in the future with which the system will maintain the required dynamism to be able to continue to work towards the set objectives now and in the future."

4. RECENT DEVELOPMENTS

So far I have described the legal aid system as it has functioned since 1994. Now I turn to some developments in the system that are more recent.

Insight has increased into the offer of

legal aid providers in cases where there was a limited understanding of the demand, mainly in the legal profession. Monitoring registrations and resignations, the number of cases per lawyer, and the legal fields in which this professional group gives financed legal aid do not at first sight show any shocking developments.

Signals from the work field have indicated for some time, however, that the interest of lawyers in social legal practice has been on the wane. To an increasing degree, those who are entitled to legal aid have to “shop around” before they will find a lawyer who is prepared to take their cases. Research by the IVAM and the Verweij-Jonker Institute in 1999 showed that there was already just cause for future concern. There are fewer new entrants in the market of legal aid, the share of social practice in the total service within offices is decreasing, and the quality is under pressure because financed cases are often submitted to inexperienced lawyers.

The most important reason for the decline appears to lie in the size of the reimbursement. The hourly rate for financed cases is about half the rate for commercial cases, while the demand for commercial legal services has grown explosively. The heavy administrative burden on legal aid also plays a role in this trend. This can lead to a situation in the future in which citizens with legal problems can call

on high-quality legal aid only with a lot of difficulty, or perhaps not at all, because appreciably fewer legal aid providers will be available.

Admittedly, the Legal Aid and Advice Centres are an alternative, but a monopoly position by these or any other professional group is not desirable, for obvious reasons. Moreover, the power of these service providers so far lies more in short-term legal aid, because of the special attention paid to the social legal practice, and less in comprehensive aid with a high degree of specialization.

The necessity, therefore, arose for the Ministry of Justice and the Legal Aid Boards not only to continue to involve the Legal Aid and Advice Centres in the system, but also to stimulate the involvement of private lawyers, on the one hand to guarantee a quantitative offer, and on the other to maintain or even strengthen the quality of the offer. In the first instance, this has already led to an increase in reimbursement rates at the beginning of 2000; however, these are still far less than commercial rates. A supplementary increase is admittedly a prospect, but only on the condition that the legal profession shows demonstrable results in the guarantee of quality. Initiatives were also developed to decrease the sharply criticized administrative burden.

5. TURNING THE BALANCE

The Legal Aid Boards, which are responsible for the quality and accessibility of the provisions, are trying to keep a balance between supply and demand. Based on the evidence, this balance is an unstable one, due to societal developments, shifts on the demand side, and movements on the supply side. In anticipation to these developments, for example, the Legal Aid Boards (1) stimulate alternative types of legal aid (ADR/mediation), (2) create specific facilities for the victims of crimes, and (3) implement new legislation for people who have been confronted with unsolvable debt problems (bankruptcy). In addition, they continue their efforts to encourage the legal aid involvement of the traditional Bar. This is done by campaigning for higher tariffs of lawyers' remuneration as well as exploring the possibility of reducing the administrative burden of the legal aid granting procedures and the facilitation of other services.

The Legal Aid Boards also see the so-called arrangements—multi-year contracts with law firms, in which they “take on” a previously defined number of cases in important legal fields, and must comply with specific criteria to guarantee quality—as an important instrument to ward off stated threats and to give impulse to a new arrangement of the market. It is evident

that this option is realistic only if there are visible advantages for the legal profession connected with the concept. In other words, there must be a win-win situation.

The boards have themselves approached the professional group to name these desired advantages. As can be imagined, it was a relief for the boards to note that the legal profession reacted positively to this initiative. The door was certainly not immediately slammed shut. Ultimately, this discussion led to an approach that appears attractive to the law firms involved, for various reasons.

In the first place, it can be advantageous, from organizational and commercial-economic viewpoints, to know beforehand that a certain number of cases present themselves with a reasonably predictable time expenditure and accompanying reimbursement, without efforts being needed to acquire these clients. The financed cases form a definite source of income and offer the possibility, for example, to plan the deployment of personnel and the in- and through-flow of new solicitors, to spread the overhead, and to arrange the organization adequately in other ways. The level of knowledge and experience in a certain field also rises because a substantial number of cases are conducted in this legal field. This benefits the efficiency and settlement of commercial cases.

The same applies to the mandatory client-satisfaction study, quality audits, the use of professional protocols, and other initiatives to guarantee and improve quality. This also strengthens the organization. Simultaneously, it satisfies the requirement set by the government for assigning a higher reimbursement. If the lawyers meet the set quality criteria, the board can therefore pay out a higher reimbursement. It is precisely because of this link between certification and rate increase, determined by the Ministry of Justice, that extra perspective is offered. It also appears to be the right time for the legal profession to accept certification as a necessary condition.

The achievement of real and controllable quality characteristics can be expressed as certification of the law firms involved. In this case, the office can use a special motif or sign of recognition, which can also be an important marketing instrument in the competitive struggle within the legal services market.

The administrative procedures are to a certain extent simplified, and the board supports, with knowledge, software, and other means, the processes that are paired with the application for legal aid, the claim for the reimbursement, and the collection of the client's personal contribution. Potential positives include support in the promotion of expertise and automation.

The desired result of these arrangements is related to all parts of the system. Access to the law is guaranteed for the citizen, and the quality of the service rises. The lawyers' expenses decrease, reimbursement rises, and there are various advantages in automation, expertise, quality, and marketing—advantages that also mean a strengthening of other activities.

Arrangements are an aid to the board in performing the legal tasks. The offer is guaranteed and quality rises, without affecting control or causing high extra costs.

Our board has signed the first contracts with law firms. There will then be a growth model, in which the growth tempo will be partly determined by the manner in which those involved experience the effects and can cope with unforeseen side effects.

Looking further into the future, it is possible that ultimately a large part of the legal aid can be offered via arrangements. This will probably cause a more closed system than is currently the case. It also cannot be excluded that contracts will be concluded for the other provisions within the system and that bodies other than lawyers will be considered.

Arrangements can therefore initiate a radical change within the system.

6. POINTS MERITING ATTENTION IN SETTING UP A SYSTEM OF LEGAL AID

Finally, some comments related to the structure of a system of legal aid should be made. Please note that these comments are in regard to the Dutch circumstances, especially meaning one financial funder (the Ministry of Justice), a multi-party system (which always requires a coalition of two or more political parties), the fact that the Netherlands is a small country, and it has a system of more than one organization providing legal aid (the Bar and the Legal Aid and Advice Centres).

What is important for a new structure?

- simple and transparent legislation;
- objective means and merits testing;
- the introduction of an independent control structure such as Legal Aid Boards;
- reasonable remuneration for lawyers who participate in the system—preferably, remuneration by fixed fees;
- a reasonable contribution system for the client;
- an adequate budget control system;
- a system with more than one provider—for example, both private lawyers and Legal Aid and Advice

Centres, etc.;

- organization of the availability of relevant information for the target group;
- collection of relevant data from the applicants;
- development of a program for continuous monitoring;
- introduction of a quality program from the start.

Procedure to apply for a legal aid certificate

A client is free to contact any lawyer who is registered by one of the five regional Legal Aid Boards. Alternatively, a client can approach a Legal Aid and Advice Centre; they are situated in every large Dutch city. The multi-step procedure is as follows:

1. The client approaches the lawyer of his or her choice, or a Legal Aid and Advice Centre. If the client approaches a Legal Aid and Advice Centre, he or she is entitled to a half hour's free advice, or three and a half hours' advice for 13.5 euros. If the case takes more time, it is dealt with in the way that is indicated in the steps below.
2. The client submits his or her prob-

lem, and the lawyer estimates whether the case is worthwhile to be handled. In addition, the lawyer must check whether he or she is permitted to deal with this type of case, given substantive criteria—supposedly probing lawyers’ expertise on specific areas of law—that the Legal Aid Boards apply.

3. The lawyer informs the client about the means test that the client has to pass. To do so, the client has to fill out a formula providing information about personal conditions (such as whether he or she is cohabiting) as well as financial conditions (income, capital, and liabilities), in order for an assessment of whether the client is entitled to legal aid. Then the client has to sign the document in order to validate it.

4. The client hands the validated formula to the lawyer.

5. The lawyer lodges a legal aid application with the Legal Aid Board. In addition, the lawyer has to make clear what kind of services he or she will render the client; either starting a legal procedure or dealing with the case by way of advice

6. The application is assessed by the Legal Aid Board, which judges the type of problem and its legal grounds. If the client

is entitled to legal aid both on substantive grounds and as a result of financial criteria, the Legal Aid Board also computes the financial contribution that the client has to pay, according to the scheme given by law.

7. Leaving aside eventual correspondence between the board and the lawyer in order to clarify the lawyers’ case, the decision taken by the board is forwarded to both the lawyer and the client. If granted, the lawyer can go on with the case as soon as the client has paid his or her own contribution. In case the client applies for the second time within a period of twenty-six weeks, he or she is entitled to some reduction of the amount to be paid (also according to a scheme provided by law). If the application for legal aid is not granted by the board, the client or the lawyer can appeal.

8. If the case is over, the lawyer sends both the original decision and an invoice back to the board. On the back of the form, the lawyer stipulates the kind of services given and the amount of time spent. If applicable, the type of legal authority to which the case has been presented has to be written down, accompanied by documents relevant to the procedure by which the case has been dealt with (such as a legal verdict).

9. Once the invoice has been completed, the board determines the lawyer's fee, according to a scheme provided by law. In fact, a lawyer is able to figure out beforehand the level of reimbursement, given that scheme minus the client's own contribution. If a lawyer complies with some extra quality standard set by the board, he or she will receive an extra allowance on top of the normal reimbursement. The lawyer receives a copy of

the calculation, which can be appealed.

10. The lawyer is paid by the board, subtracting the amount from the advance made by the board every quarter. The amount of the advance paid to the lawyer is based on the number of legal aid certificates issued by the board in the previous year. It is also possible for a lawyer to get paid once a month. In this event, the lawyer does not receive an advance.

Table 1. Legal aid in the Netherlands

Facts and figures	1994	1998	2001
Total Dutch population	15,300,000	15,650,000	16,000,000
Population under 16 years	12,100,000	12,300,000	12,600,000
Eligible for legal aid under 16 years	5,100,000	5,800,000	6,100,000
Legal aid professionals	1994	1998	2001
Private lawyers	8,000	9,900	11,600
Private lawyers who participate	6,550	7,200	8,000
Staff, Legal Aid and Advice Centres	200	210	250
Staff Centres for asylum-seekers	—	60	100
"Lawyers density": one lawyer per 1,350 habitants			
Expenditures (in euros)	1994	1998	2001
Total legal aid	184,000,000	195,000,000	262,000,000
Euros per capita, under 16 years	36	34	40
Hourly tariff	57	61.5	76
Number of cases	1994	1998	2001
Civil legal aid	202,000	166,000	148,000
Criminal legal aid	73,000	87,000	102,000

Duty solicitor	65,000	64,000	64,000
Asylum	30,000	33,000	54,000
Number of consultations, Legal Aid and Advice Centres			
Time consult, under 0.5 hour	225,000	200,000	180,000
0.5 hour + time consult, under 3 hours	32,000	28,500	35,000
Time consult, over 3 hours	374	6,700	7,500

Table 2. Income and contributions since 1 July 2002 (in euros)

Net income per month (single)	Contribution client since 1 January 2002	Net income per month (married or unmarried with child or children)
000-791	61*	0000-1,108
791-839	99	1,108-1,178
840-886	145	1,179-1,244
887-922	190	1,245-1,294
923-965	235	1,295-1,358
966-1,006	274	1,359-1,417
1,007-1,045	317	1,418-1,471
1,046-1,086	358	1,472-1,532
1,087-1,131	403	1,533-1,596
1,132-1,174	439	1,597-1,655
1,175-1,213	487	1,656-1,712
1,214-1,424	532	1,713-2,000

*In criminal cases, zero

Capital:

- Single: less than 6,370 euros
- Married or unmarried with child(ren): less than 9,100 euros

NOTES

¹ Of course, it is also possible to get advice and assistance from the unions, as well as from consumer organizations if the indi-

vidual is a member; it is also possible to get these services if there is an insurance policy.

The Legal Aid Board and the Delivery of Legal Aid Services in South Africa

by David McQuoid-Mason*

INTRODUCTION

For the past decade, the Legal Aid Board has been the main vehicle for the delivery of legal aid services in South Africa. The apartheid state had previously recognized the need to provide legal aid in civil matters, and had established the board for this purpose in 1969.¹ The board began operating in 1971, and during its early years it spent most of its budget on civil matters such as divorces and personal injury claims, at the expense of criminal cases. Recently, however, an ever decreasing amount has been spent on civil matters, and the vast majority of expenditures is now earmarked for criminal cases.

In terms of the Legal Aid Act, the Legal Aid Board is required “to render or make available legal aid to indigent persons.”² It has representatives from the bench, the advocates’ profession, the attorneys’ profession, government departments, an independent expert on legal aid, three additional members who can further the aims of the board, and not more than six additional members

appointed by the president of the Republic in consultation with the Cabinet.³ The board has justice centers in thirty-one localities and provides public defenders at forty magistrates courts. It relies on assistance from designated legal aid officers employed by the Department of Justice in the magistrates courts in towns where it has no offices.

1. OPERATION OF THE LEGAL AID BOARD

The Legal Aid Board was given complete discretion as to how it would offer legal assistance to indigent persons. It decided initially to adopt the British referral (judicare) system, rather than the American approach of a combination of judicare and salaried lawyers. Unlike the original British model, however, it dealt with both criminal and civil cases—even though there was in the past a separate *pro deo* arrangement for certain persons accused of capital crimes.⁴

The Legal Aid Board carried out its

mandate in terms of the act by establishing a set of working rules, which are incorporated in the *Legal Aid Guide*.⁵ The *Guide* provides for the board's resolutions to be carried out under the supervision of the director of legal aid, who is an officer of the board. The *Guide* recognizes that legal practitioners should be paid for their work, and a tariff of fees has been introduced for both attorneys and advocates. Generally, legal aid officers attempt to assist applicants who qualify, but if they cannot, the officers refer them to a legal practitioner who may be chosen by the applicant. If the applicant does not qualify, the legal aid officer must refer the person to another suitable government department or other institution.⁶

1.1 Financial constraints

There is no definition of an "indigent person" in the act, but the Legal Aid Board has laid down a "means test," which has been revised from time to time. The ceiling at present is 600 rands⁷ a month for single or estranged persons, 1,200 rands for married couples, plus 180 rands for each child. For example, a family of six, with a husband, a wife, and four children, would be entitled to earn a monthly income of up to 1,920 rands⁸—1,200 + 720 (4 x

180). The director of the Legal Aid Board may, however, in exceptional cases, grant legal aid to a person who falls outside the means test.⁹

1.2 Exclusions

In general, the *Guide* provides that legal aid should be "rendered in all cases where the assistance of a legal practitioner is normally required." The *Guide*, however, excludes assistance for legal aid in certain categories of criminal¹⁰ and civil cases,¹¹ even if a person qualifies in terms of the means test.

1.2.1 Exclusions in criminal cases.

Except in cases "where a substantial injustice would otherwise result" in terms of the Constitution, in criminal cases no legal aid is rendered: (i) where an admission of guilt has been determined or can be compounded; (ii) where the commission of the offense is admitted and the accused's defense or excuse is so simple that it can be advanced by the accused without assistance; (iii) where a traffic offense, or any other offense involving the use of a car (other than culpable homicide), is committed; (iv) where the applicant wishes to institute a private prosecution; (v) where the director is not satisfied that a criminal appeal has a reasonable

prospect of success; (vi) in certain matters excluded by the board from time to time; (vii) where a person is charged for the third or subsequent time on the same or a similar charge; and, (viii) save with the consent of the director, where an accused is charged for failing to pay maintenance under the Maintenance Act.¹²

1.2.2 Exclusions in civil cases. In civil matters, legal aid will not be rendered: (i) in debtors court proceedings; (ii) for the administration of an estate or the voluntary surrender of any estate; (iii) in actions for damages on the grounds of defamation, breach of promise, infringement of dignity, invasion of privacy, seduction, adultery, or inducing someone to desert or stay away from another's spouse; (iv) in a claim for maintenance that can be determined by a maintenance court without the assistance of a legal practitioner; (v) in undeserving divorce matters; (vi) for any action that may be instituted in the Small Claims Court or where the amount of the claim does not exceed the jurisdiction of the Small Claims Court by more than 25 percent; (vii) in a civil appeal, unless the director is satisfied that there are reasonable prospects of the appeal succeeding; (viii) in arbitration, conciliation, or any other forms of alternate dispute resolution; (ix) in matters where there is no sub-

stantial and identifiable benefit to the client; (x) in matters excluded by the board from time to time; (xi) in matters where enforcement of an order in favor of the applicant will yield little benefit; (xii) in inquiries in the Children's Court without the prior approval of the director; and (xiii) for an application to obtain an interdict with respect to the prevention of family violence or harassment as a result of domestic or family disputes, since an interdict in these matters can be obtained without the assistance of a legal practitioner.¹³ Applicants who are denied civil legal aid in divorce matters may apply to the registrar of the high court for help by way of *in forma pauperis* proceedings.

In civil matters, the board must always be satisfied that there is merit in the case and that there is a reasonable prospect of success and recovery. Furthermore, if there is good reason to believe that an applicant is willfully abstaining from entering into employment within his or her capabilities or that he or she has resigned from employment merely to obtain legal aid, assistance will be refused.¹⁴

1.3 Applications

In South Africa under the *judicare* system (unlike the English scheme), legal aid applicants were never able to apply

for assistance directly to private lawyers; first they had to be screened by legal aid officers, either at the board's branch offices or designated magistrates courts, and then referred to lawyers. If they did approach a private lawyer first, the latter would have to refer them to the local legal aid officer in order to obtain instructions to act as a legal aid-funded lawyer. The screening by legal aid officers was to ensure that the applicants satisfied the means test, and were not excluded in terms of the *Legal Aid Guide*. If they qualified for legal aid, they were referred to a practicing attorney or a public defender's office or a Legal Aid Board law clinic. More recently the legal aid offices, public defender's office, and Legal Aid Board clinics have been amalgamated into justice centers, which act as "one-stop legal aid shops."

1.4 Refusals

A legal aid applicant has the right of appeal to the director of the Legal Aid Board against a refusal of legal aid by a legal aid officer. The legal aid officer is obliged to inform the applicant of this right. The grounds of the appeal must be submitted in writing to the legal aid officer, who must forward them to the director. An applicant has a right of appeal to the chairman of the board against a

refusal, termination, or suspension of legal aid by the director.¹⁵

1.5 Cost of legal aid scheme

Since its establishment, the Legal Aid Board has been funded almost exclusively with public funds from Parliament. The funds allocated to the board annually have increased markedly during the last five years:

1991–92:	35.2 million rands
1992–93:	56.4 million rands
1993–94:	62.1 million rands
1994–95:	66.3 million rands
1995–96:	182.4 million rands
1996–97:	156.5 million rands
1997–98:	301.2 million rands
1998–99:	260 million rands ¹⁶
1999–2000:	224 million rands ¹⁷
2000–2001:	341 million rands ¹⁸
2001–2002:	246 million rands ¹⁹

The exponential increase from 66.3 million rands in 1994–95 to about three to four times that amount in subsequent years, is almost solely due to the effect of the board acting as the agent of the state with respect to its constitutional legal aid obligations.²⁰ For instance, the budget for the period 1995–96, amounting to 182.4 million rands, reflected 66.4 million rands with respect to the conven-

tional legal aid scheme, and 116 million rands for the provision of legal consultation services and legal representation by the board in terms of the Constitution.²¹

In spite of the substantial increases, the board does not have sufficient funds to provide legal aid to everybody who requires it in South Africa. Additional funding will have to be obtained in order to provide legal assistance for human rights cases under the Constitution, to expand the public defender system, and to establish advice offices for the millions of South Africans who cannot afford the services of lawyers.

The state alone will not be able to shoulder the burden, and other methods will have to be found in order to provide a meaningful service to the large number of indigent citizens in South Africa. At one stage the board was investigating the feasibility of introducing a telephone advice service by subscription, which, at a fee of about 10 or 15 rands a month, would enable subscribers to obtain free legal advice and access to lawyers for a free consultation. It was estimated that such a scheme could raise up to 350 million rands a year for the Legal Aid Board if the scheme was run under its auspices. This would relieve Parliament of the burden of having to provide funding for legal aid services and would be sufficient

to meet the legal aid needs of the country. The scheme was never implemented, however, because it was thought that the legislation does not empower the Legal Aid Board to raise funds in this manner. In 1994–95, the board received about 3.2 million rands from legal costs ceded to it by successful litigants²² in terms of the Legal Aid Act.²³

1.6 Impact of the Constitution

Section 35 (3) (g) of the Constitution requires that legal representation be provided in criminal trials at the expense of the state “where substantial injustice would otherwise result,” and this has had a major impact on the demands of the services of the Legal Aid Board. It is estimated that if only 20 percent of the unrepresented accused among the approximately 684,000 accused in the lower courts qualify for legal representation by the state, the state would have to provide representation for at least 136,840 accused. In 1992, it was estimated if the judicare system was used it would cost the board nearly 92 million rands in legal costs. Because only a relatively small percentage of the 12,000 legal practitioners in private practice do criminal defense work, it would probably not be possible to provide legal representation for nearly 137,000 accused

annually by way of the judicare scheme, and an extended public defender system would have to be considered. It is estimated that a public defender scheme that could provide defense for approximately 144,000 accused a year would cost about 67 million rands.²⁴

Furthermore, as previously mentioned, Section 35 (2) (c) of the Constitution provides that detained and arrested persons are entitled to consult with a legal practitioner at the expense of the state where “substantial injustice would otherwise result.” It is calculated that there are approximately 1,000 police stations in South Africa, and that almost 1.6 million people are detained annually. If only 50 percent of them were entitled to services of lawyers by the state, on average more than 2,000 consultations a day would have to be arranged and provided for by the state.²⁵

The Legal Aid Board has introduced a twenty-four-hour telephone service at its Head Office, which can be used by detained or arrested individuals who wish to obtain advice. The telephone number is displayed at all police stations and prisons, and the authorities have to allow detained or arrested persons access to the toll-free number. Such persons are entitled to consult with a practitioner, employed by the board, over the telephone, or can arrange that a practition-

er consult with them in prison or the place where they are being detained. In the latter case, the practitioner receives instruction by telephone from a member of the board’s staff to consult with the detainee. The practitioner’s fees and travel expenses are paid by the board on behalf of the state.²⁶

2. DELIVERY OF LEGAL AID SERVICES BY THE LEGAL AID BOARD

The Legal Aid Board has used the following methods of delivering legal aid services: (i) state-funded private counsel (judicare); (ii) state-funded public defenders; (iii) state-funded candidate attorneys in rural law firms; (iv) state-funded law clinics; (v) state-funded justice centers (“one-stop legal aid shops”); (vi) cooperation agreements with private specialist law firms; (vii) cooperation agreements with independent law clinics; and (viii) cooperation agreements with paralegal advice offices.

2.1 *State-funded private counsel (judicare)*

Judicare in different forms has been used as a method of delivering legal aid services in many developed countries, including the United States, the United

Kingdom, Canada, Australia, and the Netherlands. It is probably also used in most developing countries in Africa and Asia. For many years it was the main method of delivering legal aid by the Legal Aid Board. The board used the assigned-counsel approach. Private lawyers who render legal aid services in accordance with the Legal Aid Board's rules are paid for their services at fixed tariffs. The introduction of the new Constitution²⁷ had a devastating effect on the ability of the board to continue using this method. The board became notionally bankrupt because of the large increase in the number of cases and lawyers' accounts it had to handle. This led it to drastically rethink its strategies concerning the delivery of legal aid services.

It was estimated that over a period of twenty-eight years, from 1970 until 1998, a total of 997,707 legal aid cases were referred to attorneys, the vast majority of which involved criminal matters. Of these, 559,238 had been granted since 1994–95 and the advent of the new Constitution. This means that the number of legal aid applications granted during the last four years up to 1998 constituted 56 percent of all legal aid applications ever handled by the board.²⁸ The overall increase during the period 1989–90 to 1998–99 was 709 percent.²⁹

This exponential growth in the number of *judicare* cases with respect to criminal matters eventually led to the abandonment of the *judicare* model as the prime method of delivering legal aid services by the Legal Aid Board.

In 1997–98, private attorneys were paid for completing 105,732 cases, of which 87,469 (83 percent) involved criminal cases. Only 17 percent of cases concerned civil matters: 14,156 (13 percent) divorce cases, 3,617 (3.5 percent) other civil cases, and 490 (0.5 percent) labor cases.³⁰ The average cost per case finalized by the Legal Aid Board during the same period was 864 rands per case for ordinary criminal matters, 1,707 rands for constitutional criminal matters, and 1,498 rands per case for civil matters under the *judicare* system. The average cost of all *judicare* cases was 1,423 rands.³¹

The South African experience, like that in other countries, is that the *judicare* model is considerably more expensive than the salaried lawyer scheme. In 1990, a pilot public defender program was introduced to cope with the ever increasing demand for legal aid in criminal matters.³² In 1994, Legal Aid Board law clinics were introduced for the same reason. Unlike the public defender's office, they also cater to civil legal aid cases. During 1995, it was estimated that

while the average cost of a judicare criminal case was 822 rands, the average cost of a public defender criminal case was 555 rands.³³ The cost of law clinic cases was even less.

The Legal Aid Board is examining ways of reducing the cost of judicare by considering fixed-fee-per-case and fixed-price contracts. However, fee capping has proved unpopular, particularly with respect to criminal cases, and there have been threats by some lawyers to refuse to take work from the board. Some firms believe that tendering is a feasible solution and that they could tender to do cases at cheaper rates than salaried lawyers employed by the board. The board, however, has made a decision to drastically reduce the emphasis on judicare and to move toward a predominantly salaried lawyer system.

2.1.1 Lessons learned. The South African experience is that judicare system works where there is an adequate staffing and administrative structure to support it; proper accounting systems are in place to deal expeditiously with claims for fees and disbursements; and budget constraints keep pace with demand. However, once a centralized staffing establishment cannot keep pace with the demands of practitioners for payment within a reasonable period of time, the

referral system breaks down. Despite new computer systems, the incoming daily new accounts exceeded the daily number of old accounts that the Legal Aid Board's staff at the Head Office were physically able to process. This led to long delays in payment, sometimes stretching into years, and a loss of confidence in the system by practitioners who were no longer prepared to accept legal aid work—and in some instances sued the board for outstanding fees. Matters were compounded by the buildup of huge contingency sums to cover amounts owed by the board for matters that had not been completed—something with which the auditor-general was not comfortable. In desperation, the board placed severe caps on fees for criminal cases, and this further alienated the legal profession. The board has now decided to opt for a salaried lawyer justice center model as the norm, with judicare as a subsidiary method of delivery where such centers are not viable.

The overall lesson from the South African judicare experience is that the assigned-counsel method is not feasible in an environment of budget restraint, as accurate forecasts of expenditure have to be made. Where judicare is to be retained as part of the system, it should be based on the contract approach.

2.2 State-funded public defenders

In South Africa in 1990, after widespread discussion with a variety of lawyer associations, the Legal Aid Board persuaded the minister of justice to investigate the feasibility of a public defender system in South Africa and to appropriate 2.5 million rands for this purpose. This enabled the board to employ legally qualified persons to represent indigent accused. Initially the pilot project Johannesburg office was approved for two years.³⁴ Estimates that each public defender should be able to deal with approximately 200 criminal cases a year³⁵ have proved to be correct.

By November 1992, more than 2,200 cases had been dealt with by the ten public defenders in Johannesburg, with a 57 percent success rate on not-guilty pleas, and a 90 percent success rate for bail applications. The average cost per case during 1992 compared very favorably with the costs allowed to private practitioners by the Legal Aid Board.³⁶ During 1993–94, the office provided legal representation for 2,808 accused persons,³⁷ while during 1995–96 it represented 3,794.³⁸

During 1995, it was estimated that while the average cost of a judicare criminal case was 822 rands, the average cost

of a public defender criminal case was only 555 rands.³⁹ The pilot project was considered a success by the Legal Aid Board, and aspects of it have been included in the new justice centers as a permanent component of the board's work. At present, public defenders are operating in forty regional magistrates courts and dealing with 20 cases each a month. In 2001, it was estimated that they could provide 8,800 criminal defenses a year.⁴⁰

2.2.1 Lessons learned. Public defender models are considerably cheaper than the judicare system, and those developing countries relying exclusively on the judicare model, and limited by budget constraints, should seriously consider introducing aspects of public defender schemes, particularly in criminal cases. However, a full-fledged network of public defender offices is too expensive for South Africa and other developing countries. Other creative methods of using the model, such as state-funded law clinics, need to be explored.

2.3 State-funded candidate attorney interns in rural law firms

In 1995, the Legal Aid Board entered into an agreement with Lawyers for Human Rights, a human rights non-gov-

ernmental organization, to establish a pilot project whereby the board would arrange with private attorneys in a few rural towns to employ candidate attorney interns who would be funded by the board to do legal aid work. The firms are identified by local legal circles, and the board then negotiates with the persons identified to assist financially with the payment of the salary of the candidate attorneys. Lawyers for Human Rights assist with the recruitment of appropriate attorneys and thereafter monitors the progress of the project. The project not only expands access to legal aid services in rural areas, but also enables formerly disadvantaged persons to be employed in the legal profession in the areas where they live.⁴¹

The candidate attorneys are required to handle at least ten new legal aid instructions per month free on behalf of the board, as well as to perform community service one day a week. Two projects involving eight candidate attorneys were operating by the end of 1996–97.⁴² Most of the work done by the interns involve criminal cases, but some civil cases, mainly divorces, are also done. For instance, interns in four rural law firms during the period 1 March 1997 to 28 February 1998 completed 400 criminal cases and 73 civil cases.⁴³

2.3.1 Lessons learned. This model is very cost-effective and could be expanded to handle more cases. It could be replicated in those countries that require law graduates to undergo a period of internship before being admitted to legal practice. This would apply particularly to countries with large rural populations and small-town law firms. In South Africa, it is much cheaper to subvent the salaries of candidate attorneys in rural law firms than to establish branch offices of the Legal Aid Board in areas where there is a limited demand for legal aid services⁴⁴ because other methods of dispute resolution are used.

2.4 State-funded law clinics

In 1993, the South African Attorneys Act⁴⁵ was amended to allow prospective attorneys with the necessary legal qualifications to obtain practical experience other than in an attorney's office under articles of clerkship by undertaking a period of community service.⁴⁶ Community service may be done at law clinics accredited by provincial law societies, including clinics under the auspices of the Legal Aid Board. The clinics are required to employ a principal (an attorney with sufficient practical experience) to supervise law graduates in the community service program. The candidate attorneys appear

in the district courts and the principals in the regional and high courts. Interns who have been indentured for more than a year may also appear in the regional courts. The board employs candidate attorney interns and supervising attorneys with a maximum ratio of ten interns to one supervisor. The objectives of the scheme are (a) to render legal services to persons who satisfy the means test, and (b) to alleviate the shortage of internship opportunities for candidate attorneys by providing “articles of clerkship” or “contracts of community service” to law graduates.⁴⁷ In the period 1996–97, 150 candidate attorneys qualified for admission to legal practice, some 49 percent of whom were women, and 60 percent from previously disadvantaged groups.⁴⁸

The Legal Aid Board began with a pilot project of five university law clinics in 1994, and since then it has allocated up to 430,000 rands per clinic to twenty university law clinics and two others to enable them to employ a supervising attorney and up to ten community service law clerks (interns) each. More recently, in some clinics, the board has been employing a ratio of eight interns and two qualified professional assistants instead of ten interns, so that the professional assistants can appear in the regional (senior) magistrates courts. The interns appear in the lower courts, and the board has calculated

that the average cost of the 24,513 criminal and 12,997 civil cases handled by the law clinics during the period 1 July 1994 to 31 December 1996 was 433 rands.⁴⁹ This is less than half of the average cost of 976 rands per case charged under the judicare system during the same period,⁵⁰ and it is also cheaper than the pure public defender model. During the period 1997–98, twenty law clinics completed 33,951 cases, of which 20,042 (59 percent) were criminal and 13,909 (41 percent) were civil.⁵¹ This figure compares favorably with the 18,263 civil cases done under the judicare scheme for the same period⁵² at probably twice the cost. The state-funded law clinics are now being incorporated into the new justice centers. The clinics in the justice centers work on a ratio of ten candidate attorneys to one supervising professional assistant. It was estimated in 2001 that each candidate attorney handles about 30 cases a month in the magistrates courts.⁵³ Thus, the 310 candidate attorneys in the thirty-one justice center clinics will handle about 103,000 cases.⁵⁴

2.4.1 Lessons learned. The community service program provides extended legal services at a moderate cost to needy members of the public, and at the same time it develops fields of expertise, practical experience, and career opportunities for aspiring lawyers. It is a useful model for

consideration by countries with legal systems that require law graduates to serve an apprenticeship before being admitted as practitioners. It could also be used by other developing countries that do not require internships as a mechanism for integrating newly qualified law graduates into the legal profession. The South African experience has been that the standard of service of the Legal Aid Board clinic candidate attorneys in the lower courts is often better than that of qualified attorneys or privately employed candidate attorneys, because the interns obtain specialist knowledge in conducting criminal and poverty law cases.

2.5 State-funded legal aid or justice centers ("one-stop legal aid shops")

The South African Legal Aid Board has begun setting up legal aid or justice centers, which provide a "one-stop" service for legal aid clients. The centers amalgamate the different constituents of the legal aid scheme under one roof: legal aid officers, public defenders, law clinic personnel (principals, professional assistants, and candidate attorneys), paralegals, administrative assistants, and administration clerks. All the salaried lawyer components are brought under one roof so that economies of scale can be reaped with respect to overhead. Legal aid officers refer matters

to private counsel only when the office cannot handle a case. Principals and professional assistants deal with criminal cases in the regional courts and high courts.⁵⁵ Candidate attorney interns do both civil and criminal work in the district courts.⁵⁶ Paralegals assist with the initial screening of clients. Administrative assistants and clerks provide the necessary administrative backup.

The centers are designed to provide a full range of legal and paralegal services to indigent clients. The "one-stop shop" concept works well in the larger cities and towns, but not in the rural areas where there is insufficient work to justify their expense. In such circumstances, another model, such as "cooperative agreements" between the Legal Aid Board, the independent law clinics, public interest law firms, and paralegal advice offices, may be more feasible.

Between January and April 2001, eight justice centers were established, and there were plans to set up sixty such centers between 2001 and 2004.⁵⁷ By the end of 2001, it was estimated that thirty-one justice centers will be providing 115,940 criminal defenses a year, with the professional assistants handling 20 cases a month in the regional courts and candidate attorneys 30 cases a month in the magistrates courts.⁵⁸

2.5.1 Lessons learned. The justice centers provide a useful “one-stop shop” legal aid service for poor members of the community. Legal aid clients receive a whole range of services, varying from legal counseling and advice to representation in the district magistrates courts, the regional magistrates courts, and the High Courts. The costs of the justice centers are considerably less than those incurred under the *judicare* or referral system.

2.6 Cooperative agreements with private specialist law firms

Private specialist law firms that deal with public interest law matters play a valuable role in the delivery of civil legal aid services to indigent people. They exist in many countries,⁵⁹ including the United States, where they originated,⁶⁰ as well as in developing countries in South America,⁶¹ Asia,⁶² Africa,⁶³ and, more recently, in Eastern Europe.⁶⁴ The best example of a private specialist law firm in South Africa is the Legal Resources Centre (LRC).

2.6.1 Legal Resources Centre. The first Legal Resources Centre was established in Johannesburg in 1979, and six centers are now located in Johannesburg, Cape Town, Port Elizabeth, Grahamstown, Durban, and Pretoria.⁶⁵ The LRC gives practical help to communities and

individuals who would not otherwise be able to obtain professional advice or to enforce their legal rights, particularly in civil cases. In the twenty-three years of its existence, the country’s first not-for-profit law center has assisted millions of disadvantaged South Africans, either as individuals or as groups or communities sharing a common problem. In addition, the LRC has worked with numerous advice centers staffed by paralegals.⁶⁶

According to the LRC’s mission statement:

It works for the development of a fully democratic society based on the principle of substantive equality, by providing legal services for the vulnerable and marginalised, including the poor, homeless and landless people and communities of South Africa who suffer discrimination by reason of race, class, gender, disability or by reason of social, economic and historical circumstances.⁶⁷

Prior to the 1994 elections, the LRC primarily used litigation and the threat of litigation to assert the rights of thousands of disadvantaged South Africans in several areas of the law. The LRC has reassessed its position in post-apartheid South Africa and is now focusing on two

programs: one on constitutional rights and the other related to land, housing, and development. The constitutional rights program deals with access to justice, gender equality, children's rights, the enforcement of socioeconomic rights such as health care, education, housing, and water, and constitutional reforms. The land, housing, and development program includes rural and urban restitution and redistribution of land, urban and rural land tenure security, housing, land law reform, and urban and rural land development.⁶⁸

An important part of the LRC program is the training of paralegals and lawyers. It also provides a fellowship program, primarily to bring more black lawyers into the profession, and employs twelve to fifteen young law graduates each year. It also trains interns from elsewhere in Africa and the developing world.⁶⁹

The LRC charges no fees and receives no state funds; it is financed by the Legal Resources Trust, which receives money from overseas and local donors. Recently the LRC, together with the Association of University Legal Aid Institutions, has taken the lead in encouraging the Legal Aid Board to enter into cooperative agreements with independently funded organizations to extend legal services to previously marginalized parts of the country.

2.6.2 Lessons learned. The Legal Resources Centre is the most successful specialist law firm in South Africa providing legal aid services in civil cases for the poor and marginalized in the country. It owes its success to its highly professional staff and strong foreign and local donor-based financial support, administered by the Legal Resources Trust. It has consistently received support from leading members of the advocates' profession, attorneys' profession, and the judiciary and enjoys a high national and international reputation. In a climate of increasing competition for donor funds resulting from South Africa's new democratic status, the LRC has gone from strength to strength because of its successes in making access to justice a reality for large sections of the country's disadvantaged communities.

2.7 Cooperation agreements with independent law clinics⁷⁰

The Ford Foundation funded a legal aid conference in South Africa in 1973, which proved to be the catalyst for the law clinic movement.⁷¹ At the time of the conference there were only two clinics in the country, but within two years five others had been established.⁷² Most of the twenty-one universities in South Africa now

operate campus law clinics independent of the Legal Aid Board's clinics,⁷³ and employ directors who are practicing attorneys or advocates. Where the director is an attorney, the law clinic may seek accreditation by the local law society, and if granted, candidate attorneys may be employed and trained at these institutions with a view to admission. Funding for law clinics is provided by outside donors, and the Attorneys Fidelity Fund⁷⁴ subsidizes accredited clinics by providing funds to enable them to employ a practitioner (attorney or advocate) to control the clinic.⁷⁵ More recently, the Association of University Legal Aid Institutions (AULAI) has set up the AULAI Trust, with an endowment from the Ford Foundation, to strengthen the funding of the clinics.

Law clinics provide free legal services to the needy, who must comply with a means test that is less stringent than the one applied by the Legal Aid Board. Representation of individuals takes place in the lower and high courts (if the clinic employs an advocate) in both criminal and civil matters. Student practice rules were drafted in 1985 to enable final-year law students attached to law clinics to appear in criminal cases for indigent accused in the district courts.⁷⁶ The first post-apartheid government undertook to introduce legislation to provide for such

rules during its first term of office, but these promises have still not materialized. Approximately 3,000 law graduates are produced annually by South African law schools. If each final-year law student were to do only ten cases a year, mainly during the summer and winter vacations, this could provide criminal defense for 30,000 accused.⁷⁷ This would ease the criminal caseload of Legal Aid Board law clinics, which could then spend more time on civil matters.

Funding for law clinics is a critical issue and a limiting factor on the capability of clinics to train candidate attorneys and provide satisfactory legal services. The independent university law clinics play a valuable role in supplementing the work of the Legal Aid Board, and recently some have entered into cooperation agreements with the board that enable them to be compensated regularly for their services. The board set aside 10 million rands for this purpose. Stringent requirements are provided for the cooperation agreements; for example, the organization must have "a proven track record in public interest law and effective community services."⁷⁸

The cooperation agreements are entered into with legal service providers "who either have an established infrastructure in a region where the Legal Aid Board has no presence or who specialise

in matters identified by the Board as priorities for service delivery.”⁷⁹

More than twenty years ago, it was pointed out that law students can play a valuable role in legal aid issues in Africa, and this is still true today:

Students represent a cheap source of manpower, which in the presence of proper supervision reaches a standard at least equal to that of a young qualified lawyer. . . . The well-supervised use of law students will significantly ease the limitations under which most of the legal aid programmes in Africa now have to work; it is only through student programmes that there is any possibility in the near future for legal services becoming widely available to the poor.⁸⁰

The use of properly supervised law students to deliver legal services has been recognized by the United States Supreme Court as fulfilling the requirement of a constitutional right to counsel: “Law students can be looked to make a significant contribution, qualitatively and quantitatively, to the representation of the poor in many areas.”⁸¹

2.7.1 Lessons learned. The advent of a democratic legal system and more state expenditure on legal aid should have

eased the service loads of the independent law clinics. In fact, the opposite has occurred, because of the reduced spending on civil cases by the Legal Aid Board and the increasing challenges to the state to deliver on social and economic rights. The law clinics are playing a useful role in this regard. Two lessons have emerged: First, despite the good intentions of the new government to introduce student practice rules, it has been no more successful than the apartheid government in doing so. This may be due more to bureaucratic bungling than to political will, but time will tell whether South Africa’s second democratic administration is more successful than the first in this regard. Second, financial support for the independent law clinics is somewhat precarious, as they rely on annual grants from the Attorneys Fidelity Fund and the AULAI Trust. The valuable contribution made by the independent clinics has now been recognized as an integral part of the national legal aid scheme, and the Legal Aid Board has entered into cooperative partnership agreements with several of them.

2.8 Cooperative agreements with paralegal advice offices

Paralegal advice offices exist in many countries in both the developed and

developing worlds. In some cases paralegals are paid professionals, while in others they are volunteers.⁸² Some work closely with lawyers, while others act completely independently. In most cases they interface directly at a grass-roots level with the communities they serve, and they provide a valuable front-line link for providers of legal aid services.

In South Africa, a variety of organizations are involved in paralegal advice work. Many of these also provide access to justice by educating the public concerning their legal rights, as well as training paralegals to give advice. Some bodies, such as the Black Sash, concentrate in urban areas, while others, such as the Community Law and Rural Development Centre (CLRDC), Durban, and Lawyers for Human Rights (LHR), Stellenbosch, focus on rural areas. Services are provided at a variety of levels, which vary from simple advice-only offices in the high-density townships to those providing full legal aid services such as the Legal Aid Bureau in Johannesburg.⁸³

Employees at advice offices in South Africa are generally paid, but often the remuneration is very low and in some cases the staff works for nothing. Training of paralegal staff varies from the formal training offered by LHR, and by the CLRDC in Durban, leading to diploma courses, to mainly practical experience

that is obtained “on the job.” Some of the more sophisticated advice offices are linked to such organizations as the Legal Resources Centre, LHR, and the CLRDC, while others rely on free services provided by legal practitioners in private practice. Most advice offices offer mainly legal advice, which very often resolves the problem. Many of them have built up expertise in particular areas, such as pensions, unemployment insurance, unfair dismissals, etc. When the advice office cannot solve the problem, the party concerned is usually directed to the Legal Aid Board’s offices or to a sympathetic law firm. Paralegals are also being included in the board’s new justice centers and cooperative agreements. A National Para-Legal Institute (NPLI) has been set up to assist the more than 350 paralegal advice offices in the country with training and fundraising. It is also investigating paralegal accreditation certification procedures. The NPLI works closely with the Association of University Legal Aid Institutions.

Paralegal advice offices are particularly useful in rural areas. More recently, some paralegal organizations have begun entering into cooperation agreements with the Legal Aid Board. A good example of a rural paralegal advice office program is the Community Law and Rural Development Centre in KwaZulu-Natal.

2.8.1. Community Law and Rural Development Centre (CLRDC). The CLRDC in Durban was established in 1989, and it presently serves a population of about 1 million rural South Africans living in the provinces of KwaZulu-Natal and the Eastern Cape. The CLRDC was established to empower rural communities, through advice and education, to: (a) participate in a changing South Africa by increasing individual accountability, skills, self-reliance, and confidence; (b) educate rural communities about democracy, voting, and civil society; and (c) strengthen the rule of law in rural South Africa. It has worked on developing a self-sustaining program of legal advice, education, and training, which it believes will be a model in rural development.

The CLRDC teaches rural communities how to raise and administer funds and tries to develop a broad-based understanding of the role and application of law in South Africa. It assists rural communities with skills development to participate in the changing South Africa, through increasing their sense of self-reliance, confidence, and responsibility while developing an awareness that although law is an important tool for self-reliance, it is not the only tool. The CLRDC promotes

the attainment and maintenance of democracy through development of a rights-based culture in which all levels of government are expected to honor their obligations and be accountable to their citizens.

CLRDC operates in fifty-six target rural communities, which are governed by customary law and ruled by tribal authorities. The latter consist of tribal chiefs, tribal administrators, and unpaid tribal councilors. There is no formal training for tribal authorities, who are expected to administer increasingly complex affairs in their communities, and there is often conflict between “Western law” and customary practices. This conflict has increased under the new Constitution.

At present, the CLRDC responds to requests from communities that have established paralegal committees to provide training for paralegal advisers. The CLRDC uses an intensive four-month training program divided into two seminars of two months each in about thirty-six areas of law. After that, the paralegals undertake twelve months of practical training in their communities under the supervision of the CLRDC trainers, who visit the offices at least once a month to monitor work and performance.⁸⁴ At the end of the training period, the paralegals are issued a diplo-

ma from the Faculty of Law, University of Natal, Durban. During 2000, the CLRDC handled 2,654 cases and recovered more than 6 million rands for rural residents, as well as providing numerous community legal education workshops and monitoring state administrative functions to measure accountability.⁸⁵ The CLRDC is a useful model for rural communities, and every year it attracts a number of interns from developing countries.

2.8.2 Lessons learned. Paralegal advice offices are a useful adjunct to conventional lawyer-based legal aid service schemes. Legal aid services must be considered holistically, and paralegals are in the front line in the field where communities make their first contact with the law. Paralegal advice offices can play a valuable role in screening initial legal complaints and referring potential litigants to lawyer-based services. This role has been acknowledged by the Legal Aid Board, which is integrating paralegals into its new justice centers, and it hopes to include them in some of the cooperative agreements. For the effective functioning of paralegal advice offices, workers should be paid for their services and properly trained. The offices themselves should be placed on a sound financial footing

and this can best be done by integrating them into the national legal aid scheme.

3. CONCLUSIONS

In light of the above, the following conclusions can be drawn from the South African experience concerning the delivery of legal aid services by the Legal Aid Board:

- There is no single effective method of delivering legal aid services, and different combinations of judicare and public defender programs are probably the most desirable models. If the judicare model is used, it should be the contract variety. If the public defender model is used, it should be modified to suit the conditions of developing countries.
- Given the shortage of lawyers and financial resources in most African countries, careful consideration should be given to including law students and recent law graduates in the delivery of legal aid services, for example in state-funded and independent law clinics.
- The national legal aid body should consider entering into cooperative

legal aid arrangements with independent providers of legal services. Paralegal advice offices should be acknowledged as an

important front-line resource and, where appropriate, should be included in such arrangements.

NOTES

- * Professor David J. McQuoid-Mason, professor of procedural and clinical law, University of Natal, Durban, South Africa.
- ¹ Legal Aid Act 22 of 1969.
- ² Section 3. See, generally, David J. McQuoid-Mason, *Outline of Legal Aid*, p. 27.
- ³ Section 4 (1) (g).
- ⁴ See, generally, David J. McQuoid-Mason, "Legal Aid," in *The Law of South Africa* (1999), vol. 14, paragraph 234.
- ⁵ Legal Aid Board, *Legal Aid Guide* (1996). A new *Guide* is being prepared to put before Parliament.
- ⁶ *Ibid.*
- ⁷ The foreign exchange rate is approximately USD 1 = 10 Rands.
- ⁸ Legal Aid Board, *Annual Report 1991/2* (1993), p. 13.
- ⁹ *Legal Aid Guide*, paragraph 2.5.
- ¹⁰ *Ibid.*, paragraph 3.1.
- ¹¹ *Ibid.*, paragraph 3.1.
- ¹² Act 23 of 1963. *Legal Aid Guide*, paragraph 3.1.
- ¹³ *Legal Aid Guide*, paragraph 3.1.
- ¹⁴ *Legal Aid Guide*, paragraph 3.5.1.
- ¹⁵ *Legal Aid Guide*, paragraph 4.12.2.
- ¹⁶ Legal Aid Board, *Legotla: Overview of the Board and Its Activities* (unpublished) (November 1998), p. 6.
- ¹⁷ The board estimates that it has been underfunded by about 425.8 million rands for 1998–99 and 428 million rands for 1999–2000; Legal Aid Board, *Business Plan Covering the Period 2000 to 2003* (1999), p. 20.
- ¹⁸ Legal Aid Board, *Annual Report 2001*, p. 37.
- ¹⁹ *Ibid.*
- ²⁰ Legal Aid Board, *Business Plan Covering the Period 2000 to 2003* (1999), p. 20.
- ²¹ Legal Aid Board, *Report on Activities* (1996), p. A5.
- ²² Legal Aid Board, *Annual Report 1994–95* (1995), p. 35.
- ²³ Legal Aid Act 22 of 1969, Section 8A.
- ²⁴ *Ibid.*
- ²⁵ Legal Aid Board, *Memorandum for the Minister of Justice*, p. 24.
- ²⁶ *Ibid.*
- ²⁷ Section 35.
- ²⁸ Legal Aid Board, *Legotla: Overview of the*

- Board and its Activities* (unpublished) (November 1998), p. 8.
- 29 Ibid.
- 30 Legal Aid Board, *Legotla: Overview of the Board and its Activities* (unpublished) (November 1998), p. 8.
- 31 Ibid.
- 32 Legal Aid Board, *Annual Report 1991–92*, pp. 32–33.
- 33 Ibid.
- 34 Legal Aid Board, *Annual Report 1991–92*, pp. 32–33.
- 35 David J. McQuoid-Mason, “Public Defenders and Alternative Service,” 4 *SACJ* 4 (1991): 267–70.
- 36 *Business Day*, 2 November 1992.
- 37 Legal Aid Board, *Annual Report 1994–95* (1996), p. 32.
- 38 Legal Aid Board *Annual Report 1995–96* (1997), p. 27.
- 39 Ibid.
- 40 Legal Aid Board, *Annual Report 2001*, p. 14.
- 41 Legal Aid Board, *Annual Report 1995–96* (1996), p. 24.
- 42 Legal Aid Board, *Annual Report 1996–97* (1999), p. 21.
- 43 Calculations by the present writer based on statistics in Legal Aid Board, *Legotla: Statistics on the Work Done by Way of Salaried Staff Models* (unpublished) (November 1998), pp. 6–7.
- 44 Legal Aid Board, *Annual Report 1996–97* (1999), p. 21.
- 45 Act 53 of 1979.
- 46 Act 115 of 1993.
- 47 Legal Aid Board, *Annual Report 1993–94* (1994), p. 35.
- 48 Legal Aid Board, *Annual Report 1996–97* (1999), p. 20.
- 49 Legal Aid Board, *Monthly Report* (4 February 1997). This includes the costs for clinics that have only just been established. Ultimately the cost per case will be much less, as the more established clinics cost about 350 rands per case; *ibid.*
- 50 This figure is the average for criminal and civil cases—about 75 percent of the work in the clinics is criminal and 25 percent civil. See above.
- 51 Calculations by present writer based on statistics in Legal Aid Board, *Legotla: Delivery of Legal Aid by Way of Salaried Staff Models, Public Defenders, Attorneys and Candidate Attorneys as at 30 October 1998* (unpublished) (November 1998), pp. 1–5.
- 52 Legal Aid Board, *Legotla: Overview of the Board and Its Activities* (unpublished) (November 1998), p. 8.
- 53 Legal Aid Board, *Annual Report 2001*, p. 14.
- 54 Based on cases for eleven months of the year.
- 55 Regional courts can impose fines of up to 300,000 rands and imprisonment of up to twenty-five years (Magistrates’ Courts Act 32 of 1944).
- 56 District courts can impose fines of up to 100,000 rands and imprisonment of up

- to three years (Magistrates' Courts Act 32 of 1944).
- ⁵⁷ Legal Aid Board, *Annual Report 2001*, pp. 9–10.
- ⁵⁸ *Ibid.*, p. 14.
- ⁵⁹ See, generally, NAACP and LDF, *Public Interest Law around the World* (1992).
- ⁶⁰ See Helen Hershkoff and David Hollander, "Rights into Action: Public Interest Litigation in the United States," in Ford Foundation, *Many Roads to Justice* (2000), p. 89.
- ⁶¹ See Hugo Fruhling, "From Dictatorship to Democracy: Law and Social Change in the Andean Region and the Southern Cone of South America," in Ford Foundation, *Many Roads to Justice* (2000), p. 55.
- ⁶² See, for example, Stephen Golub, "From the Village to the University: Legal Activism in Bangladesh," in Ford Foundation, *Many Roads to Justice* (2000), p. 127; Stephen Golub, "Participatory Justice in the Philippines," in Ford Foundation, *Many Roads to Justice* (2000), p. 197.
- ⁶³ See Stephen Golub, "Battling Apartheid, Building a New South Africa," in Ford Foundation, *Many Roads to Justice* (2000), p. 19.
- ⁶⁴ See Aubrey McCutcheon, "Eastern Europe: Funding Strategies for Public Interest Law in Transitional Societies," in Ford Foundation, *Many Roads to Justice* (2000), p. 233.
- ⁶⁵ Legal Resources Centre, *Annual Report* (1996), p. 25.
- ⁶⁶ *Ibid.*, p. 9.
- ⁶⁷ Legal Resources Centre, *Annual Report* (1998), p. 1.
- ⁶⁸ *Ibid.*, p. 4.
- ⁶⁹ *Ibid.*, p. 7.
- ⁷⁰ For a description of the operation of the independent law clinics, see David J. McQuoid-Mason, "University Legal Aid Clinics in South Africa" (unpublished) (2002).
- ⁷¹ For the Conference Proceedings, see Faculty of Law, University of Natal, *Legal Aid in South Africa* (1974).
- ⁷² David J. McQuoid-Mason, *Outline of Legal Aid*, p. 139.
- ⁷³ David J. McQuoid-Mason, "The Role of Legal Aid Clinics in Assisting Victims of Crime," in *Victimisation: Nature and Trends*, edited by W.J. Schurink, Ina Snyman, W.F. Krugel, and Laetitia Slabbert (1992), p. 559 n 1. See also P. Maisel, *Clinical Legal Education in South Africa: Part 1, A Statistical Report* (unpublished) (1999).
- ⁷⁴ The Attorneys Fidelity Fund is a fund that has accumulated out of the interest paid on monies held in attorneys' trust accounts. It is used to compensate members of the public who have suffered loss as result of fraud by practicing attorneys, but it also makes money available for legal education.
- ⁷⁵ David J. McQuoid-Mason, "The Organisation, Administration and Funding of Legal Aid Clinics in South Africa," *NULSR* 1 (1986): 189–93.

76 The present writer drafted “Student Practice Rules for South Africa,” based on the American Bar Association’s “Model Rules for Student Practice” (Council for Legal Education and Professional Responsibility, *State Rules Permitting the Student Practice of Law: Comparisons and Comments*, 2nd ed. [1973], p. 43) and submitted them to the Association of Law Societies of South Africa in April 1985 for onward transmission to the then minister of justice. Although the rules have been approved by all branches of the practicing profession and the law schools, they have been consistently and clandestinely blocked by bureaucrats in the Department of Justice. The new minister of justice, who took office in 1994, has given an undertaking to have the rules implemented.

77 Minister of Justice and Department of Justice, *Enhancing Access to Justice through Legal Aid: Position Paper for National Legal Aid Forum* (unpublished) (15–17 January 1998), p. 25.

78 Legal Aid Board, *Annual Report 2001*, p.

11: “Full disclosure of all funding and activities is also required, as is submission of audited balance sheets each year and if necessary, a financial audit by the Board and the Auditor-General. Other requirements are that the service must be provided to the poor at a cost less than Judicare and, at no charge, to those who cannot afford the services in accordance with the means test which must always be conducted.”

79 Ibid.

80 J. Reyntjens, in F.A. Zemans, *Perspectives on Legal Aid* (1979), p. 36.

81 *Argersinger v. Hamlyn*, S Ct 2006 (1979).

82 See, generally, Stephen Golub, “Non-Lawyers as Legal Resources for Their Communities,” in Ford Foundation, *Many Roads to Justice*, pp. 297, 301–6.

83 In 1996, the Legal Aid Bureau experienced financial difficulties, and the Legal Aid Board agreed to provide substantial funding for it.

84 Community Law and Rural Development Centre, *Annual Report 1 January–31 December 2000* (2001), pp. 10–12.

85 Ibid., p. 43.

Israel's Office of Public Defender: Lessons from the Past, Plans for the Future *

by Moshe Hacoen **

1. INTRODUCTION

The Israeli Office of Public Defender (OPD) was created by statute in 1995. The office's creation was the culmination of an endeavor undertaken by numerous members of the Judiciary and the Knesset (Israel's Parliament) together with members of the legal and academic communities. The project started with a small group of activists in the early 1980s and gained momentum through the early 1990s.

Before the establishment of the OPD, less than 20 percent of pre-trial detainees and about 30 percent of all defendants at trial were represented by counsel. Today, in districts where the OPD's pre-trial detainee and juvenile representation program has been implemented, an average of 70 percent of all detainees and more than 50 percent of defendants in criminal proceedings are represented by counsel. In numerical terms, prior to the establishment of the public defender's office a total of 4,000 cases a year were dealt with by appointed attorneys. Today, the vari-

ous units of the public defender's office handle 23,000 cases. For the purpose of providing a perspective, Israel's population today stands at approximately 6 million individuals.

2. THE LEGAL AND FACTUAL ENVIRONMENT PRECEDING OPD'S CREATION

Until 1992, Israel had no constitutional provisions guaranteeing the rights of those suspected or accused of a crime (e.g., protection from arbitrary arrest, a right to be informed about the accusations brought against the defendant, a right to due process, a provision against cruel punishment, etc.). However, the existing provisions, which were statutory in nature and could thus be amended by a simple majority in the Knesset, did guarantee, *inter alia*, the right of the accused to consult a lawyer and to have representation during most criminal proceedings—but they provided for only the most basic legal assistance to indigent defendants. Yet even the enactment of Basic Law: Human Dig-

nity and Freedom, which is considered to be Israel's constitutional Bill of Rights, while elevating the normative standing of some of the above-mentioned rights of the accused, still left unaddressed the right to be represented by counsel of one's choosing or by one appointed by the state.

By virtue of Section 15 of Israel's Criminal Procedure Law, indigent defendants were entitled to a court-appointed counsel only if they fell within one of the following categories:

- accused of an offense carrying capital punishment or a prison sentence of ten years or more;
- being mentally or physically disabled in a manner that prevents the accused from conducting his or her own defense;
- minors less than sixteen years old charged in an adult court;
- being a respondent in a summary hearing in which the prosecution requests detention without bail pending the final verdict.

The courts did have discretion to appoint counsel to indigent defendants in all other cases, pursuant to their request, but the law did not define indigence, and that discretion was seldom followed.

The most neglected segments of the population insofar as representation is

concerned were juveniles and suspects detained for interrogation by the police. As for the former group, members of the Juvenile Court held the view that counsel's presence unnecessarily complicates proceedings and derails them from the rehabilitative and educational track they should be taking.

As for detainees, the courts seemed to accept the notion that counsel's presence serves to obstruct the investigation of the police and that, in any event, judges are the best guarantors of detainees' rights. The upshot was that courts seldom appointed counsel to defend juveniles, and court-appointed counsel for pretrial detainees constituted an even rarer phenomenon.

That situation dramatically changed after the establishment of the OPD.

2.1 Counsel appointments prior to the Public Defender Statute

The prevailing system of delivering legal aid to indigent defendants in the forty-seven years that preceded the establishment of the OPD was an *ad hoc* court-appointed counsel system. The system suffered from a number of major shortcomings, which were severely criticized:

- Judges and court clerks decided at random who should be appointed,

without any criteria related to training and skills. They also controlled the financial remuneration that counsel would receive, as the presiding judge's discretion to determine what amount should be paid to counsel was unfettered, limited only by the prescribed maximum statutory payment per court session and the judge's perception of counsel's conduct.

- Appointed counsel often suffered from a "split personality" when their allegiance to the defendant conflicted with the temptation to please the court. Thus, appointed counsel would frequently refrain from zealously pursuing the defendant's case, especially when the judge had already formed a negative opinion regarding that case. The system also encouraged counsel to dispose of cases as speedily as possible, to be considered "efficient" in the eyes of the appointing judge and therefore receive many more appointments.
- Court-appointed counsel's potential "double allegiance" also made them suspect in the eyes of defendants and often dissuaded them from fully confiding in their attorney, thereby making the case for the defense even more difficult.

- Courts had absolute discretion regarding whether to approve defense costs. As the prosecutor was present at hearings on whether to approve a particular cost (e.g., ordering a psychiatric opinion, or hiring an investigator), this resulted in the prosecution's being forewarned regarding defense strategy.

3. CHANGES BROUGHT ABOUT BY THE CREATION OF THE OPD

The Public Defender Statute set out to achieve two major goals:

- to increase the number of indigent defendants and detainees eligible to receive legal aid, with the ultimate goal of providing every indigent defendant and detainee with adequate legal representation;
- to improve the quality of representation and remove the stigma associated with the former institution of court-appointed counsel.

3.1 Expanding the basis for representation

Under this statute, indigent defendants accused of offenses carrying a potential term of imprisonment of five to ten years

have the right to be represented by a public defender. To prove economic entitlement, applicants must show that they earn less than two-thirds of the median income per month, which today roughly corresponds to USD 1,000, and not own assets exceeding the value of USD 4,500.

Pursuant to regulations subsequently approved by the Knesset, eligibility for representation by a public defender has also been extended to all pretrial detainees who meet the above-mentioned economic criteria and to all juvenile defendants and detainees regardless of their income, with the exception of charges on traffic violations. Due to budgetary constraints, however, implementation of the pretrial detainee and juvenile representation program has been put on hold in two of Israel's five judicial districts.

Furthermore, since the establishment of the OPD, courts increasingly make use of the residuary discretion granted to them by Section 18(b) of the Public Defender Statute to refer defendants to the OPD even if they do not meet the strict economic criteria stipulated in the law or are charged with offenses carrying a prison term of less than five years. Indeed, approximately 50 percent of all adult defendants (as opposed to suspects and minors) represented by public defenders are referred to the OPD by the courts following Section 18(b).

Currently, a petition filed by the Association for Civil Rights in Israel, requiring the Ministry of Justice to expand the scope of indigent defendants entitled to a public defender to include all persons accused of an offense that is likely to result in a deprivation of liberty for any period of time, is under review by the Supreme Court sitting as the High Court of Justice. Significantly, the High Court ordered the Ministry of Justice to specify within six months the measures it has taken to increase the number of defendants entitled to representation.

3.2 Improving the quality of representation

The system put in place by the statute replaced the prior system of court-appointed counsel with what is commonly known as a “mixed system,” i.e., a combination of public defenders who are full-time state employees and private attorneys contracted by the OPD to represent indigent defendants.

Under the statute, the OPD constitutes a branch of the Department of Justice, but a Board of Public Defender has been established to guarantee the independence of the office. Under Section 3 of the statute, the board is empowered to appoint the official called the national public defender and to

supervise the activities of the Office of Public Defender. In order to guarantee the prevalence of nonpartisan considerations in the board's work, the board is composed of the following five members: the minister of justice (as a presiding member), a retired Supreme Court justice, a criminal lawyer selected by the National Council of the Bar Association, a criminal lawyer appointed by the minister of justice with the consent of the chairman of the Bar Association, and a criminal law scholar.

The OPD is headed by the national public defender, whose term of office is for five years, with a possible extension for a second term of five years, subject to the approval of the Board of Public Defender. A district public defender serves in each of the five districts. A person holding that position may be terminated either by resignation or retirement or by resolution of the Board of Public Defender.

Under the Public Defender Statute, the OPD bears the responsibility to provide quality representation in criminal proceedings. This is ensured by the following means:

The OPD has sole authority to contract private attorneys to represent indigent defendants. Interested lawyers must apply in writing to be included in the list of public defenders. The OPD examines

their qualifications and references in order to determine whether to include them in the list, and it requires them to attend training sessions. Furthermore, an elaborate structure has been put in place to enable the internal attorneys to supervise the representation given by private attorneys in their capacity as public defenders. In this framework, different levels of supervision apply, depending on the experience and the skill of the attorney. In all cases, internal attorneys oversee the way in which the private attorney conducts the defense by closely examining the transcripts of all the hearings and, if necessary, intervening in the way the case is handled. In appropriate situations, the district public defender may replace the private attorney, and, in extreme cases, even bar him from acting as a public defender.

The above-mentioned steps—in addition to increased remuneration to public defenders relative to the payment scale effective before the establishment of the OPD; a change in the way they are perceived by the courts, the police, the prosecution, and ultimately by their clients; and a growing supply of lawyers willing to become public defenders—have allowed the OPD to be much more selective in choosing the attorneys it employs and to raise the standards of representation.

3.3 Representing juveniles

Whereas prior to the enactment of the Public Defender Statute and its expanded eligibility provision, only about 10 percent of all minors tried in a Juvenile Court were represented by an attorney (usually retained by the parents), today more than 70 percent of minors are represented during criminal proceedings, mostly by public defenders. This has caused a major change in the way proceedings in Juvenile Courts are conducted. The Juvenile Courts, which conduct their proceedings in closed chambers, were once considered to be the sole domain of judges, prosecutors, and probation officers, the criminal defense lawyer being perceived as an outsider; today, however, after some struggle, public defenders have established themselves as indispensable participants in the process.

The presence of defense lawyers in the courtroom has led to much more attention being paid to procedural rights of the accused and to the establishment of guilt beyond a reasonable doubt. Interestingly, public defenders also take part in devising rehabilitative solutions that are in the defendant's best interest and sometimes even assist the courts with creative solutions to the disposition of cases.

Because the representation of minors requires particular skills and knowledge that the ordinary criminal lawyer does not possess, the OPD has launched a special training program that every defender who wants to represent juveniles must participate in before being allowed to represent clients in a Juvenile Court.

3.4 Representing pre-trial detainees

From a civil rights perspective, police detention of suspects for interrogation purposes, i.e., in order to obtain a confession from the suspect, has always been considered a problematic feature of the Israeli criminal justice system. Under Israeli law, the police may detain a suspect for questioning for no longer than twenty-four hours, at which point they must bring the suspect before a magistrate to have the period of detention extended. As the individual suspect is totally isolated from the outside world, and is subjected to psychological and sometimes even moderate physical pressures in order to elicit a confession regarding his or her involvement in a particular crime, the suspect's ability to consult an attorney is essential to safeguard his or her rights and prevent false confessions.

Furthermore, under the Israeli system of criminal justice, a magistrate can order the detention of a suspect in police custody for interrogation purposes for consecutive periods of up to fifteen days each, with a total of up to six months. In hearings held before the magistrate, most of the evidence is confidential, so that the suspect may be mostly groping in the dark. The presence of a defense attorney in such proceedings, therefore, is essential to guarantee the fairness of the proceeding and to prevent the suspect's unnecessary detention for excessive periods of time.

Before the establishment of the OPD and the extension of eligibility to all indigent suspects, less than 20 percent of all suspects were represented in such proceedings, most frequently by private attorneys. Today, in districts where the OPD's pre-trial detainee representation program has been implemented, about 70 percent of all suspects are represented, most frequently by a public defender.

To provide indigent detainees with representation, a new system was recently put in place, so that on any given day a group of on-duty public defenders can be (and always are) dispatched to jails and police stations to interview and counsel indigent detainees. The selected defender continues to represent the detainee in the court hearing and, in many cases, fol-

lows the case until its final disposition. The introduction of the new system triggered an almost immediate reduction in the length of detention periods approved by magistrates for investigative purposes and engendered an increased readiness on the part of the police to release suspects before the twenty-four-hour period, during which they are permitted by law to question a suspect without a court warrant, elapses.

4. THE SYSTEM AT A CROSSROADS

Since its inception in 1996, the OPD's budget has increased five-fold, its share of the Ministry of Justice's overall budget having risen from 2 percent at the outset to 10 percent at the present time. Given the very modest sums invested in the past by the Ministry of Justice to provide representation to indigent defendants, in comparison to per capita expenditures in developed countries in Europe and North America, current spending levels are not considered to be excessive by most actors within the criminal justice system.

Yet successive increases in the activities of the Office of Public Defender over the last five years has resulted in a 100 percent chasm between the financial needs of the OPD and its allotted bud-

get. Its current budget is equivalent to approximately USD 11 million, while the actual operating costs of the office approach USD 20 million. This “overdraft” has resulted in the Ministry of Justice temporarily halting all payments to the private defense attorneys working with the OPD, as well as a temporary directive from the Treasury not to approve any costs requested by outside attorneys such as those for expert opinions.

In the framework of a restructuring plan mandated by the Treasury, the fixed payments to private attorneys have been reduced across the board by 22 percent.

In addition, there is a program—the efficacy and the merits of which are in question—that involves transferring the care of cases to attorneys on a “wholesale” contract basis, especially in fields such as juvenile representation. Under this program, the private attorney’s remuneration is substantially lower than the payments due to the lawyer on the standard-fee basis in place until now. The stated intent of the decision makers at the Ministry of Justice and at the Treasury is to decrease the budget allotted to the OPD by 40 percent.

A larger dilemma facing the decision makers is whether to limit the entitlement to a public defender. The Ministerial Legislation Committee recently approved a

proposed exigency measure to suspend the operation of Section 18(b) of the statute for two years. Under the proposed amendment, judges’ discretion to appoint counsel to defendants who do not strictly fall within the criteria of the statute is limited to “exceptional circumstances,” and the amendment subjects every such appointment to the approval of the court’s president. If strictly implemented, this measure, which has yet to be approved by the legislature, may substantially reduce the number of defendants represented by a public defender by as much as 40 percent. Needless to say, the Office of Public Defender has strenuously objected to this possibility and has argued that the enforced changes detailed above have already had serious ramifications on the right of indigents to effective counsel.

These enforced changes must also be seen in light of the administrative reforms taking place with regard to expediting the disposition of criminal cases. According to the proposed reforms, the processing of the majority of criminal files in the lower courts (primarily misdemeanors and minor felonies) will be transferred to a centralized calendar. Each judge sitting at this “special term” shall hear pleas in a large number of cases a day. Defendants willing to conclude their cases at this juncture may be con-

victed or have sentences passed. Those wishing to enter a plea of not guilty or raise other relevant arguments shall have their cases transferred to a different judge. Duty public defenders assigned to represent the defendants before this “special term” shall be compelled to meet their clients for the first time in court and read the discovery material presented to them by the prosecution moments before their clients cases are adjudicated. These duty public defenders shall be paid on a per-diem rather than per-case basis, thus helping to further reduce the “handling fees” of criminal files—including the remuneration of public defenders—by up to 80 percent.

This projected reform is highly controversial and has drawn strong criticism from many actors in the criminal justice system. At this stage, its effects on the quality of representation of defendants can only be assumed.

5. RELATIONS WITH THE ISRAELI BAR ASSOCIATION

The vast increase in the representation of detainees at the pre-trial stage pursuant to the establishment of the OPD gave rise to charges by representatives of the Israeli Bar Association to the effect that outside attorneys who act as public defenders (and who are also members of the Bar)

enjoy an unfair advantage over their fellow Bar members who also work within the field of the criminal law, and whose clientele is mostly made up of lower- and middle-class citizens. Moreover, it was argued that the OPD frequently offers its services without thoroughly verifying first that the applicants are devoid of financial means, as required by the regulations.

The aforementioned criticisms raised by the Bar have impelled the OPD to verify with greater scrutiny—even by use of private investigators, where necessary—the entitlement of applicants by law to legal representation insofar as their financial capacity is concerned.

It has also been suggested that the OPD should distribute cases more evenly among as many lawyers as possible, and that the standards for representation set by the OPD should be less strict, so as not to put young and inexperienced attorneys at a disadvantage.

6. IMPOSITION OF A CONTRIBUTION CHARGE

In the year 2000, an amendment to the Public Defender Statute has provided for the imposition of a “contribution” charge on indigent defendants who benefit from the legal services of a public defender, for assistance in the funding of the OPD. With the exception of

detainees, prisoners, juveniles and certain categories of defenders regarding which the appointment of counsel is mandated by law, all defendants are subject to a charge if they wish to benefit from the services of a public defender. Regulations have been promulgated to deal with the various issues involved in the imposition and collection of the contribution charge. The charge has initially given rise to much concern among actors within the criminal justice system, who fear that it may engender considerable delays in case-processing times and, in turn,

detract from the willingness of the courts to appoint counsel. Furthermore, it was believed that the new charge will discourage indigent defendants from seeking the assistance of state-funded counsel.

In practice, however, the charge is rarely collected, usually as a result of judges utilizing their authority to exempt defendants from its payment or to defer payment until the end of the proceedings. Therefore, the charge has had a minimal effect on the system, apart from increasing paperwork and bureaucracy.

NOTES

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Legal Aid Reform in France and the Republic of Ireland in the 1990s*

by Mel Cousins

INTRODUCTION

The comparative study of legal aid schemes has tended to focus on 'leaders' (i.e. those countries with more extensive legal aid schemes) and to ignore the 'laggards'. Cappelletti's study of legal aid, for example, was based on the assumption that the development of legal aid was tied to the modernisation of societies. Accordingly, those countries which did not have extensive legal aid schemes were seen as 'Anachronisms in the Modern World' (Cappelletti, Gordley and Johnson, 1975).

However, there are a number of problematic aspects about this focus. First, it is based on an assumption that more extensive legal aid systems are somehow 'better' at providing access to the law. While this assumption is intuitively appealing, it needs to be tested rather than simply taken for granted. In fact, there have been relatively few studies which have tried to assess the degree of access to the law between countries

with different levels of legal aid. Secondly, it is now clear that there are many more countries which have a low or medium level of civil legal aid spendings compared to the very small number of countries with extensive schemes. This calls into question the modernisation theory implicit in Cappelletti's approach and suggests that there are a range of other factors which need to be taken into account in analysing the development of legal aid. Finally, the focus on 'leaders' has tended to mean that Catholic countries which generally have much lower levels of legal aid are not included in the analysis.

This Chapter attempts to make an initial step towards redressing this imbalance by looking at two Catholic countries in which public spending on legal aid is in the low to medium category: France and the Republic of Ireland (hereafter Ireland). For this purpose a country is considered to be Catholic if a clear majority of the population has been baptised as Roman Catholic for most of the period

during which legal aid has developed. On this basis both Ireland and France (Whyte, 1981:139) can be described as Catholic. The Chapter focuses primarily on civil (rather than criminal) legal aid. Ideally, a long-term comparative study of the development of legal aid in both countries should be made (and indeed in other Catholic countries such as Belgium, Italy and Spain). However, the detailed history of the development of legal aid in both France and Ireland remains to be written (for France see Schnapper, 1984 and Crespín, 1995; for Ireland see Carney, 1979). This Chapter focuses on reforms in France and Ireland in the 1990s, and, in particular, on the detailed public discussion as set out in official reports and parliamentary debates.²

The theoretical approach adopted follows the Marxist-oriented perspective of *Alcock* (1976:163). It seeks 'to locate the social basis of the phenomenon of legal aid in the variety of practices historically involved in its formation'. The *Alcock* perspective on the development of legal aid does not treat any one factor as determinative, but 'treats all phenomenon as the result of the interrelationship of the social factors comprising them, none being the sole causal factor, but all together acting as the structural cause of the existence of the phenomena' (*Alcock*, 1976:164).

In the first part of this article, I look briefly at the modern history of legal aid in both France and Ireland up to the 1990s, and in more detail at the passage of recent legislation in both countries. In the second part of the Chapter, I move from description to analysis and attempt to identify some of the factors relevant to the way in which legal aid has developed in both countries.

THE HISTORY OF LEGAL AID IN FRANCE AND IRELAND

France

In France, legislative provision for legal aid was initially established in 1851 (see Cappelletti, Gordley and Johnson, 1975; Schnapper, 1984; Crespín, 1995). These provisions obliged the legal profession to provide gratuitous assistance to indigents. There was, however, no right to legal aid and no public remuneration of the lawyers involved (although lawyers could, in some cases, recover their costs from the other party to the litigation). The initial legislation applied only to court cases and there was no provision in relation to legal advice. Legal aid bureaux were established to adjudicate on applications for legal aid. These consisted of representatives of the state, the judiciary and the legal profes-

sions. The number of persons assisted rose from 3,000 (2.5 per cent of all cases) in 1870 to 20,000 (14 per cent) by 1897 (Crespin, 1995:144). The 1851 legislation remained in force for over 100 years with relatively minor changes. In 1901 the term indigent was replaced by the expression 'persons who, due to inadequate resources, cannot exercise their rights effectively'. This, however, had little impact on the operation of the scheme in practice (Crespin, 1995:149). In 1958, at a time when much more extensive legislation was being implemented in countries such as the United Kingdom and the Netherlands, the French scheme was reformed. The reforms provided that, in certain circumstances, a lawyer could obtain his or her costs from a legally aided person who was awarded damages of such a level that he or she would not have been entitled to legal aid.

In 1972 new legislation was enacted by the French Parliament to replace the 1851 legislation. In his speech to the French Parliament, the then Minister for Justice highlighted the four main criticisms of the existing legislation as being (1) the arbitrary nature of decisions in relation to granting and refusing legal assistance; (2) the all-or-nothing nature of such decisions and the lack of any partial legal aid; (3) the fact that almost the entire costs of the scheme fell on lawyers; and

(4) the fact that, in adjudicating on applications for legal aid, the legal aid bureaux were, in effect, evaluating the case (Cappelletti, Gordley and Johnson, 1975:423). In response to these criticisms, the new legal aid legislation set out clear criteria in relation to the granting of legal aid, provided for the compensation of lawyers involved in legal aid and introduced a system of partial legal aid. However, the payment to lawyers was not intended to reflect the full market value of their services and was described as an indemnité (allowance). The reforms very much retained the shape of the earlier legislation and the main differences involved the sharing of financial responsibilities for legal aid by the state and the clarification of criteria in relation to the granting of legal aid.

The 1972 reforms represented an important development in relation to legal aid. The scheme had a broad scope, both in terms of the proportion of households entitled to legal aid and the types of case covered. In practice, however, it never developed in the way which might have been expected. The proportion of households entitled to legal aid was allowed to decline significantly through a failure to index-link the income thresholds. In practice, about two-thirds of all legal aid cases related to family law and there were significant

delays in getting access to legal aid. At the same time, the indemnities paid to the legal profession in respect of legal aid services were also allowed to decline in real terms. This led to calls for reform from the legal profession and to strike action by local bar organisations, itself directly related to the ongoing reform of the French legal profession which led to new legislation in 1990 (Karpíe, 1995:390-4). As a result, in December 1989, the government requested the Conseil d'État to carry out a study of legal aid and make recommendations for reform which are considered in more detail below.

Ireland

Legal aid in Ireland developed quite differently from that in France (Carney, 1979). Modern Ireland was initially part of the United Kingdom with the consequence that much United Kingdom legislation also applied in Ireland. On Independence in 1922, there were no particular statutory provisions in force in Ireland relating to civil or criminal legal aid. Up to the 1960s, it appears that criminal legal aid was provided only in relation to murder cases (and even here there appears to have been no statutory basis for the practice). A comprehensive system of criminal legal aid was provided

for in the Criminal Justice (Legal Aid) Act 1962. This legislation did not come into force until 1965 due to disagreement with the legal profession as to the fees to be paid. This legislation provided for legal representation by private lawyers where a person's means were insufficient to enable him or her to obtain legal assistance and where 'by reason of the gravity of the charge or of exceptional circumstances, it [wa]s essential in the interests of justice that he should have legal aid in the preparation and conduct of his defence'. The 1962 scheme made no provision for legal advice. It was in effect transformed in the 1970s, first, by a decision of the Irish Supreme Court that persons had a constitutional right to criminal legal aid in certain circumstances, and secondly, by significant increases in the fees paid to lawyers (Cousins, 1996x).

In civil proceedings in contrast there was no State provision of legal aid and advice at all until 1980. In so far as private practitioners did such work on a *pro bono* basis, this was left entirely to their own discretion. The position in relation to civil legal aid began to change in the 1960s with [lie establishment of the Free Legal Advice Centres (FLACs). From 1969 this organisation of young lawyers and law students both provided legal advice and representation and cam-

paigned for the introduction of a comprehensive scheme of civil legal aid and advice. As part of this campaign, FLAG established the Coolock Community Law Centre in Dublin in 1975 which remains the only service of its kind operating in Ireland.

In 1974, and arising from the FLAG campaign, the then Minister for Justice appointed a committee to advise on the introduction of a comprehensive scheme of legal aid and advice in civil matters. This Pringle Committee reported in 1977 (Committee on Civil Legal Aid and Advice, 1978). The recommendations of the report were very much influenced by arguments put forward by FLAG and comparable organisations. The Pringle Committee Report recommended [the establishment of a comprehensive system of civil legal aid and advice under the auspices of an independent Legal Aid Board. Legal services were to be provided both through private practitioners and through a network of community law centres and legal advice centres. The Pringle Committee estimated the overall cost of the comprehensive scheme to be of the order of £2m per annum. It also put forward proposals in relation to a more limited interim scheme if it was considered necessary to introduce Such an interim measure. However, no immediate action was taken by the govern-

ment in response to its recommendations.

Late 1979 saw two significant developments in relation to legal aid in Ireland. In October the European Court of Human Rights found in *Airily v. Ireland* (1979), 2 EHRR 305, that Ireland was in breach of its obligations under the Convention of Human Rights. In particular that its failure to provide a scheme of legal aid and advice had meant that an individual's right of access to the courts under Article 6(1) of the Convention had been violated. Two months later the Irish Minister for Justice established a trial civil legal aid and advice scheme on an interim administrative basis. The new civil legal aid scheme differed significantly from the recommendations of the Pringle Committee (Whyte, 1984). In contrast to those recommendations, private practitioners were not involved in providing services at all. Legal aid and advice was to be provided solely through a network of government law centres managed directly by the Legal Aid Board. Whilst the scheme provided for the appointment of advisory committees, including representatives of the community, they had no direct role in the management of the centres. The 1979 civil legal aid scheme excluded a number of areas of legal proceedings (including defamation and debt collection) and set

out a range of detailed tests which an applicant had to satisfy in order to qualify for legal aid.

Throughout the 1980s Ireland experienced significant financial and economic difficulties which led to strict controls on public expenditure. This had unfortunate repercussions for the new civil legal aid scheme. In contrast to other public services which already had established levels of spending, it was forced to seek additional funding at a time of fiscal restraint. This led to severe restrictions on the legal aid services being provided. In effect, the vast majority of services related to family law matters, long delays operated in many cases in getting access to legal aid and, at times, services were totally suspended (other than for emergency cases) in order to clear existing backlogs of work.³ In January 1990 the then Chairman of the Legal Aid Board (who was coincidentally also then Chairman of the Bar Council) and the then President of the Law Society who was a member of the Legal Aid Board both resigned from the Board due to successive governments' failure to provide adequate resources. There were a number of reasons for the slow development of legal aid in the 1980s. Obviously, the overall economic climate was unfavourable. However, the legal aid service was also faced with a generally unresponsive Department and a succession of

Ministers who also showed little support for the service. In addition, neither legal profession campaigned seriously for a more comprehensive legal aid service. While the resignation of the leaders of both professions would suggest the contrary, in fact these resignations were treated very much as personal matters by the two individuals concerned and did not lead to any particular action by either profession. However, in the 1990s there was a changed environment for legal aid in Ireland, and the consequent developments are discussed below.

DEVELOPMENTS IN THE 1990s

France

The Conseil d'État, which in December 1989 had been requested to carry out a study of the legal aid scheme, reported back to the government in April 1990, highlighting the inadequacies of the current scheme and setting out detailed proposals for reform (Conseil d'État, 1991). The Conseil found that criticisms of the existing legal aid scheme came from three different quarters. First, the coverage of legal aid had been allowed to decline from 75 per cent of the population in 1972 to about 34 per cent. Secondly, the legal profession was dissatisfied both with the

inadequate level of fees payable and with the inequalities between local bar organisations, some bars providing significantly more legal aid than others. Finally, the study found that the state itself had very little control over the manner in which legal aid was spent. The Conseil Report highlighted the importance of legal aid in ensuring access to justice in a country such as France which had well developed systems of law and social services. However, the Conseil found that the level of spending on legal aid in France was extremely low: 7 FF per person, compared to 30 FF in comparable countries such as Germany, and as much as 98 FF in England and Wales. It also found considerable delays in obtaining access to legal aid in many areas.

The Conseil put forward a range of proposals for reform of the 1972 scheme. In the area of legal aid itself, most of these consisted of a refining and updating of the legislation. In particular, the Conseil proposed a move from *indemnification* of lawyers to *remuneration* (i.e. payment for services). However, the Conseil recognised that the level of remuneration would not correspond to that received in private practice and that the legal professions should accept a lower rate as part of a duty of solidarity (*devoir de solidarité*) seen as a counterpart to their legal monopoly. The Conseil also recommended the intro-

duction of a scheme of legal advice. In contrast to the legal aid service which was to be funded by the state, the legal advice service was to operate at a local level and obtain funding from a variety of sources including local government and the state. It proposed the establishment of a National Commission on Legal Aid and Regional Legal Aid Commissions which would be tripartite bodies including representatives of the legal profession, the judiciary and local authorities (the latter in their dual capacity as providers of finance and representatives of users).

The proposals of the Conseil d'État were largely accepted by the government and in April 1991 a Legal Aid Bill was brought forward to implement them. The Bill proposed a significant increase in the level of legal aid so as to increase the number of households covered to approximately 50 per cent. The government also committed itself to significant increases in funding for legal aid. In the area of legal aid itself, the Bill set out a range of proposals to fine-tune the existing service and to reform the system of payment to lawyers. The Bill also contained proposals for the establishment of the system of legal advice to be managed at a local level by Departmental Legal Aid Commissions.

The Bill was adopted by the French Parliament largely in the form in which it

had been presented by the government. However, on a number of key issues the Parliament forced changes on the minority Socialist Government. These related to the method of payment of lawyers and the extent of control of lawyers over the legal aid service and, in particular, to the new legal advice service.

First, the Bill made a number of proposals in relation to the payment of lawyers. It proposed to change from the existing system of *indemnité* to one of *contribution* (i.e. a contribution to the cost of providing legal aid rather than *remuneration* as recommended by the Conseil d'état) while recognising that this '*contribution*' would not correspond to market prices because of the duty of solidarity owed by the legal profession. The Bill also provided for the decentralisation of payments and proposed a new method for the assessment of payments based on an hourly rate. While the decentralisation of payments was generally accepted, there was significant opposition to the notion of a contribution rather than remuneration and to the introduction of an hourly system of payment. It appears that the opposition arose because the legal profession feared that hourly payment would lead to the *tarification* (fixing a scale of costs) of legal costs. Ironically, the introduction of a system of scale payments had been opposed on similar

grounds in 1972 (Herzog and Ecolivet Herzog, 1973). Despite the objections of the Government, the Parliament amended the legislation to provide for payment of a '*retribution*' (a compensatory payment towards the cost of legal aid) and to revert to the existing system of a scale list of fees for different type of work rather than payment on an hourly basis. In addition, and against the strong objections of the Minister of Justice, Parliament amended the legislation in relation to the National and Departmental Legal Aid Commissions to provide that the representatives of the legal profession would make up at least 50 per cent of the boards of these bodies.

It is interesting to note that references to the concept of solidarity appeared at a number of points in the debate. The role of the state in funding the legal aid scheme was justified as being on the basis of national solidarity, in contrast to funding responsibilities for the legal advice service which was seen as including a much wider range of actors (*Assemblée nationale rapport*, no. 2010: 21). The concept of family solidarity was invoked to justify taking into account the means of the family for the purposes of the means test (*Assemblée nationale rapport*, no. 2010: 61). Finally, as we have seen, the legal profession were seen as owing a duty of solidarity in relation to reduced fees as a

counterpart of the monopoly which they enjoyed in terms of legal representation.

The 1991 legislation required the Government to carry out a study of the operation of the new scheme after three years and to report to Parliament. This study provides some detailed information on the implementation of the legislation (Ministère de la Justice, 1995). The number in receipt of legal aid has increased sharply from 350,000 in 1991 to 580,000 in 1994. Civil and administrative matters accounted for two-thirds of all grants of legal aid with criminal matters accounting for the remainder. Family law remained the principal area giving rise to applications for legal aid, accounting for almost half of all civil matters. The study attempted to identify the reasons for the significant increase in legal aid. It found that the increase in the legal aid income thresholds accounted for over a quarter of the increase. The overall trend in the case-load of the French judicial system was only weakly linked to the increase in legal aid and the study suggested that other relevant factors included the increase in the jurisdictional scope of the scheme (relatively limited impact), increased awareness of the scheme, the unfavourable economic conjuncture (rising unemployment, etc.) and a greater propensity amongst lawyers to advise the clients to seek legal aid (arising from the

increased legal aid payments) (1995:19). Overall expenditure on legal aid had, however, increased more slowly than expected (to about 890 million FF: in 1994 or about 0.012 per cent of GDP). The study found that the legal advice system had been very slow to develop and that a number of departments had not yet taken any steps to establish a scheme. Reform of this aspect of the legal aid law is currently under discussion as Departmental Legal Aid Commissions operate in only about 20 departments (*Le Monde*, 13 Jan. 1998).

Ireland

A number of factors led to the changed environment for legal aid services in Ireland in the 1990s. First, Ireland's economic position improved which led to easier access to public expenditure for social services. Secondly, elections in 1992 led to the establishment of a new Government in 1993. Responsibility for the Civil Legal Aid Scheme was transferred to a newly established Department of Equality and Law Reform. The new Minister of the Department was perceived to be much more supportive towards the scheme than had been previous Ministers for Justice. Thirdly, the new Government decided to hold a referendum to remove the constitutional

ban on divorce during its term of office. A similar referendum had previously been held in 1986. Although opinion polls in the early 1990s indicated that a significant majority of the population supported the removal of the ban on divorce, the proposal was soundly defeated in the referendum itself. Many commentators attributed this result, at least in part, to a lack of preparation by the then Government. There was a perception that a range of other legislation, ancillary to divorce, had not been put in place and that this had influenced people in voting 'No'. The new government adopted a policy of putting in place a wide range of legislation in an attempt to ensure that the divorce referendum campaign would focus on the right to remarry. One of the key planks of this approach was to put in place an adequate legal aid scheme as it was clear that the introduction of divorce would lead to significant additional demands on the legal aid service.

Thus there were significant increases in funding for the Civil Legal Aid Scheme from 1993 onwards (to 0.0135 per cent of GDP in 1994 and 0.016 per cent in 1995). The level of funding for legal aid had probably been artificially held down because of the lack of support of previous Ministers. It is likely that some significant increase would have occurred in any case in view of the growing level of

family law litigation. To some extent, this can already been seen in the early 1990s where levels of spending already show an increase (from 0.006 per cent of GDP in 1989 to 0.009 per cent in 1992).

The Law Society had been approached in the early 1990s by the then Minister for Justice, in the context of discussions concerning general legislation on the solicitor's profession, with a view to seeing whether the profession would be prepared to make a *pro bona* contribution to the legal aid service. The Law Society immediately established a Committee to consider the issue of legal aid; this effectively resulted in a rejection of the Minister's suggestion and reiterated calls for a statutory legal aid service with increased funding. The Committee did foresee some involvement by private practitioners, but only as supplementary to the existing salaried service. Indeed, the only flurry of activity on the part of the Law Society throughout the 1990s related to the subsequent establishment of such a pilot system in 1993. Initially, the Council of the Law Society approved a proposal from the Minister for Equality and Law Reform that Family Law solicitors might take on one legal aid case on a *pro bona* basis in return for which the Minister indicated that he would substantially increase funding to the legal aid service and include the private profession

((1993) 87 *Gazette*: 93). However, when the pilot scheme was introduced the Law Society was highly critical of the limited amount of funding provided (£100,000) and of the fact that the scheme only applied to District Court work. In particular, the Council took the view that the fee of £75 per case was too low (up to the first four cases, with £65 after that). This compared with a Law Society recommended fee of £300 for a custody application in the District Court (Fair Trade Commission 1990). The Law Society considered that the new fees were so inadequate that it recommended that members should not participate ((1993) 87 *Gazette*: 245). However, some solicitors did participate in the scheme and were criticised by the Law Society for doing so ((1993) 87 *Gazette*: 293, 333).

In addition to increasing the level of funding, the Government decided to introduce the long awaited legislation to put the scheme on a statutory basis and this was introduced and passed in 1995 prior to the holding of the divorce referendum itself in November 1995. In introducing the Civil Legal Aid Bill in the Senate, the Minister for Equality and Law Reform, Mervyn Taylor, TD, described it as being 'in substance, a family law measure, and for that reason it is a priority measure under the Government's Programme of Legislation'. The Minister

described the Bill as 'part of a series of extensive proposals which the government is pursuing in relation to Family Law matters, including the holding of a Referendum on Divorce in 1995' (141 *Seanad Debates*, col. 2124).

In effect, the Bill simply puts the existing Scheme of Civil Legal Aid and Advice into statutory form and there were relatively few changes to the structure of the service. Legal aid services are still provided primarily by salaried lawyers in law centres administered directly by the Legal Aid Board. The 1995 legislation allowed for the continued involvement of private practitioners but it was clear that this was seen as supplementary to the main provision of services by the law centres. Otherwise, the legislation very much reflected the existing limitations set out in the Scheme of Civil Legal Aid and Advice. The Scheme focused solely on advice and representation, and amendments proposing to give the Legal Aid Board a role in relation to research, education and law reform were defeated in the Parliament. Legal representation only applied to representation in the courts although the Bill did allow the Minister to extend this to tribunal representation. An opposition amendment to extend legal aid to social welfare and employment tribunals was successful at committee stage in the Senate but this

was reversed by the Government at a later stage of the debate. The means test and the wide range of exclusion for various legal matters remained largely intact although a number of relatively minor provisions were amended or removed.

The 1995 Civil Legal Aid legislation came into effect in October 1996. The involvement of private practitioners continues to face opposition both from the salaried staff employed by the Board and from the Law Society who, despite a significant increase in the proposed fees to £120 per case, continued to feel that this was totally inadequate and that a fixed fee was wrong in principle. However, the Society agreed that participation in the scheme should be left to individual solicitors as 'it seemed that some practitioners would participate in it regardless of the Society's views' ((1996) 90 *Gazette* 319).

Similarities and differences

To conclude the descriptive section of this Chapter, let us consider the similarities and differences between the schemes in France and Ireland. Despite the reforms of the 1990s, both countries still have relatively limited schemes of legal aid and advice in comparison with the Netherlands and the United Kingdom. The legal aid schemes in both France and Ireland are narrowly confined to legal repre-

sentation and advice and neither has any role in relation to a broader concept of legal research, legal education or law reform. In both countries, family law accounts for the majority of civil legal aid cases, although this is much more the case in Ireland (over 90 per cent) than in France (50 per cent). Both schemes are means-tested and appear to apply to roughly the same proportion of the population. On the other hand there are major differences in the way in which legal aid is delivered. In Ireland, salaried lawyers directly employed by the government appointed Legal Aid Board remain responsible for the vast majority of legal aid work; in France the legal aid service is provided solely through private practitioners who appear to have gained a dominant role in relation to the provision of legal advice.

ANALYSING THE DEVELOPMENT OF LEGAL AID

This section of the Chapter examines recent developments in legal aid in France and Ireland so as to analyse factors relevant to the way in which services have developed. In doing so, I look at both structural factors (such as the underlying economic position, the structure of the legal system, and religion) and the role of key actors (in particular, the state and the

legal profession). These two levels, of course, are not independent of each other. The structure of the legal system has implications for the way in which the legal profession acts and, in turn, the legal profession influences the structure of the legal system.

I have argued elsewhere (Cousins, 1996b) that structural factors such as industrialisation, economic development, religion, divorce and political unrest *may* influence the development of legal aid, but that none of these factors is determinative. In relation to religion, I noted that legal aid spending is generally higher in Protestant than in Catholic countries and suggested that this might be related to general cultural factors which had an indirect effect on the development of legal aid. I argued that the legal profession and the public administration have played a key role in the development of legal aid. Here I rehearse some of the arguments in relation to factors explaining the development of legal aid and consider to what extent these general arguments are confirmed or contradicted by this specific study.

Social and economic structures

There is no clear correlation between public spending on legal aid and the wealth (in terms of Gross Domestic Product) of

European countries. France has a significantly higher GDP *per capita* than Ireland but both spend about the same on legal aid. While poorer countries, such as Spain and Portugal, are likely to have low levels of legal aid expenditure, one can observe a great variation in levels of expenditure amongst wealthy countries. For example, in 1994-5 Belgium, which has a higher level of GDP *her capita* than the United Kingdom, spent only BF316m on civil legal aid (0.004 per cent of GDP) which is a small fraction of the annual legal aid expenditure in the United Kingdom. The lack of any clear correlation between wealth and legal aid spending combined with the fact that legal aid spending is extremely small in relation to other social services suggests that legal aid has a limited functional importance for European countries. It appears that some wealthy European countries can get on quite well without spending significant sums of money on legal aid.

Alternatively, one might hypothesise that, as legal aid is a social service, spending in relation to legal aid would be related to the level of spending on other social services. However, this is also not the case. In 1993 France spent 31 per cent of its GDP on social security and health services; Ireland spent only 21 per cent (European Commission, 1995). Yet, as we have seen, their levels of legal aid spend-

ing are quite similar. Belgium and the United Kingdom spent very similar proportions of their Gross Domestic Product on social security and health (27.6 per cent and 27.3 per cent respectively) yet there are enormous differences between their levels of spending on legal aid.

Even if there is no clear relationship between the level of spending on legal aid and that on social services, can we identify links between the manner in which legal aid is provided and the general structure of social services in a particular country? Esping-Andersen (1990:29) argues that the essential criteria for categorising welfare states are: (1) the quality of social rights; (2) social stratification; and (3) the relationship between state, market and family. The outcome is a typology of three models of welfare state—the social democratic, the corporatist, and the liberal. It has been suggested that Esping-Andersen's typology can usefully be employed in the analysis of legal aid schemes (Regan, 1994). Unfortunately, however, Ireland does not appear to fall easily into any of these three models (Cousins, 1997), a problem which is not resolved by the alternative Castles and Mitchell (1993) analysis of welfare states in English speaking nations. France on the other hand is clearly identified by Esping-Andersen as falling into the corporatist model of welfare state.

Esping-Andersen identifies corporatist welfare states as being weak on social rights; focusing on the preservation of status differentials; and being 'perfectly ready to displace the market as a provider of welfare' (1993:27). To what extent does the system of legal aid in France correspond with this model? There appears to be a weak legal right to aid since, despite the long delays which existed prior to the 1991 reforms, there is no indication that individuals were able to assert their right to legal aid through the courts. While French legal aid is focused primarily on the poorest section of the population, there is little evidence of legal aid being socially stratified like other French social services. For example, many social insurance schemes have historically been linked to particular occupations. In contrast, the legal aid scheme falls much more into the tradition of residual *aide sociale*. In terms of the relationship between the state, market and family, the market clearly plays a dominant role in the provision of legal aid. Thus, while there are some points of similarity, it is not at all clear that the French legal aid system would fit neatly into the corporatist model of welfare state. Regan's (1994) examination of legal aid in Sweden and Australia also found a less than perfect match with Esping-Andersen's typologies (Goriely, 1994).⁵ Thus, while the social policy approach

utilised by Esping-Andersen in analysing different welfare regimes may be helpful in terms of analysing legal aid, it is suggested that any clear link between typologies of legal aid and Esping-Andersen's welfare regimes is yet to be demonstrated.

Religion

While the sociological implications of religion have received considerable study, particularly in relation to the impact of religion on economic development and politics, the role of religion in relation to social policy has received very little attention. In a recent article, Castles (1994) has undertaken a preliminary study of the impact of Catholicism on various aspects of social policy. However, those aspects have tended to be ones in which the Catholic Church had clearly identifiable policies, such as the development of the welfare state and the role of women in the labour force.

It has been noted by several authors that legal aid schemes tend to be slower to develop in Catholic countries than in Protestant countries (Abel, 1996; Cousins, 1996b). However, the reasons for this have not been investigated in any detail. In the present case study, we can clearly see that the development of legal aid in Ireland is closely linked to the

growth in family breakdown and, specifically, to the introduction of divorce in 1995. Given that the Irish legal aid scheme is almost totally a family law scheme, it is clear that the growing demand for the scheme arose from increasing family law litigation. Specifically, the introduction of the Legal Aid Bill in 1995 was part of the government's overall strategy to ensure the passage of the Divorce Referendum. The Catholic nature of Irish society was clearly one of the reasons (although not the only one) for the much later development of significant levels of family litigation in comparison with other European countries.

However, this explanation does not apply in the French case. A nationwide survey in 1958 concluded that 91 per cent of the population had been baptised in the Catholic faith (quoted in Whyte, 1981:139). Despite this at least nominally Catholic nature of the French population there has historically been a much greater level of secularism in French politics and policy. In fact, it appears that the level of marriage breakdown in France has, historically, been quite high. For example, in 1950 there were 11 divorces per 100 marriages in France compared to 8 in the Netherlands and 7 in the United Kingdom (Andersen, 1980:21). However, this did not lead to the development of legal aid, despite the fact that legal repre-

sentation is necessary in order to obtain a divorce. A possible explanation for this is considered below.

Legal system

This section examines the relationship between legal aid schemes and the legal systems in different countries. One point can be disposed of initially. There appears to be no relationship between the population density of lawyers in a country and the amount spent on legal aid. In France there are almost 2,000 people per lawyer, compared to about 800 in Ireland (McIntosh and Holmes, 1991). Yet spending on legal aid is very similar. The Netherlands has one of the lowest population densities of lawyers in the EU (2,500 people per lawyer) and yet has one of the highest levels of legal aid spending.

Secondly, there is no clear relationship between the overall level of litigation in a country and the development of legal aid. It might be thought that countries with higher levels of litigation would tend to have more extensive legal aid schemes. If anything, the opposite is the case. For example, Blankenburg's (1995; 1997) analysis of case-loads in civil law countries indicates that the Netherlands (a legal aid leader) has a low case-load, a factor which Blankenburg attributes to

the development a range of out-of-court institutions which avoid litigation. In contrast countries with much less extensive legal aid schemes, such as Belgium and Germany, have high case-loads, with France coming in between. While it is always difficult to compare case-loads, it would appear that the Republic of Ireland has a higher civil case-load than does Northern Ireland (which, as part of the United Kingdom, has a much more extensive system of legal aid). In 1993 for instance there were about 6,600 civil proceedings brought per 100,000 people in the Irish Republic, compared to about 3,000 in Northern Ireland. The Republic figures are disproportionately high by reason of the inclusion of about 100,000 licensing and debt enforcement cases, proceedings of a kind which are generally not dealt with in the court system of Northern Ireland. If these proceedings are excluded the number of civil proceedings per 100,000 people in the Republic falls to about 3,500.

Is there a relationship between the type of legal system (i.e. civil or common law) and spending in legal aid? This appears to be the case in the area of criminal legal aid. In Ireland, more public funding has always gone to the criminal legal aid scheme than to civil legal aid and similar tendencies can be seen in the United Kingdom, Canada and Australia.

In contrast, only a small proportion of French legal aid spending goes on criminal legal aid, and a similar tendency can be seen in the Netherlands and Germany. The situation in relation to civil legal aid appears to be more complex. Francis Castles and his colleagues have developed the concept of 'Families of Nations' in analysing social policies (Castles, 1993). In particular, Castles has drawn on work by Zweigert and Kötz (1987) in relation to different legal families. Studies have, for example, been carried out in relation to the influence of different legal families on divorce rates (Castles and Flood, 1993) and children's rights (Therborn, 1993). These authors have argued that, in general terms, differences in divorce rates and in the development of children's rights can, in part, be explained or at least categorised according to different types of legal families. The different types of families of relevance to our study are:

1. Anglo/American (including the United Kingdom, Ireland, Australia, Canada (except Quebec) and the United States);
- 2 Romanistic (including France, Belgium, Luxembourg, the Netherlands, Spain, . Portugal, Italy and Quebec);
3. Germanic (including Germany, Aus-

tria and Switzerland);

4. Nordic (including Sweden, Denmark, Finland and Norway).

At first sight, this breakdown does not seem to be of much assistance in analysing legal aid since, for example, the Anglo/American family includes countries with very high levels of legal aid (the United Kingdom) and very low levels (the United States). The same applies in relation to the Romanistic family which includes both the Netherlands and Belgium. However, looking at the situation in more detail, perhaps this breakdown may be of assistance. If we look at the Nordic family, there does seem to be a general tendency to have reasonably developed legal aid schemes in these countries (Johnsen, 1994). In addition, these countries have tended to be the leaders in developing other forms of assistance to individuals seeking to enforce rights, such as ombudsman schemes. In contrast, the Germanic countries generally appear to have more limited legal aid schemes.

In the case of Anglo/American countries, one could argue that because the United States separated from the United Kingdom at such an early stage, and because its law and legal professions developed in such different ways, it may not be useful to categorise this country in the same group (at least for present pur-

poses). Looking at the other countries in this group, they generally have low to medium levels of development of legal aid, only the United Kingdom having exceptionally high spending in this area. This suggests that perhaps the United Kingdom is also an exception to this group. This exceptionalism might be explained by the greater wealth of the United Kingdom, the development of a welfare state after World War 11 and the strength of the legal profession in shaping legal aid policy.

The Romanistic family generally involves countries with quite low levels of legal aid spending. Important exceptions are the Netherlands and, to a lesser extent, Quebec. Perhaps one of the reasons for this mismatch is a misclassification of countries within the different groups. It has been suggested that the categorizations developed for (the purposes of comparative legal study may not be useful from a sociological (or social policy) perspective (Cotterrell, 1997). Nonetheless, there is at least enough evidence to warrant further investigation of whether or not different legal families may have their own legal aid regimes.

It appears that the French legal aid system, despite its apparently low level of funding, is much more successful in delivering legal aid to persons involved in family law proceedings than is the Irish

system. For example, in 1994 36 per cent (it file parties to a divorce were legally aided in France. This contrast, with the Irish situation where in 1994 legal aid certificates were granted in relation to 3,600 family law matters compared to a total of 17,000 family law applications in that year. It must, of course, be remembered that the Irish legal aid scheme also involves the provision of legal advice, something which has only been introduced in France. The difficulties in relation to ensuring comparability of figures must also be borne in mind in comparing this data. However, the degree of difference between the two strongly suggests that the French legal aid scheme is able to deliver representation in a much higher proportion of cases for approximately the same level of spending as a proportion of GDP.

This would suggest either that legal services in France are significantly cheaper than in Ireland or that the French legal profession is prepared to subsidize legal aid services to a much greater extent. While comparisons are difficult, it would appear that the relevant costs in France may be lower in relative terms than those in Ireland. The Conseil d'Etat report in 1990 refers to legal costs of between 350 and 400 FF per hour. In contrast, in 1994 the Irish Law Society sought payments of I£65 an hour in respect of legal aid ser-

vices ((1994) Gazette: 91). In addition, it was clearly accepted that the French legal profession would, on a basis of a duty of solidarity, accept a significantly lower level of payment than the going market rate. This duty of solidarity is referred to on numerous occasions in both the Conseil d'Etat report and in the Parliamentary Debates on the legal aid legislation. It is interesting to note that, in contrast, as long ago as 1977 the legal profession representatives on the Irish Committee on Civil Legal Aid and Advice dissented from the Committee's recommendation that private practitioners should be prepared to accept a percentage reduction in their fees in recognition of the fact that legal aid is a social service and that they would be guaranteed payment of their fees. In a reservation, these representatives argued that they did not 'see why the work which is done for the less fortunate members of our community should be remunerated on a level which is less than that which would be applicable to (the more fortunate members of the community' (Committee on Civil Legal Aid and Advice, 1978:170).

While the concept that the legal profession might reduce their fees in such a situation is not, of course, unknown in other countries, it is unlikely to be presented as being on the basis of solidarity. Solidarity is a concept which emerged in

French social thought towards the end of the last century, and has since been used in social policy in France (Donzelot, 1984). It is also utilized in Catholic social thought. Its basic principles were not inconsistent with late nineteenth-century Catholic social thought (Dorr, 1983) although it appears that Catholic (or at least Vatican) social thinking did not use the term until much later. Clearly, solidarity is not a concept which applies to all Catholic countries as the Irish case shows. It would, however, be interesting to investigate whether the legal professions in Continental Catholic countries, such as France, Belgium, Spain and Italy (i.e. the bulk of the Romanistic family) are prepared to make a greater contribution of their resources towards the provision of legal aid and whether this explains, to some extent, the seemingly low level of public spending on legal aid in these countries. This is not necessarily to suggest that these legal professions are necessarily more altruistic than others but rather than the early introduction of a statutory obligation to provide legal aid may have created a situation whereby an obligation to contribute to legal aid is more widely accepted. One factor of specific relevance to Ireland is that the Department of Justice which has been responsible for the legal aid service has traditionally had little knowledge about or

interest in concepts such as efficiency and cost-effectiveness. The Department's main concern was to be able to control the legal aid service, both in terms of its overall cost (which was easy as it was cash-limited) and in terms of the types of case it might take on (so as to exclude test cases and representative actions) (Dalton, 1989). The Department had little interest in whether or not the scheme itself was run efficiently.

Key actors

In the French case, the key actors were the state and the legal profession. The government was, effectively, forced to act in 1991 in relation to legal aid because of the dissatisfaction of the legal profession with the existing situation. The report of the Conseil d'Etat drawn up by a commission consisting of civil servants (including members of the judiciary) and lawyers was largely accepted by the Government and formed the basic shape of the Legal Aid Bill. In its passage through the French Parliament, the Bill was altered to strengthen the provisions in relation to the payment of the legal profession and to strengthen their role in relation to legal advice. Although non-governmental organizations were consulted by the Conseil d'Etat, there is little indication that they had any significant

say in shaping the final outcome. There is also little sign that the shape of the legal aid system would have been substantially different had the right-wing opposition parties, rather than the then Socialist Government, been in power. Many opposition speakers during the debates broadly welcomed the Bill (although it was criticized on many grounds) and few opposition speakers put forward any clear alternatives to the basic approach proposed by the government.

The development of legal aid in France is consistent with Karpik's (1994) sociological interpretation of the history of the (or more correctly a) French legal profession. Karpik argues that in the nineteenth century the profession of *avocat* adopted a logic based on an *économie de la modération* which excluded pure market principles and emphasised the *disinterestedness* of the profession. This is not inconsistent with provision of gratuitous legal aid under the 1851 Act. Karpik argues that in recent decades the profession has nursed towards a much more market-influenced approach with two major reforms of the French legal professions in 1971 and 1990. The legal aid reforms in 1972 and 1991-introducing and then extending payment for legal aid services-are consistent with this interpretation.

The key actor in the Irish case was ostensibly the state. The Legal Aid Bill,

originally drafted by the Department of Justice, largely replicated the original Scheme of Civil Legal Aid and Advice (itself drafted by the Department). Over the period since 1980, all major Irish political parties have been in government at some stage and there is no indication whatsoever that any of the parties would have adopted a significantly different approach to that outlined in the 1995 Bill. During the Dail Debates on that Bill, the opposition parties opportunistically put forward proposals which they had themselves refused to entertain while in government (such as the broadening of the scope of the legal aid service to include research, education and law reform and the inclusion of tribunal representation). Non-governmental organisations, such as the Free Legal Advice Centres and Coolock Community Law Centre, were very influential in shaping the parliamentary debate. However, the views of the organisations had little impact on the final content of the Act. Indeed, one of the key tenets of such groups, community involvement, disappeared entirely with the Act although it had been present in the original administrative scheme.

The Law Society and Bar Council were noticeable by their absence in the debates on the Bill. The Law Society's own monthly journal made almost no

comment at all on the proposal. Although a significant number of parliamentarians are members of the legal profession, there is no indication in the debate that any informal briefing had been carried out by either the Law Society or the Bar Council. However, I would argue that the failure to act by the Law Society and the Bar Council does not make them unimportant actors. Both organisations are key players in the development of any legal service. Accordingly, their failure to act represented a particular course of action.

The Law Society, the larger and much more active of the two bodies, has, despite occasional rhetorical calls for improvements in civil legal aid, consistently displayed a lack of interest in the area. Arguably, this arises from a fear amongst certain sections of the Law Society that a growth in legal aid amongst the private profession would lead, first to a dragging down of overall civil legal costs, and secondly, to a greater level of involvement by the state in the operation of the private profession. Accordingly, the Law Society has effectively acquiesced in the establishment of a two-tier legal system with a small salaried service for those who cannot afford the fees of private practitioners.

CONCLUSION

We have seen that there are a number of similarities between the French and Irish civil legal aid schemes—in particular both have comparatively low levels of public funding (of the order of 0.015 per cent of GDP) and both concentrate on family law. Both are confined to traditional legal advice and representation and do not involve any educational, research or reform role. There are, however, also significant differences.

The French scheme was originally established almost 150 years ago. It has retained its total reliance on the private profession as providers of services. The Irish scheme is a much later developer and relies principally on a salaried service. The indirect impact of Catholicism can clearly be seen in Ireland where the scheme developed later than in other European countries, largely because family law litigation also developed later. In contrast, no such clear link can be seen in the French case. It is noteworthy that the French scheme delivers representation to a much higher proportion of people and it appears that the scheme is subsidised to a much greater extent by the French legal profession. This is perhaps related to the early establishment of a system of gratuitous legal aid on a statutory basis which has now created an environment whereby a duty of solidarity

is expected of and (more or less willingly) accepted by the legal profession. Whether any relationship exists between this duty of solidarity and Catholicism must be a matter for further research.

In both France and Ireland, the key actors have been the state and the legal profession. In the French case, the legal profession have effectively traded off low fees for a legal monopoly. In contrast, the Irish profession have largely failed to act thereby allowing the development of a two-tier system with a private market for those who can afford the services and a public salaried model for those who cannot.

In overall terms, the study of legal aid reforms in France and Ireland is consistent with the theory that the phenomenon of legal aid is the result of the interrelationship of a complex range of social factors (including group interests) and that there is no one causal factor. There are no clear links between the legal aid schemes and the wealth of either country, nor the structure or size of its social services, the size of its legal profession nor level of litigation. The lack of any evidence of a link between Catholicism and legal aid in France suggests the need for caution in positing any general theories about the impact of Catholicism on the development of legal aid. This study does suggest that there may be links between the type of legal system and the development of legal

aid and that this issue would merit further research. Finally, the findings of this study are consistent with the argument that the

state and the legal profession tend to be key players in the development of legal aid.

NOTES

- * I would like to thank Don Fleming and Gerry Whyte, Trinity College, Dublin, for their very helpful comments on earlier drafts.
1. Low public spending means public spending on civil legal aid and advice <0.01% of GDP; medium = 0.01-0.025% of GDP; high = > 0.025% of GDP. While the level of public spending on legal aid in a country cannot be assumed to be precisely correlated to the extent or 'quality' of its service, in the absence of any other reliable indicator in this regard (e.g. case-load), it gives some indication as to the political importance attached to legal aid in a given country in terms of the amount spent on legal aid as a proportion of the countries' Gross Domestic Product.
 2. For France see Conseil d'État 0991); Assemblée nationale: Project de loi no. 1949; Rapport de 1st. Colcombot, commission des loins, no. 2010; Discussion and adoption 29 and 30 Apr. 1991; Project de loi, modifié par le Serial, no. 2075; Rapport de M. Colcombot, commission des loins, no. 2079; Discussion and adoption 10 June 1991; Project de loi, modifié par le Senat en 2ème lecture, no. 2154; Rapport de M. Colombet, commission mixte paritaire, no. 2155; Discussion and adoption 28 June 1991; Senat•, Project de loi, adopté par l'Assemblée nationale, no. 310; Rapport de M. Dejoie, commission des loins, no. 338; Discussion and adoption 29 and 30 May 1991; Project de loi, adopté avec modifications par l'Assemblée nationale en 2ème lecture, no. 374; Rapport de M. Dejoie, commission des loins, no. 404; Discussion and adoption 26 June 1991; Rapport de M. Dejoie, commission mixte paritaire, no. 422; Discussion and adoption 28 June 1991. For Ireland see 141 Seanad Debates 2124fi.; 142 Seanad Debates 47ff.; 1864if.; 143 Seanad Debates 515fi.; 1975if.; 455 Dail Debates 762if.; 458 Dail Debates 406fi.; L5 Select Committee on Legislation and Security 171 ff.
 3. See the successive annual Reports of the Legal Aid Board.
 4. In 1997, following the most recent elections, the Department of Equality and L %N Reform was abolished and a new Department of Justice, Equality and Law Reform was established. The implications of these changes remains to be seen.
 5. In the case of Australia this may, in part, arise from the fact that Australia is misclassified by Esping-Andersen (Castles and Mitchell, 1993).

" 'Legal Aid Reform in France and the Republic of Ireland in the 1990's' by Mel Cousins in 'The Transformation of Legal Aid' by Francis Reagan, Alan Paterson, Tamara Goriely and Dom Fleming (1999). Reprinted by permission of Oxford University Press. www.oup.com "

Three

INTERNATIONAL STANDARDS

This chapter includes:

- International Standards Regarding Access to Legal Aid: United Nations, Council of Europe, European Union
- Important Cases of the European Court of Human Rights on Legal Aid (excerpts)
- Summary of Recent Cases of the European Court of Human Rights on Legal Aid
- Council of Europe, Committee of Experts on Efficiency of Justice, Action Plan on Legal Assistance Systems, Strasbourg, 31 May 2002
- Council of Europe, Committee of Ministers, Recommendation no. R (93) 1 on Effective Access to the Law and to Justice for the Very Poor, adopted by the Committee of Ministers on 8 January 1993, and Explanatory Memorandum
- European Commission, Justice and Home Affairs, Procedural Safeguards for Suspects and Defendants in Criminal Proceedings, Green Paper, 2002
- Council Directive 2002/8/EC to Improve Access to Justice in Cross-Border Disputes by Establishing Minimum Common Rules Relating to Legal Aid for Such Disputes, January 2003

INTERNATIONAL STANDARDS REGARDING ACCESS TO LEGAL AID: COUNCIL OF EUROPE, EUROPEAN UNION, UNITED NATIONS

COUNCIL OF EUROPE

TREATIES

EUROPEAN CONVENTION ON HUMAN RIGHTS

- *Relevant texts*

Article 6, para. 3 (c):

“Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it for free when the interests of justice so require”.

Article 6, para. 1

In determination of his civil rights and obligations or of any criminal charge against him everyone is entitled to fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

- *Relevant jurisprudence*

ECHR criteria for legal aid in criminal cases

The European Convention on Human Rights (ECHR) requires states parties to provide free legal assistance to criminal defendants who meet certain eligibility requirements:

Financial criterion

- insufficient means to afford representation (defendant must establish)

"Interests of justice" criteria

- what is "at stake" for the defendant, such as length of imprisonment or severity of the sentence otherwise;
- legal and factual complexity of the case;
- ability of the defendant to defend himself or herself personally.

The European Court of Human Rights may hold a state liable if it determines that the state has failed to provide legal aid to a defendant who has demonstrated financial need and fulfills one or more of the "interests of justice" criteria.

- *ECtHR case law regarding the right to free legal assistance*

General state obligation to ensure access to justice

Artico v. Italy, decision of 13 May 1980, Series A no. 37. (1) Whether the lack of legal assistance has prejudiced the actual proceedings is irrelevant for finding violation of Article 6.3(c); (2) states parties are required to take steps to ensure that defendants enjoy effectively the right to free legal assistance.

Quality of legal services provided by the state

Goddi v. Italy, decision of 9 April 1983, Series A no. 76. Not providing enough time and facilities for the officially appointed lawyer to prepare for the case, violates state's obligation to ensure effective right to free legal assistance.

Reimbursement

Croissant v. Germany, decision of 25 September 1992, Series A no. 237-B. The requirement to reimburse the state for the fees for the ex officio appointed defense counsel by itself alone does not violate Article 6.3(c). The enforcement proceedings generally follow the criminal proceedings and cannot

affect their fairness. The question of post-conviction reimbursement of the attorney's fees by indigent defendants was not decided.

Financial criterion

Pakelli v. FRG, decision of 25 April 1983, Series A no. 64. Applicant is not required to prove lack of sufficient means beyond all doubt; offer to prove the lack of means in the absence of clear indications to the contrary satisfies the means test of Article 6.3(c).

Case of R.D. v. Poland, decision of 18 December 2001,

When evaluating applicant's financial situation the ECtHR cannot substitute itself for the domestic courts, but must review whether the domestic courts have acted in accordance with the Convention. A decision of the domestic court to refuse legal aid, issued two and a half months after the initial decision to grant legal aid in the absence of evidence that applicant's financial situation has improved violates the Convention.

“Interests of justice” criteria

Quaranta v. Switzerland, decision of 23 April 1991, Series A no. 205. Interests of justice require consideration of the seriousness of the offense, the complexity of the case, and the ability of the defendant to provide his own representation. Free legal assistance should be granted even if there is little likelihood that the three-year maximum potential sentence will be imposed.

Benham v. U.K., decision of 10 June 1996, Reports 1996-III. Where deprivation of liberty is at stake, the interests of justice mandate legal representation. A potential sentence of three months' imprisonment, along with the relative legal complexity of the case, triggers the right to free legal assistance.

Perks and others v. U.K., decision of 12 October 1999, not published at time of writing (available on the Internet, at <http://www.echr.coe.int/Eng/Judgments.htm>). Potential sentence of imprisonment taken together with

relatively complex applicable law requires free legal assistance to be granted.

Stages of the proceedings to which the obligation to provide legal assistance applies

Granger v. U.K., decision of 28 March 1990, Series A no. 174. Whether the interests of justice require legal aid depends on the case as a whole, not only on the facts known when the application for legal aid has been filed but also on the facts known at the time of appeal.

Boner v. U.K., decision of 28 October 1994, Series A no. 300-B. The right to legal aid applies to appellate proceedings. Factors to consider in determining whether the interests of justice require free legal assistance on appeal include the nature of the proceedings, the powers of the appellate court, the capacity of an unrepresented appellant to present a legal argument, and the importance of the issue at stake in view of the severity of the sentence.

Pham Hoang v. France, decision of 25 September 1992, Series A no. 243. The right to free legal assistance applies to proceedings before the Court of Cassation if the defendant wishes to appeal the conviction and, if unrepresented, is unable to raise complex issues on appeal.

Twalib v. Greece, decision of 9 June 1998, Reports 1998-IV. The right to free legal assistance generally applies to proceedings before the Court of Cassation. Important factors to consider are the complexity of the Cassation Court proceedings, the powers of the court, and the ability of the defendant to raise alone the complex legal and factual issues on appeal.

Legal aid in civil cases

Airey v. Ireland, decision of 11 September 1979, Series A no. 32.

Although the ECHR contains no provision on legal aid for civil disputes, Article 6, para. 1, may compel states to provide free legal assistance in civil matters when such assistance proves indispensable for effective access to the courts, either because legal representation is mandatory under domestic law or because of the complexity of procedure or the case.

* * *

EUROPEAN AGREEMENT ON TRANSMISSION OF APPLICATIONS FOR LEGAL AID

According to this Agreement, residents of one state party may apply for legal aid for all types of civil and administrative proceedings, which take place on the territory of another state party. For this purpose the state parties are required to designate special authority to receive and transmit applications for legal aid.

* * *

ADDITIONAL PROTOCOL TO THE AGREEMENT ON TRANSMISSION OF APPLICATIONS FOR LEGAL AID

Provides guarantees to the right to legal aid, concerning the procedure for granting legal aid and the communication between lawyers and applicants, among others.

- *Relevant text*

Article 2 – Co-operation between Parties

1. The Parties undertake promptly to afford each other the widest measure of mutual assistance in respect of applications for legal aid in civil, commercial or administrative matters which fall within the jurisdiction of the competent authorities of the requested Party.
2. Subject to the provisions of the Agreement, the requested Party shall not reject applications made under the Agreement without considering their merit, but shall process them in the most effective way possible in accordance with domestic procedures, which may include the seeking of further information.

* * *

PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE

• *Call to combat social exclusion*

In a memorandum adopted on 28.01.98 PACE “called on Council of Europe members to give free legal aid to poor people and set up legal advisory services for the socially excluded” (among other things).

• *Violence on women in Europe (Motion for a recommendation)*

On 12 October 1998 PACE adopted a document recommending that member states:

“ ...

(i). provide adequate and accessible legal aid for the victims of violence”

* * *

COMMITTEE OF EXPERTS ON EFFICIENCY OF JUSTICE (CJ-EJ)

• *Draft resolutions for an enlarged partial agreement*

The representatives on the Committee of Ministers of ...

...

Taking into account in particular the following principles:

I. Access to justice and proper and efficient functioning of courts

1. Access to justice

(i) Access to justice shall be guaranteed in all cases concerning the determination of civil rights and obligations or of any criminal charges;

legal advice and assistance shall be available when the interests of justice so require.

- (ii) In order to do so, the provisions contained in the relevant Council of Europe international legal instruments referred in Appendix II should, *inter alia*, be taken into account.

...

HEREBY,

RESOLVE to establish the European Commission for the Efficiency of Justice (CEPEJ) by means of this Enlarged Partial Agreement, governed by the Statute contained in Appendix I hereto; The CEPEJ will work in close co-operation and co-ordination with the CDCJ ...

EUROPEAN UNION

- *Proposal for a Council Directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid and other financial aspects of civil proceedings (January 18, 2002)*

The Directive establishes minimum common rules on legal aid in all types of civil cases, which will be mandatory for all member states. The goal is to secure that a resident of one member-state will be able to receive adequate legal aid for civil proceedings in another country. The Directive will allow a resident of one country to apply for legal aid directly in the country of the forum, which implies that all member-states should have relatively similar systems for granting legal aid in civil cases.

- *Green Paper on Legal Aid in Civil Matters*

Explains the need to set up common rules for granting legal aid in all member states

in order to guarantee the right to legal aid to the residents of all member states. Led to the above proposal for a Council Directive (2 September, 2000)

- *Council Framework Decision of March 15, 2001 on the standing of victims in criminal procedure (possibility to include legal aid in the chapters for accession)*

Article 6

Specific assistance to the victim

Each member state shall ensure that victims had access to advice as referred to in Article 4 (1)(f)(iii), provided free of charge where warranted, concerning their role in the proceedings and, where appropriate, legal aid is referred to in Article 4 (1)(f)(ii), when it is possible for them of have the status of parties to criminal proceedings.

This decision is part of the community legislation in force, more precisely of the chapter on judicial cooperation in criminal matters and therefore should be covered by the Chapter 24: Cooperation in the field of Justice and Home Affairs

UNITED NATIONS

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

- *Relevant text*

Article 14, para. 3 (d) ICCPR:

In determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

...

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him, in any case where

the interests of justice so require and without payment by him in any such case if he does not have sufficient means to pay for it.

• *Relevant General Comments on interpretation of the treaty**

General Comments No 13 (Equality before the courts and the right to a fair and public hearing by an independent court established by law) (Article 14) (Twenty-first session, 1984) (excerpts)

...

11. Not all reports have dealt with all aspects of the right of defense as defined in subparagraph 3 (d). The Committee has not always received sufficient information concerning the protection of the right of the accused to be present during the determination of any charge against him nor how the legal system assures his right either to defend himself in person or to be assisted by counsel of his own choosing, or what arrangements are made if a person does not have sufficient means to pay for legal assistance. The accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defenses and the right to challenge the conduct of the case if they believe it to be unfair. When exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defense is all the more necessary.

General Comment No. 28 Article 3 (Equality of rights between men and women) Adopted by the Committee at its 1834th meeting (sixtyeighth session), on 29 March 2000 (excerpts)

...

18. States parties should provide information to enable the Committee to ascertain whether access to justice and the right to a fair trial, provided for in article 14, are enjoyed by women on equal terms with men. In particular, States parties should inform the Committee whether there are legal provisions preventing women from direct and autonomous access to the courts (see communication No. 202/1986, *Ato del Avellanal v. Peru*, Views of 28 October 1988); whether women may give evidence as witnesses on the same terms as men; and whether measures are taken to ensure women equal access to legal aid, in particular in family matters.

- *Relevant jurisprudence:*

Quality of the service of the legal aid lawyers

Communication 928/2000 (CCPR/C/73/D/928/2000) Sooklal v. Trinidad and Tobago

Failure of the court to ascertain that the legal aid lawyer has informed his client about his intention not to file an appeal against the conviction of the trial court violates article 14, para. 3 (d) ICCPR.

Communication No 668/1995 12/05/99 (CCPR/C/65/D/668/1995) Smith v. Jamaica

In a capital case, when counsel for the accused concedes that there is no merit in the appeal, the court should ascertain whether counsel has informed the accused. The upper court's failure to do so violates Article 14, para. 3 (d).

Legal aid in different stages of criminal proceedings

*Communication No 752/97 (CCPR/C/64/D752/1997)
Allan Henry v. Trinidad and Tobago*

Legal assistance must be provided free of charge where a convicted person seeking constitutional review of irregularities in a criminal trial has insufficient means to meet the costs of legal assistance in order to pursue his constitutional remedy and where the interest of justice so requires.

* * *

INTERNATIONAL COVENANT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS (ICESCR)

- *Relevant General Comments*

General Comment No. 7 The right to adequate housing (art. 11 (1) of the Covenant): forced evictions (adopted on 20.05.97, 16th session, CESCR General comment 7)

...

Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognized in both the International Covenants on Human Rights. The Committee considers that the procedural protections which should be applied in relation to forced evictions include: ... (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

* * *

INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (ICERD)

- *Relevant text*

Article 5, para. (a):

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right to everyone, without distinction as to race, color, or natural or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

...

(a): The right to equal treatment before the tribunals and all other organs administering justice

- *Relevant General Comments*

General Recommendation 27 Discrimination against Roma (16/08/2000)

CERD recommends that the States parties to the Convention, taking into account their specific situations, adopt for the benefit of members of the Roma communities, inter alia, all or part of the following measures, as appropriate

...

7. To take appropriate measures to secure for members of Roma communities

effective remedies and to ensure that justice is fully and promptly done in cases concerning violations of their fundamental rights and freedoms.

* * *

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

CEDAW obliges the state parties to secure both legal and *de facto* equality between man and woman in many fields including in the administration of justice.

- *Relevant texts*

Article 15, para. 1 (read together with the Article 1)

States Parties shall accord to women equality with men before the law.

Article 1

For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex *which has the effect or purpose* of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

- *Relevant General Comments*

General Recommendation No 19 Violence against Women (29/01/92) (excerpts)

The Committee on the Elimination of Discrimination against Women recommends:

...

(i) Effective complaints procedures and remedies, including compensation, should be provided;

...

(o) States parties should ensure that services for victims of violence are accessible to rural women and that where necessary special services are provided to isolated communities;

...

(t) That States parties should take all legal and other measures that are necessary to provide effective protection of women against gender-based violence, including, *inter alia*:

(i) Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including, *inter alia*, violence and abuse in the family, sexual assault and sexual harassment in the workplace;

...

(v) That the reports of States parties should include information on the legal, preventive and protective measures that have been taken to overcome violence against women, and on the effectiveness of such measures.

* * *

CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT (CAT)

• *Relevant text*

Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the

death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

* * *

CONVENTION ON THE RIGHT OF THE CHILD (CRC)

• *Relevant text*

Article 37 (d):

Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance as well as right to challenge the legality of deprivation of his or her liberty before a court or other competent, independent and impartial authority and to a prompt decision on any such action.

Article 40, para. 2 (b):

Every child, alleged as or accused of having infringed the penal law has at least the following guarantees:

...

(ii) to be informed promptly and directly of the charges against him or her, and if appropriate through his or her own parents or legal guardian, and to have legal or other appropriate assistance in the preparation and presentation of his or her defense;

* * *

UN BASIC PRINCIPLES ON THE ROLE OF LAWYERS

• *Relevant text*

Principle Three:

Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons.

* * *

UN DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE (THE SINGHVI DECLARATION)

- *Relevant text*

Article 95:

Governments shall be responsible for providing sufficient funding for appropriate legal service programs for those who cannot afford the expenses on their legitimate litigation.

* * *

DRAFT PRINCIPLES ON THE INDEPENDENCE OF THE LEGAL PROFESSION (THE NOTO PRINCIPLES)

- *Relevant Text*

Principle 31:

It is... the responsibility of governments, having regard to available resources, to provide sufficient funding for legal service programs.

NOTES

* The general comments are statements clarifying the scope of the obligations of the member states, issued by the Human Rights Committee—the body authorized

by the Covenant to monitor and enforce its implementation, and are authoritative source of interpretation of the treaty.

IMPORTANT CASES OF THE EUROPEAN COURT OF HUMAN RIGHTS ON LEGAL AID¹

prepared by INTERRIGHTS, London

1. EFFECTIVE ACCESS TO COURT

“49. The “right to a court”, which is a constituent element of the right to a fair trial, is no more absolute in criminal than in civil matters. ... it is not the Court’s function, though, to elaborate a general theory of such limitations ... Nevertheless, in a democratic society too great an importance attaches to the “right to a court” for its benefit to be forfeited solely by reason of the fact that an individual is a party to a settlement reached in the course of a procedure ancillary to court proceedings. In an area concerning the public order (*ordre public*) of the member States of the Council of Europe, any measure or decision alleged to be in breach of Article 6 calls for particularly careful.”

Deweert v. Belgium, Judgment of 27 February 1980

“25. ... the Court is called upon to decide two distinct questions arising on

the text cited above:

- (i) Is Article 6 para. 1 limited to guaranteeing in substance the right to a fair trial in legal proceedings which are already pending, or does it in addition secure a right of access to the courts for every person wishing to commence an action in order to have his civil rights and obligations determined?
- (ii) In the latter eventuality, are there any implied limitations on the right of access or on the exercise of that right which are applicable in the present case?”

Golder v. the United Kingdom, Judgment of 21 February 1975

“35. Article 31 para. 3 (c) of the Vienna Convention indicates that account is to be taken, together with the context, of “any relevant rules of international law applicable in the relations between the parties”. Among those rules are general principles of law and especially “general

principles of law recognized by civilized nations” (Article 38 para. 1 (c) of the Statute of the International Court of Justice). Incidentally, the Legal Committee of the Consultative Assembly of the Council of Europe foresaw in August 1950 that “the Commission and the Court must necessarily apply such principles” in the execution of their duties and thus considered it to be “unnecessary” to insert a specific clause to this effect in the Convention (Documents of the Consultative Assembly, working papers of the 1950 session, Vol. III, no. 93, p. 982, para. 5). The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally “recognised” fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 para. 1 must be read in the light of these principles. Where Article 6 para. 1 to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government. Such assumptions, indissociable from a danger of arbitrary power, would have serious consequences which are repugnant to the aforemen-

tioned principles and which the Court cannot. It would be inconceivable, in the opinion of the Court, that Article 6 para. 1 should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.

36. ...it follows that the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1. This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 para. 1 read in its context and having regard to the object and purpose of the Convention, a law-making treaty, and to general principles of law. The Court thus reaches the conclusion, without needing to resort to “supplementary means of interpretation” as envisaged at Article 32 of the Vienna Convention, that Article 6 para. 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the “right to a court”, of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one

aspect only. To this are added the guarantees laid down by Article 6 para. 1 as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing. The Court has no need to ascertain in the present case whether and to what extent Article 6 para. 1 further requires a decision on the very substance of the dispute (English “determination”, French “décidera”).

37. Since the impediment to access to the courts ... affected a right guaranteed by Article 6 para. 1, it remains to determine whether it was nonetheless justifiable by virtue of some legitimate limitation on the enjoyment or exercise of that right.

38. ... the right of access to the courts is not absolute. As this is a right which the Convention sets forth (see Articles 13, 14, 17 and 25) without, in the narrower sense of the term, defining, there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication.”

Golder v. the United Kingdom, Judgment of 21 February 1975

“24. The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and

effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial. It must therefore be ascertained whether Mrs. Airey’s appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily.

...

26. ... the Convention’s only express provision on free legal aid is Article 6 para. 3 (c) which relates to criminal proceedings and is itself subject to limitations; what is more, according to the Commission’s established case law, Article 6 para. 1 does not guarantee any right to free legal aid as such.

It would be erroneous to generalise the conclusion that the possibility to appear in person before the High Court does not provide Mrs. Airey with an effective right of access; that conclusion does not hold good for all cases concerning “civil rights and obligations” or for everyone involved therein. In certain eventualities, the possibility of appearing before a court in person, even without a lawyer’s assistance, will meet the requirements of Article 6 para. 1; there may be occasions when such a possibility secures adequate access even to the High Court.

Indeed, much must depend on the particular circumstances. In addition, whilst Article 6 para. 1 guarantees to litigants an effective right of access to the courts for the determination of their “civil rights and obligations”, it leaves to the State a free choice of the means to be used towards this end. The institution of a legal aid scheme ... constitutes one of those means but there are others such as, for example, a simplification of procedure. In any event, it is not the Court’s function to indicate, let alone dictate, which measures should be taken; all that the Convention requires is that an individual should enjoy his effective right of access to the courts in conditions not at variance with Article 6 para. 1. The conclusion appearing at the end of paragraph 24 above does not therefore imply that the State must provide free legal aid for every dispute relating to a “civil right”. To hold that so far-reaching an obligation exists would, the Court agrees, sit ill with the fact that the Convention contains no provision on legal aid for those disputes, Article 6 para. 3 (c) dealing only with criminal proceedings. However, despite the absence of a similar clause for civil litigation, Article 6 para. 1 may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because

legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.”

Airey v. Ireland, Judgment of 9 October 1979

“31. It is further observed that Article 6 of the Convention does not compel Contracting States to set up courts of cassation. However a State which does institute such a court is required, nevertheless, to ensure that persons amenable to the law shall enjoy before such a court the fundamental guarantees contained in Article. In a number of cases the Court has considered that to refuse to hear a cassation appeal because the accused has not surrendered himself to custody prior to the appeal constitutes a disproportionate interference with the right of access to court and therefore a denial of a fair trial.”

Eliazer v. the Netherlands, Judgment of 16 October 2001

1. There is no automatic right under the Convention for legal aid or legal rep-

resentation to be available for an applicant who is involved in proceedings which determine his or her civil rights. Nonetheless Article 6 may be engaged under two inter-related aspects.

2. Firstly, Article 6 § 1 of the Convention embodies the right of access to a court for the determination of civil rights and obligations (see the *Golder v. the United Kingdom* judgment of 21 February 1975, Series A no. 18, p. 18, § 36). Failure to provide an applicant with the assistance of a lawyer may breach this provision, where such assistance is indispensable for effective access to court, either because legal representation is rendered compulsory as is the case in certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or the type of case (see *Airey v. Ireland* judgment of 9 October 1979, Series A no. 32, pp. 15-16, §§ 26-28, where the applicant was unable to obtain the assistance of a lawyer in judicial separation proceedings). Factors identified as relevant in the *Airey* case in determining whether the applicant would be able to present her case properly and satisfactorily without the assistance of a lawyer included the complexity of the procedure, the necessity to address complicated points of law or to establish facts, involving expert evidence and the examination of witnesses, and the fact that the

subject-matter of the marital dispute entailed an emotional involvement that was scarcely compatible with the degree of objectivity required by advocacy in court. In such circumstances, the Court found it unrealistic to suppose that the applicant could effectively conduct her own case, despite the assistance afforded by the judge to parties acting in person.

3. It may be noted that the right of access to court is not absolute and may be subject to legitimate restrictions. Where an individual's access is limited either by operation of law or in fact, the restriction will not be incompatible with Article 6 where the limitation did not impair the very essence of the right and where it pursued a legitimate aim, and there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (*Ashinglane v. the United Kingdom* judgment of 28 May 1985, Series A no. 93, pp. 24-25, § 57). Thus, though the pursuit of proceedings as a litigant in person may on occasion not be an easy matter, the limited public funds available for civil actions renders a procedure of selection a necessary feature of the system of administration of justice, and the manner in which it functions in particular cases may be shown not to have been arbitrary or disproportionate, or to have impinged on the essence of the right of access to court

(see the judgment *Del Sol v. France*, no. 46800/99, [Section 3], of 26 February 2002, *Ivison v. the United Kingdom*, no. 39030/97, dec. 16 April 2002). It may be the case that other factors concerning the administration of justice (e.g. the necessity for expedition or the rights of other individuals) could also play a limiting role as regards the provision of assistance in a particular case, though such restriction would also have to satisfy the tests set out above.

4. Secondly, the key principle governing the application of Article 6 is fairness. In cases where an applicant appears in court notwithstanding lack of assistance of a lawyer and manages to conduct his or her case in the teeth of all the difficulties, the question may nonetheless arise as to whether this procedure was fair (see, for example, no. 46311/99, *McVicar v. the United Kingdom*, judgment of 7 May 2002 (...), §§ 50-51). There is the importance of ensuring the appearance of the fair administration of justice and a party in civil proceedings must be able to participate effectively, *inter alia*, by being able to put forward the matters in support of his or her claims. Here, as in other aspects of Article 6, the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy and fairness of the procedures.

Application in the present case

5. The Court recalls that the applicant P. was awarded legal aid for legal representation in the proceedings brought by the local authority in applying for a care order and a freeing for adoption order in respect of her daughter S. This reflected the position in the domestic legal system that in such proceedings as a general rule the interests of justice require a parent to be given legal assistance. Initially therefore P. was represented by senior and junior counsel and solicitors, who prepared her case and advised her up until the hearing of the application for a care order which commenced on 2 February 1999. However, on 5 February 1999, her lawyers applied to the judge to withdraw from the proceedings, alleging that P. was requiring them to conduct the case in an unreasonable manner. The judge permitted them to withdraw. He allowed P. an adjournment of four days until 9 February 1999, at which point he refused any further adjournment, giving detailed reasons for that decision which required the applicant to conduct her own case over the bulk of the trial. After making the care order on 8 March 1999, the judge fixed the hearing of the application for the freeing of S. for adoption for one week later on 15 March 1999. On that

date, he refused the application of P. for the proceedings to be deferred to allow her to obtain legal representation. He then proceeded after the hearing of the application to issue an order freeing S. for adoption without any provision for continued direct contact. There can be no doubt therefore of the seriousness of the outcome of the proceedings for P. and C., which deprived them of the possibility of bringing S. up in their family and of any future contact with her and which severed their legal relationship with her.

6. The applicants' complaints about the lack of legal assistance during these proceedings were met by the Government's arguments largely based on the reasoning given by the judge for the procedural decisions which he took. In the care proceedings, the judge considered that P. was well able, and had shown herself able, to present her own case, with assistance from counsel representing other parties in court and with considerable leeway given by himself. He gave great weight to the opinion given by Dr Bentovim that the future of S. should be settled by her first birthday and considered that any adjournment would inevitably jeopardise her welfare due to the delay factor. The Government have emphasised the difficulties which would have been attached to relisting a trial of this length.

7. The Court has paid careful attention to the reasons given by the trial judge in this case, whose long judgment received merited praise in the Court of Appeal for the thoroughness of his analysis and who had first hand experience of the events and participants. It also notes that the Court of Appeal considered that the proceedings had been fair, an opinion shared by counsel for the guardian *ad litem*, who represented S.

8. Nonetheless, P. was required as a parent to represent herself in proceedings which as, the Court of Appeal observed, were of exceptional complexity, extending over the course of 20 days in which the documentation was voluminous and which required a review of highly complex expert evidence relating to the applicants, P. and C.'s, fitness to parent their daughter. Her alleged disposition to harm her own children, along with her personality traits, were at the heart of the case, as well as her relationship with her husband. The complexity of the case, along with the importance of what was at stake and the highly emotive nature of the subject matter, lead this Court to conclude that the principles of effective access to court and fairness required that P. receive the assistance of a lawyer. Even if P. was acquainted with the vast documentation in the case, the Court is not persuaded that she should

have been expected to take up the burden of conducting her own case. It notes that at one point in the proceedings, which were conducted at the same time as she was coping with the distress of the removal of S. at birth, P. broke down in the court room and the judge, counsel for the guardian *ad litem* and a social worker, had to encourage her to continue (see paragraph 61 above).

9. The Court notes that the judge himself commented that if P. had been represented by a lawyer her case would have been conducted differently. Though he went on in his judgment to give the opinion that this would not have affected the outcome of the proceedings, this element is not decisive as regards the fairness of the proceedings. Otherwise, a requirement to show actual prejudice from a lack of legal representation would deprive the guarantees of Article 6 of their substance (*Artico v. Italy* judgment of 13 May 1980, Series A no. 37, § 35). Similarly, while the judge considered that the case would turn on the cross-examination of P., where a lawyer would only have been able to give limited assistance, that assistance would nonetheless have furnished P. with some safeguards and support.

10. While it is also true that P. and C. were aware that the freeing application was likely to follow the care application

within a short time, this does not mean however that they were in an adequate position to cope with the hearing when it occurred. This hearing also raised difficult points of law and emotive issues, in particular since the issuing of the care order, and the rejection of the applicants' claims to have S. returned home, must have had a significant and distressing impact on the parents.

11. Nor is the Court convinced that the importance of proceeding with expedition, which attaches generally to child care cases, necessitated the draconian action of proceeding to a full and complex hearing, followed within one week by the freeing for adoption application, both without legal assistance being provided to the applicants. Though it was doubtless desirable for S.'s future to be settled as soon as possible, the Court considers that the imposition of one year from birth as the deadline appears a somewhat inflexible and blanket approach, applied without particular consideration of the facts of this individual case. S. was, according to the care plan, to be placed for adoption and it was not envisaged that there would be any difficulty in finding a suitable adoptive family (eight couples were already identified by 2 February 1999). Yet though S. was freed for adoption by the court on 15 March 1999, she was not in fact placed

with a family until 2 September 1999, a gap of over five months for which no explanation has been given, while the adoption order which finalised matters on a legal basis was not issued until 27 March 2000 more than a year later. Her placement was therefore not achieved by her first birthday in May in any event. It is not possible to speculate at this time as to how long the adjournment would have lasted had it been granted in order to allow the applicant P. to have representation at the care proceedings, or for both parent applicants to be represented at the freeing for adoption proceedings. It would have been entirely possible for the judge to place strict time-limits on any lawyers instructed, and for instructions to be given for re-listing the matter with due regard to priorities. As the applicants have pointed out, S. was herself in a successful foster placement and unaffected by the ongoing proceedings. The Court does not find that the possibility of some months' delay in reaching a final conclusion in those proceedings was so prejudicial to her interests as to justify what the trial judge himself regarded as a procedure which gave an appearance of "rail-roading" her parents.

12. Recognising that the courts in this matter were endeavouring in good faith to strike a balance between the interests of the parents and the welfare of S., the

Court is nevertheless of the opinion that the procedures adopted not only gave the appearance of unfairness but prevented the applicants from putting forward their case in a proper and effective manner on the issues which were important to them. For example, the Court notes that the judge's decision to free S. for adoption gave no explanation of why direct contact was not to be continued or why an open adoption with continued direct contact was not possible, matters which the applicants apparently did not realise could, or should, have been raised at that stage. The assistance afforded to P. by the counsel for other parties' and the latitude granted by the judge to P. in presenting her case was no substitute, in a case such as the present, for competent representation by a lawyer instructed to protect the applicants' rights.

13. The Court concludes that the assistance of a lawyer during the hearing of these two applications which had such crucial consequences for the applicants' relationship with their daughter was an indispensable requirement. Consequently, the parents did not have fair and effective access to court as required by Article 6 § 1 of the Convention. There has, therefore, been a breach of this provision as regards the applicant parents, P. and C.

P., C. and S. v. the United Kingdom, judgment of 16 July 2002

14. The applicant contended that the unavailability of legal aid in defamation proceedings violated his right to effective access to court under Article 6 § 1 of the Convention. He drew attention to, *inter alia*, the complexity of the law and procedure in connection with defamation actions, the fact that the evidence of Mr Moule and Mr Walusimbi had been excluded and the burden of proof imposed upon him to prove the truth of the allegations in mounting his defence before the High Court.

15. He contended further that the unavailability of legal aid, exclusion of witness evidence and burden of proof which he faced, together with the order that he pay Mr Christie's costs and the injunction prohibiting repetition of the allegations, violated his right to freedom of expression under Article 10 of the Convention.

...

16. The Court recalls that the right of access to court constitutes an element which is inherent in the right to a fair trial under Article 6 § 1 of the Convention (see, among other authorities, the *Golder v. the United Kingdom* judgment of 21 February 1975, Series A no. 18, § 36).

17. It recalls further that, despite the absence of a clause similar to Article 6 § 3(c) of the Convention in the context of civil litigation, Article 6 § 1 may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for effective access to court, either because legal representation is rendered compulsory, or by reason of the complexity of the procedure or of the case (see the *Airey v. Ireland* judgment of 9 October 1979, Series A no. 32, § 26).

18. However, as the Airey case itself made clear (at §§ 24 and 26), Article 6 § 1 leaves to the State a free choice of the means to be used in guaranteeing litigants a right of effective access to court. The question whether or not that Article requires the provision of legal representation to an individual litigant will depend upon the specific circumstances of the case and, in particular, upon whether the individual would be able to present his case properly and satisfactorily without the assistance of a lawyer.

19. In the Airey case, the Court highlighted a number of circumstances which cumulatively led to a finding that Mrs Airey had been denied an effective right of access to court by the State's refusal of legal aid. First, the proceedings, which concerned an application for a decree of judicial separation from the applicant's

husband, were commenced by petition and conducted in the High Court, where the procedure was complex. Secondly, litigation of the kind at issue, in addition to involving complicated points of law, necessitated proof of adultery, unnatural practices or cruelty, which might have required the tendering of expert evidence or the calling and examining of witnesses. Thirdly, marital disputes often entailed an emotional involvement that was scarcely compatible with the degree of objectivity required by advocacy in court. The Court drew attention also to the fact that the applicant was from a humble background, had gone to work as a shop assistant at a young age before marrying and having four children, and had been unemployed for much of her life.

In all the circumstances, the Court considered it most improbable that Mrs Airey could effectively present her own case. It considered further that this view was corroborated by the fact that, in each of the 255 judicial separation proceedings initiated in Ireland between January 1972 and December 1978, the petitioner had been represented by a lawyer.

20. Turning to the present case, the Court considers that the relevant question is not whether the applicant had access to court as such, since he was defendant in the proceedings. Rather, the applicant's complaints relate to the fair-

ness of the libel proceedings generally and his right under Article 6 § 1 of the Convention to present an effective defence. However, the principles which apply to his complaint are identical to those which applied in the Airey case.

21. The Court notes that the applicant was defendant in a libel action brought against him by a comparatively wealthy and famous individual. The proceedings were conducted in the High Court before a judge and jury and attracted a great deal of media and public interest. The applicant was faced with the burden of having to prove, on the balance of probabilities, that the allegations which he had made against his opponent were substantially true, and in order to do so was required to call witness and expert evidence, some of which was excluded as a result of his failure to comply with the rules of court. He was also required to scrutinise evidence submitted on behalf of the plaintiff and to cross-examine the plaintiff's witnesses and experts in the course of a trial which lasted over two weeks. He had no formal legal training and, although it appears that he had previously defended himself successfully in relatively minor criminal proceedings (see paragraph 11 above), the Court considers that the libel trial must have taken a significantly greater physical and emotional toll on the applicant than would have

been the case in relation to an experienced legal advocate.

However, the question remains whether, in all the circumstances, the lack of legal aid operated to deprive the applicant of a fair trial and breached his right to present an effective defence in violation of Article 6 § 1 of the Convention.

22. The Court does not consider the fact that the proceedings were held before a High Court judge and jury conclusive as regards this question. As it said in the Airey case (at § 26), there may be occasions when the possibility of appearing before the High Court in person, even without a lawyer's assistance, will meet the requirements of Article 6 § 1. This is not a case where domestic law required representation by counsel before the court concerned.

23. Similarly, the fact that the applicant was faced with the burden of proving the truth of the allegations made against Mr Christie cannot automatically require the provision of legal aid. It is true that the imposition of a burden of proof required the applicant to call witness and expert evidence and to rebut evidence submitted by the plaintiff. However, the Court notes that the applicant was a well-educated and experienced journalist who would have been capable of formulating cogent argument. His position in this respect can be contrast-

ed with that of the applicant in the Airey case.

24. The Court considers that the rules pursuant to which both the trial judge and Court of Appeal excluded the evidence of Mr Moule and Mr Walusimbi were clear and unambiguous. (...) In all the circumstances, the Court believes that the applicant should have understood what was expected from him under the rules and the order for directions as regards submission of his own witness and expert evidence. If he was unsure as to any particular issue, he could have sought guidance during the hearing of 28 June 1996, at which he was present.

25. So far as the law of defamation is concerned, the Court does not consider that this was sufficiently complex to require a person in the applicant's position to have legal assistance under Article 6 § 1. The outcome of the libel action turned on the simple question of whether or not the applicant was able to show on the balance of probabilities that the allegations at issue were substantially true.

26. The Court notes that the applicant was represented by Mr Price from 30 April 1998 until commencement of the trial (see paragraphs 15 and 21 above). Mr Price had previously acted for the applicant's co-defendants in the action, whose interests were described by the trial judge and the Court of Appeal as "identical" to those of

the applicant (see paragraph 20 above).

27. In relation to the excluded evidence of Mr Moule (...)

28. The exclusion of Mr Walusimbi's evidence (...) does not appear to have diminished the applicant's ability to present his defence effectively because ...)

29. It is therefore apparent that the applicant's failure to comply with the procedural requirements when submitting purported "gist" statements in respect of Mr Moule and Mr Walusimbi was not the only factor which weighed in the domestic judges' minds when deciding to exercise their discretion so as to exclude the evidence of those witnesses. Had fuller details of those witnesses' evidence been given earlier, or had the applicant's defence been amended prior to trial once he had a legal representative, those judges might have exercised their discretion differently and the applicant might have been able to present a fuller defence at trial.

30. The Court considers that the fact that the applicant was represented between 30 April 1998 and the commencement of the trial by a specialist defamation lawyer who had worked previously for the applicant's co-defendants in the action illustrates further that he was not prevented from presenting an effective defence to the libel action by his ineligibility for legal aid. The importance of this factor is not diminished by the fact that his

lawyer was extremely busy reacting to Mr Christie's pre-trial strategy during the weeks leading up to the trial (see paragraphs 16 to 21 above). To the extent that the applicant was confused about any aspects of the relevant law and procedure in connection with the trial proceedings, it was open to him to seek guidance from Mr Price before they began.

31. Finally, as regards the applicant's emotional involvement in the case, the Court recalls that, in application no. 10594/83 *Munro v. the United Kingdom* 52 DR 158 (1987), the Commission commented that the general nature of a defamation action, being one protecting an individual's reputation, is clearly to be distinguished from an application for judicial separation, which regulates the legal relationship between two individuals and may have serious consequences for any children of the family. For this reason, and with regard to the applicant's background and experience (see paragraph 9 above), the Court considers that the applicant's emotional involvement was not incompatible with the degree of objectivity required by advocacy in court, notwithstanding the factors identified at paragraph 51 above.

32. In all the circumstances, the Court concludes that the applicant was not prevented from presenting his defence effectively to the High Court, nor was he

denied a fair trial, by reason of his ineligibility for legal aid. It follows that there has been no violation of Article 6 § 1 of the Convention.

McVicar v. the United Kingdom, Judgment of 7 May 2002

2. LIMITATION ON THE RIGHT OF ACCESS

“57. ... the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access “by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals”. In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. Whilst the final decision as to observance of the Convention’s requirements rests with the Court, it is no part of the Court’s function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field. Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Fur-

thermore, a limitation will not be compatible with Article 6 para. 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.”

Ashinglane v. the United Kingdom, Judgment of 28 May 1985

“29. The Court recalls that Article 6 § 1 embodies the “right to a court”, of which the right of access, that is the right to institute proceedings before a court in civil matters, constitutes one aspect. The right is not however absolute. It may be subject to legitimate restrictions, for example, statutory limitation periods, security for costs orders, regulations concerning minors and persons of unsound mind. Where the individual’s access is limited either by operation of law or in fact, the Court will examine whether the limitation imposed impaired the essence of the right and in particular whether it pursued a legitimate aim and there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.”

Devlin v. the United Kingdom, Judgment of 30 October 2001

“30. ... right to a court guaranteed by Article 6 of the Convention, of which the right of access is one aspect, is not absolute. It may be subject to limitations, particularly regarding the conditions of admissibility of an appeal. However, these limitations must not restrict exercise of the right in such a way or to such an extent that the very essence of the right is impaired. They must pursue a legitimate aim and there must be a reasonable proportionality between the means employed and the aim sought to be achieved. In addition, the compatibility of limitations under domestic law with the right of access to court guaranteed by Article 6 of the Convention will depend on the special features of the proceedings concerned and account must be taken of the whole of the proceedings conducted in the domestic legal order as well as the functions exercised by a court of cassation whose admissibility requirements are entitled to be more rigorous than an ordinary appeal court.”

Eliazer v. the Netherlands, Judgment of 16 October 2001

“54. The time bar in the applicants’ cases commenced from the age of majority and could not be waived or extended. It appears from the material available to the Court that there is no uniformity amongst

the member States of the Council of Europe with regard either to the length of civil limitation periods or the date from which such periods are reckoned. In many States, the period is calculated from date of the accrual of the cause of action, while in other jurisdictions time only starts to run from the date when the material facts in the case were known, or ought to have been known, to the plaintiff.

55. The Contracting States properly enjoy a margin of appreciation in deciding how the right of access to court should be circumscribed.

56. There has been a developing awareness in recent years of the range of problems caused by child abuse and its psychological effects on victims, and it is possible that the rules on limitation of actions applying in member States of the Council of Europe may have to be amended to make special provision for this group of claimants in the near future. However, since the very essence of the applicants’ right of access was not impaired and the restrictions in question pursued a legitimate aim and were proportionate, it is not for the Court to substitute its own view for that of the State authorities as to what would be the most appropriate policy in this regard”

Stubbings & otrs v. the United Kingdom, Judgment of 22 October 1996

“32. In the Golder case the Court held that the procedural guarantees laid down in Article 6 concerning fairness, publicity and promptness would be meaningless in the absence of any protection for the pre-condition for the enjoyment of those guarantees, namely, access to court. It established this as an inherent aspect of the safeguards enshrined in Article 6, referring to the principles of the rule of law and the avoidance of arbitrary power which underlie much of the Convention. Thus, Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court.

33. The right of access to court is not, however, absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if

there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

34. The Court must first examine whether the limitation pursued a legitimate aim. It notes in this connection that sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State. The Court considers that the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.

35. The Court must next assess whether the restriction was proportionate to the aim pursued. It recalls that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, and that Article 31 § 3 (c) of that treaty indicates that account is to be taken of “any relevant rules of international law applicable in the relations between the parties”. The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take

the relevant rules of international law into account. The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.

36. It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 § 1. Just as the right of access to court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity.

37. ... there appears to be a trend in international and comparative law towards limiting State immunity in respect of employment-related disputes. However, where the proceedings relate to employment in a foreign mission or embassy, international practice is divided on the question whether State immunity continues to apply and, if it does so apply, whether it covers disputes relating to the contracts of all staff or only more senior members of the mission. Certainly, it cannot be said that the United King-

dom is alone in holding that immunity attaches to suits by employees at diplomatic missions or that, in affording such immunity, the United Kingdom falls outside any currently accepted international standards.

38. ...the proceedings which the applicant wished to bring did not concern the contractual rights of a current embassy employee, but instead related to alleged discrimination in the recruitment process. Questions relating to the recruitment of staff to missions and embassies may by their very nature involve sensitive and confidential issues, related, *inter alia*, to the diplomatic and organisational policy of a foreign State. The Court is not aware of any trend in international law towards a relaxation of the rule of State immunity as regards issues of recruitment to foreign missions. In this respect, the Court notes that it appears clearly from the materials referred to above that the International Law Commission did not intend to exclude the application of State immunity where the subject of proceedings was recruitment, including recruitment to a diplomatic mission."

Fogarty v. the United Kingdom, Judgment of 21 November 2001

3. STATE-FUNDED PROVISION OF LEGAL ASSISTANCE - WHEN IN THE "INTERESTS OF JUSTICE"

"32. In order to determine whether the "interests of justice" required that the applicant receive free legal assistance, the Court will have regard to various criteria. To a large extent they correspond to those put forward by the Government. However, the way in which the Swiss authorities appear to apply them may differ - and in the present case did differ - from the Court's approach.

33. In the first place, consideration should be given to the seriousness of the offence of which Mr Quaranta was accused and the severity of the sentence which he risked. He was accused of use of and traffic in narcotics and was liable to "imprisonment or a fine. According to the Government, there was nothing in the file to indicate that the Criminal Court was likely to impose a sentence exceeding eighteen months, the maximum for a suspended sentence. By sentencing the applicant to six months' imprisonment, the court did not reach this limit, even if the sentence imposed in 1982 is taken into account. The Court notes however that this was no more than an estimation; the imposition of a more severe sentence was not a legal impossibility. Under sec-

tion 19 para. 1 of the Federal Misuse of Drugs Act, in conjunction with Article 36 of the Swiss Criminal Code, the maximum sentence was three years' imprisonment. In the present case, free legal assistance should have been afforded by reason of the mere fact that so much was at stake.

34. An additional factor is the complexity of the case. The Court agrees with the Government that the case did not raise special difficulties as regards the establishment of the facts, which the applicant had moreover admitted immediately at his only examination by the investigating judge. However, the outcome of the trial was of considerable importance for the applicant since the alleged offence had occurred during the probationary period to which he was made subject in 1982. The Criminal Court therefore had both to rule on the possibility of activating the suspended sentence and to decide on a new sentence. The participation of a lawyer at the trial would have created the best conditions for the accused's defence, in particular in view of the fact that a wide range of measures was available to the Court."

Quaranta v. Switzerland, Judgment of 24 May 1991

When does the right arise?

“62. ... the manner in which Article 6 para. 3 (c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case.

63. National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation. However, this right, which is not explicitly set out in the Convention, may be subject to restrictions for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing.”

John Murray v. the United Kingdom, Judgment of 8 February 1996

“41. ... even if the primary purpose of Article 6, as far as criminal matters are concerned, is to ensure a fair trial by a “tribunal” competent to determine “any criminal charge”, it does not follow that the Article has no application to

pre-trial proceedings. Thus, Article 6 – especially paragraph 3 – may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions. The manner in which Article 6 §§ 1 and 3 (c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case. In its *John Murray* judgment the Court also observed that, although Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation, this right, which is not explicitly set out in the Convention, may be subject to restriction for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing.”

Magee v. the United Kingdom, Judgment of 6 June 2000

“33. The applicants also alleged a violation of Article 6 of the Convention (...)

34. In this respect the applicants complained that on 6 October 1993, when appealing against the bail order of

5 October 1993, they both had requested that an official defence counsel be provided for them. However, the prosecutor had not replied to the request nor had referred it to the court, thereby breaching the requirements of Article 69 of the Code of Criminal Procedure. The applicants stated that they had had no lawyer until 17 October 1994, when the Lublin District Court had appointed a defence counsel under Article 70 § 1 of the Code out of concern for their state of mind. As a result they had not been able properly to defend themselves, in breach of Article 6 §§ 1 and 3 (c) of the Convention.

35. The Government admitted that no reply had been given to the request of 6 October 1993, and that “the prerequisites of Article 6 § 3 (c) of the Convention [had not been] satisfied” in the present case.

36. The Court recalls that, even if the primary purpose of Article 6, as far as criminal matters are concerned, is to ensure a fair trial by a “tribunal” competent to determine “any criminal charge”, it does not follow that this provision of the Convention has no application to pre-trial proceedings. Thus, Article 6 - especially paragraph 3 - may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an

initial failure to comply with its provisions. The manner in which Article 6 §§ 1 and 3 (c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case (see *Brennan v. the United Kingdom*, no. 39846/98, 16.10.2001, § 45, ECHR 2001-X).

37. In its judgment in the case of *John Murray v. the United Kingdom* (no. 18731/91, 8.2.1996, § 63, ECHR 1996-I), the Court also observed that, although Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer at the initial stages of police interrogation, this right, which is not explicitly set out in the Convention, may be subject to restriction for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing (also see the *Brennan* case cited above, *ibid.*).

38. The Court observes that it is undisputed that the applicants lacked means to employ a private representative in the context of criminal proceedings against them. It is also uncontested that the applicants’ request for an official lawyer to be appointed was ignored by the authorities, with the result that they had no defence counsel for more than a

year. Given that a number of procedural acts, including questioning of the applicants and their medical examinations, were carried out during that period (see §§ 40-45 above), the Court finds no justification for this restriction which deprived the applicants of the right to adequately defend themselves during the investigation and trial.

39. Accordingly, there has been a breach of Article 6 §§ 1 and 3 (c) of the Convention.”

Berlinski v. Poland, Judgment of 20 June 2002

“42. Mr Granger complained of the refusal to grant him legal aid for his appeal and of the inequality of arms he attributed thereto.

...

43. Since the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial in criminal proceedings stated in paragraph 1 (see, for example, the *Kostovski* judgment of 20 November 1989, Series A no. 166, p. 19, § 39), the Court considers it appropriate to examine the applicant’s complaints from the angle of paragraphs 3 (c) and 1 taken together.

44. As regards paragraph 3 (c) it was common ground that Mr Granger did

not have “sufficient means to pay for legal assistance”; the sole issue under this paragraph is therefore whether “the interests of justice” required that he be given such assistance free.

In this connection, the Court recalls that the manner in which paragraph 1, as well as paragraph 3 (c), of Article 6 is to be applied in relation to appellate or cassation courts depends upon the special features of the proceedings involved; account must be taken of the entirety of the proceedings conducted in the domestic legal order and of the role of the appellate or cassation court therein (see, *inter alia*, the *Monnell and Morris* judgment of 2 March 1987, Series A no. 115, p. 22, § 56).

45. The Government maintained that the Commission’s conclusion was not justified by the various factors on which it had relied. In their view, the interests of justice, the evaluation whereof lay in the first place with the domestic authorities, did not require a grant of legal aid for the appeal, which they described as being “wholly without substance” and having “no reasonable prospects of success”.

They pointed out that Mr Granger had had full legal aid for his trial, extending to the obtaining of counsel’s opinion on the prospects of an appeal, which opinion had been negative (...);

that the Legal Aid Committee, an independent and expert body, had not been satisfied that there were substantial grounds for the appeal (...); that the applicant had been able to present argument at the appeal hearings (...); and that the case had to be seen in the context of the Scottish system in which an active role was played by the appeal court and an impartial role was expected of the Crown and where the automatic right of appeal resulted in the filing of many appeals which were without merit (...).

46. The Government's description of the appeal as "wholly without substance" is more categorically negative than the opinion expressed on this subject by the applicant's counsel and the Legal Aid Committee (...). However, it is not the Court's task to go further into this matter, notably by formulating its own view as to whether the Committee was correct in concluding, on 11 July 1985, that it was not satisfied that there were substantial grounds for appealing. The question whether the interests of justice required a grant of legal aid must be determined in the light of the case as a whole. In that respect not only the situation obtaining at the time the decision on the application for legal aid was handed down but also that obtaining at the time the appeal was heard are material.

47. Mr Granger had been convicted on indictment of perjury and sentenced to five years' imprisonment. There can thus be no question as to the importance of what was at stake in the appeal.

Before the High Court of Justiciary, the Solicitor General, on account of his familiarity with the case, appeared for the Crown and addressed the judges at length (...). On the other hand, the applicant, as was not contested, was not in a position fully to comprehend the pre-prepared speeches he read out (...) or the opposing arguments submitted to the court. It is also clear that, had the occasion arisen, he would not have been able to make an effective reply to those arguments or to questions from the bench.

The foregoing factors are of particular weight in the present case in view of the complexity of one of the issues involved. Whilst the High Court of Justiciary apparently had little trouble in disposing of four of Mr Granger's grounds of appeal, the same did not apply to the remaining one. After hearing argument, it decided that this ground - which turned on what the Solicitor General himself described at the European Court's hearing as the "difficult" distinction between "pre-cognitions" and other statements (...)

above) - deserved more detailed consideration. It adjourned its hearing and called for a transcript of the evidence given at the applicant's trial, so as to be able to examine the matter more thoroughly (...). It thus became clear that this ground of appeal raised an issue of complexity and importance.

In this situation some means should have been available to the competent authorities, including the High Court of Justiciary in exercise of its overall responsibility for ensuring the fair conduct of the appeal proceedings, to have the refusal of legal aid reconsidered. According to the scheme in operation at the relevant time, however, the Legal Aid Committee's decision of 11 July 1985 was stated to be final (...). The Government, it is true, maintained that as a matter of practice the decision could have been reviewed after the High Court had called for a transcript of the evidence and adjourned its hearing of the appeal (...). In fact no such review took place. It would appear to the Court that in all the circumstances of the case it would have been in the interests of justice for free legal assistance to be given to the applicant at least at that stage for the ensuing proceedings. Such a course - which would have been in line with what occurred in the later cases of Larkin and Williamson (...) - would in

the first place have served the interests of justice and fairness by enabling the applicant to make an effective contribution to the proceedings (see, *mutatis mutandis*, the *Pakelli* judgment of 25 April 1983, Series A no. 64, p. 18, § 38). Furthermore, the High Court of Justiciary would then have had the benefit of hearing - just as it does before giving an opinion on a reference by the Lord Advocate (...) - expert legal argument from both sides on a complex issue.

48. The Court thus concludes that there has been a violation of paragraph 3 (c), taken together with paragraph 1, of Article 6).”

Granger v. UK, Judgment 28 March 1990

“40. The applicants complained under Article 6 § 3(c) of the Convention about the lack of legal representation and, alternatively, legal aid for their adjudication hearings (...).

A. Applicability of Article 6 of the Convention

41. The parties disputed the applicability of Article 6 to the adjudication proceedings. The applicants contended that the charges against them should be considered “criminal” for the purposes

of Article 6 of the Convention. The Government considered that they were disciplinary, emphasising the necessity of prison disciplinary regimes independent of the criminal justice system. They considered that the dividing line between disciplinary and criminal had been placed in a manner consistent with Article 6 and underlined the deterrent value of the prison disciplinary regime.

...

42. Having regard to the factors defined in paragraph 82 of its *Engel and Others* judgment, the Court finds that the deprivations of liberty, which were at stake and which actually resulted from the awards of additional days to the two applicants, must be regarded as appreciably detrimental and that the presumption that the charges resulting in such awards were criminal has not been rebutted.

The Court's conclusion

43. In such circumstances, the Court finds that the nature of the charges against the applicants, together with the nature and severity of the potential and actual penalties, were such as to lead to the conclusion that both applicants were subject to criminal charges within the meaning of Article 6 § 1 of the Convention and that, accordingly, Article 6

of the Convention applied to their proceedings before the Governor.

B. Compliance with Article 6 § 3(c)

The second limb of Article 6 § 3(c)

44. The applicants complained that there had been a violation of the second limb of Article 6 § 3(c) because they were not allowed to be legally represented. This was regardless of whether or not they could have paid for such representation themselves and they argued that, in fact, they could have obtained legal representation free of charge. The statement submitted by the applicants' representative to the Court, who also advised them in relation to the adjudication proceedings, confirmed that he would have represented the applicants without a fee if he had been allowed to attend the hearing before the Governor, as he considered the charges serious and the applicants had been referred by a long-established client. The applicants considered that the second limb of Article 6 § 3(c) was unqualified in its protection (by the "interests of justice" criterion or otherwise) and, accordingly, the refusal of legal representation for their hearings violated Article 6 § 3(c).

45. The Government submitted that

the applicants had the opportunity to consult legal representatives prior to the adjudications. In addition, they had never asked or indicated that they could have paid for lawyers themselves, so their request for legal representation was reasonably interpreted as a request for free legal aid. Furthermore, they never indicated during the adjudications that they felt unable to defend themselves and they proceeded to defend themselves without any difficulty.

46. The Court recalls that the Convention requires that a person charged with a criminal offence who does not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing (the above-cited Campbell and Fell judgment, § 99, and the Pakelli judgment of 25 April 1983, Series A no. 64, § 31).

47. In this respect, the Court notes that it is not disputed that both of the applicants requested legal representation, *inter alia*, for the hearing before the Governor. This was refused by the Governor because he considered it unnecessary. Any such consideration of legal representation was to be based on the criteria outlined in the above-cited cases of *R v. the Home Secretary ex parte Tarrant and Others*, approved by the House of Lords in *Hone and McCartan v. Maze Prison Board of Visitors*. These judgments

exclude any “right” to legal representation for adjudications, and indeed Lord Bridge in the latter case found it difficult to imagine that the rules of natural justice would ever require legal representation before the Governor. In the present case, the single judge of the High Court confirmed that there was no right to legal representation and that the Governor’s refusal of legal representation was not irrational or perverse.

48. Accordingly, the question whether the applicants could have secured representation (either through personal funding or free of charge) was not a relevant consideration for the Governor: the Governor excluded the applicants’ legal representation, as he was entitled to under domestic law, irrespective of whether they could have obtained the services of a lawyer free of charge.

49. In such circumstances, the Court considers that the applicants were denied the right to be legally represented in the proceedings before the prison Governor in violation of the guarantee contained in the second limb of Article 6 § 3(c) of the Convention.

The third limb of Article 6 § 3(c)

50. The applicants further complained under this limb of Article 6

§ 3(c) that the interests of justice required a grant of free legal aid, arguing that the guidelines approved in the above-cited *Hone and McCartan* case did not meet the Convention “interests of justice” test. Alternatively, they complained that, where a deprivation of liberty was at stake, the interests of justice in principle required free legal representation both before and during the hearing on all questions of guilt or innocence (the above-cited *Benham* judgment, §§ 61-64). While the Government accepted that the applicants did not have the means to pay for their own legal representation, they maintained that the denial of free legal aid was not contrary to the interests of justice.

51. In the light of its conclusions as to a violation of their right to obtain legal representation (see paragraph 106 above), the Court does not consider it necessary to consider the applicants’ alternative argument that the interests of justice required that they be granted free legal assistance for the adjudication proceedings.”

Ezeh and Connors v. The United Kingdom, judgment of 15 July 2002

4. THE COMPETENCE OF LEGAL REPRESENTATION

“33. As the Commission observed in paragraphs 87 to 89 of its report, sub-paragraph (c) guarantees the right to an adequate defence either in person or through a lawyer, this right being reinforced by an obligation on the part of the State to provide free legal assistance in certain cases. Mr. Artico claimed to be the victim of a breach of this obligation. The Government, on the other hand, regarded the obligation as satisfied by the nomination of a lawyer for legal aid purposes, contending that what occurred thereafter was in no way the concern of the Italian Republic. According to them, although Mr. Della Rocca declined to undertake the task entrusted to him on 8 August 1972 by the President of the Second Criminal Section of the Court of Cassation, he continued to the very end and “for all purposes” to be the applicant’s lawyer. In the Government’s view, Mr. Artico was, in short, complaining of the failure to appoint a substitute but this amounted to claiming a right which was not guaranteed.

The Court recalls that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective;

this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive (see the *Airey* judgment of 9 October 1979, Series A no. 32, pp. 12-13, par. 24, and paragraph 32 above).

As the Commission's Delegates correctly emphasised, Article 6 par. 3 (c) speaks of "assistance" and not of "nomination". Again, mere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes 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. Adoption of the Government's restrictive interpretation would lead to results that are unreasonable and incompatible with both the wording of sub-paragraph (c) and the structure of Article 6 taken as a whole; in many instances free legal assistance might prove to be worthless. In the present case, Mr. Artico did not have the benefit of Mr. Della Rocca's services at any point of time. From the very outset, the lawyer stated that he was unable to act. He invoked firstly the existence of other commitments and subsequently his state of health (...). The Court is not

called upon to enquire into the relevance of these explanations. It finds, as did the Commission (...), that the applicant did not receive effective assistance before the Court of Cassation (...).

34. Sub-paragraph (c) of Article 6 par. 3 does, nevertheless, make entitlement to the right it sets forth dependent on two conditions. Whilst here there was no argument over the first condition - that the person charged with a criminal offence does not have sufficient means -, the Government denied that the second condition was satisfied: on their view, the "interests of justice" did not require that Mr. Artico be provided with free legal aid. The subject-matter of the Court of Cassation proceedings was, so the Government claimed, crystallized by the grounds adduced in support of the applications to quash, grounds that were filed by the applicant in December 1971 with the assistance of a lawyer of his own choice, Mr. Ferri. However, the Government continued, the grounds related to an issue - the regularity of the summons to appear in court - that was of the utmost simplicity, so much so that the public prosecutor pleaded in July 1973 that the applications were manifestly ill-founded (...); hence, a lawyer would have

played but a “modest” role, limited to receiving notification to the effect that the Court of Cassation would take its decision in chambers (...). According to the Commission’s Delegates, this opinion contrasted with that of the President of the Second Criminal Section of the Court of Cassation. By 8 August 1972, when this judge granted the legal aid that had been requested on 10 March, several months had elapsed since the filing of the applications to quash and the supporting grounds; moreover, Mr. Artico had sent to the registry, on 10 and 14/15 March, declarations which he had drafted himself and which set out his further arguments (...). Nevertheless, the President came to the conclusion that there was a genuine need for a lawyer to be nominated for legal aid purposes. The Delegates doubted whether it was open to the Government to argue the contrary at the present time. The Court recalls that, subject to certain exceptions not pertinent to the present case, anyone who is in a state of poverty is entitled under Italian law to free legal aid in criminal matters (Article 15 of Royal Decree no. 3282 of 30 December 1923; see also Article 125 of the Code of Criminal Procedure). In any event, here the interests of justice did require the provision of effective assistance. This would,

according to Mr. Della Rocca, have been a very demanding and onerous task (...). At any rate, the written procedure, which is of prime importance before the Italian Court of Cassation, had not been concluded by 8 August 1972. A qualified lawyer would have been able to clarify the grounds adduced by Mr. Artico and, in particular, to give the requisite emphasis to the crucial issue of statutory limitation which had hardly been touched on in the “voluminous and verbose” declarations of 14/15 March 1972 (see paragraph 10 above and the verbatim record of the hearing of 31 January 1980). In addition, only a lawyer could have countered the pleadings of the public prosecutor’s department by causing the Court of Cassation to hold a public hearing devoted, amongst other things, to a thorough discussion of this issue (...).

35. The Government objected that this was pure conjecture. In their view, for there to be a violation of Article 6 par. 3 (c), the lack of assistance must have actually prejudiced the person charged with a criminal offence. The Court points out, in company with the Commission’s Delegates, that here the Government are asking for the impossible since it cannot be proved beyond all doubt that a substitute for Mr. Della

Rocca would have pleaded statutory limitation and would have convinced the Court of Cassation when the applicant did not succeed in doing so. Nevertheless, it appears plausible in the particular circumstances that this would have happened. Above all, there is nothing in Article 6 par. 3 (c) indicating that such proof is necessary; an interpretation that introduced this requirement into the sub-paragraph would deprive it in large measure of its substance. More generally, the existence of a violation is conceivable even in the absence of prejudice (see the *Marckx* judgment of 13 June 1979, Series A no. 31, p. 13, par. 27); prejudice is relevant only in the context of Article 50.

36. The Government criticised Mr. Artico for not having recourse to the services of the colleague of whom Mr. Della Rocca spoke highly (...) and for failing to induce the Court of Cassation to take notice of the issue of statutory limitation, allegedly because he did not plead it either soon enough, that is as from December 1971, or with sufficient emphasis and persistence. The second criticism is tantamount to saying that the interests of justice did not necessitate the presence of a lawyer, a matter on which the Court has already ruled (...); in fact it confirms if anything that his presence was indispensable. The

first criticism also does not bear examination since the applicant would have lost the benefit of free legal aid had he followed Mr. Della Rocca's advice (...). In reality, Mr. Artico doggedly attempted to rectify the position: he multiplied his complaints and representations both to his official lawyer - to the extent of importuning and even finally exasperating him - and to the Court of Cassation (...). Admittedly, a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes but, in the particular circumstances, it was for the competent Italian authorities to take steps to ensure that the applicant enjoyed effectively the right to which they had recognised he was entitled. Two courses were open to the authorities: either to replace Mr. Della Rocca or, if appropriate, to cause him to fulfil his obligations. They chose a third course - remaining passive -, whereas compliance with the Convention called for positive action on their part (see the above-mentioned *Airey* judgment, p. 14, par. 25 in fine).

37. The Court thus concludes that there has been a breach of the requirements of Article 6 par. 3 (c)."

Artico v. Italy, Judgment of 30 April 1980

“65. Mr Kamasinski was at no point unrepresented before the Austrian courts. Dr Steidl, a lawyer who is also a registered interpreter for the English language, was appointed legal aid counsel when it became clear that the lawyer initially assigned had an insufficient command of English to communicate with his client. Following the trial Dr Steidl was himself replaced by Dr Schwank shortly after asking the Bar Association to be discharged from his duties as defence counsel. Certainly, in itself the appointment of a legal aid defence counsel does not necessarily settle the issue of compliance with the requirements of Article 6 § 3 (c). As the Court stated in its Artico judgment of 13 May 1980: “The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective [M]ere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall serious-

ly 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.” Nevertheless, “a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes”. It follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed. The Court agrees with the Commission that the competent national authorities are required under Article 6 § 3 (c) 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.”

Kamasinski v. Austria,
Judgment of 19 December 1989

NOTES

¹ Excerpts; for full texts of the documents, see www.echr.coe.it

SUMMARY OF RECENT CASES OF THE EUROPEAN COURT OF HUMAN RIGHTS ON LEGAL AID*

1. JUDGMENTS

SUBSTANTIVE

- *Violation*

Krombach v. France

[Information Note No. 27- February
2001

Article 6(3)(c)

DEFENCE THROUGH LEGAL ASSISTANCE

Refusal to allow representation of an
absent appellant: *violation*.]

Judgment 13. 02. 2001

Facts: In July 1982 the applicant and his wife invited the latter's daughter from a previous marriage with a French national to stay with them near Lake Constance. One morning the fourteen-year-old girl was found dead. The evening before, the applicant had injected her with a substance containing iron, which was intended for the treatment of anaemia. On finding her dead, he attempted to resuscitate her by administering various injections.

The German police immediately opened an investigation against a person or persons unknown in connection with the girl's death. In the light of the post-mortem findings, the Kempten Public Prosecutor's Office decided to take no further action. The investigation was reopened three times on the initiative of the victim's father, and on each occasion it was decided not to prosecute. The final decision not to prosecute was upheld by the Principal Public Prosecutor at the Munich Court of Appeal in May 1986 and in a subsequent decision of the Munich Court of Appeal in September 1987. Meanwhile, in January 1984, the victim's father had lodged a complaint against a person or persons unknown with the Paris investigating judge, alleging manslaughter and applying to join the proceedings as a civil party. Following the completion of the investigation in February 1991, the applicant was charged with the offence of unintentionally causing death by violence. In March 1993 the applicant and his counsel failed to appear at the hearing in the Indictment Division. In a decision of 8 April 1993 the Indict-

ment Division of the Paris Court of Appeal committed the applicant to stand trial for murder at the Paris Assize Court and issued a warrant for his arrest. On 4 May 1993 the applicant was notified of the decision by service of the judgment on the German prosecuting authorities. The applicant did not comply with any of the summonses to undergo a preliminary examination to establish his identity. He appealed on points of law against the decision to commit him for trial, alleging in particular that there had been a breach of the principles of *non bis in idem* and *res judicata*. In a judgment of 21 September 1993 the Court of Cassation dismissed the applicant's appeal on the ground that it was based on a new argument: the applicant had not maintained in the Indictment Division that the German authorities had decided not to prosecute him for the same acts. The applicant's French lawyer was duly informed of the date of the hearing in the Assize Court and, assisted by a German colleague, filed pleadings, seeking leave to represent the applicant in his absence and to submit argument in support of the *res judicata* objection; he also requested the court to rule on that objection of its own motion and to order an extension of the investigation with a view to obtaining the file on the investigation conducted by the German authorities and determining the

scope of the decisions not to prosecute. In a judgment delivered *in absentia* in March 1995 the Assize Court found the applicant guilty of intentionally inflicting violence on his stepdaughter, thereby unintentionally causing her death, and sentenced him to fifteen years' imprisonment, stating that if he had appeared in court, the trial *in absentia* would have been discontinued and he would have had the opportunity to submit any arguments that might have been beneficial to his case. It also reminded the applicant's lawyers, who were present at the hearing, that under Article 630 of the Code of Criminal Procedure, an absent defendant was not entitled to representation, and declared their submissions inadmissible. In a civil judgment, also delivered *in absentia*, the Assize Court ordered the applicant to pay damages to the victim's father. In June 1995, pursuant to Article 636 of the Code of Criminal Procedure, the President of the Court of Cassation ruled that the applicant's appeals on points of law against the Assize Court's judgments were inadmissible.

Law: Preliminary objection (non-exhaustion) – Although conviction *in absentia* was not final, subsequent retrial could not be regarded as a “remedy” in the usual sense, since it might be entirely contingent on an objective circumstance, name-

ly the arrest of the accused, which by definition was not a deliberate act on his part. The accused could also be retried following conviction *in absentia* if he gave himself up; however, complying with this requirement for the reopening of proceedings did not amount to the normal exercise of a domestic remedy. Moreover, a retrial would not have the effect of eliminating or redressing any violations that had occurred during the trial *in absentia*, such violations being precisely in issue in this application. Lastly, retrials following conviction *in absentia* were not subject to any procedural requirements or time-limits and might ultimately be hypothetical if the accused was not arrested or did not give himself up before the expiry of the time-limit for enforcing the sentence. The Government's preliminary objection should therefore be dismissed.

Article 6(1) taken together with Article 6(3)(c) – The applicant's situation was comparable to that examined by the Court in the cases of *Poitrimol v. France* (Series A no. 277-A), *Lala and Pelladoah v. the Netherlands* (Series A no. 297-A and B) and *Van Geyseghem v. Belgium* (ECHR 1999-I), in which it had found that the defendant's failure to appear, in spite of his having been properly summoned, could not – even in the absence of an excuse – justify depriving him of his right

under Article 6(3)(c) of the Convention to be defended by counsel. There did not appear to be any reason to depart from that approach on the ground that the case concerned proceedings in an assize court, rather than a court dealing with less serious offences. The holding of a retrial following conviction *in absentia* only had an impact on the accused's right to a fair hearing if he was arrested. In such an eventuality, the authorities were under a positive obligation to afford him the right to have a full re-examination of his case in his presence. However, there could be no question of forcing an accused person to give himself up in order to secure the right to be tried in accordance with the requirements of Article 6. It remained to be determined whether, in the case under consideration, the fact that the applicant's defence lawyers had been prevented from submitting argument on his behalf at the hearing in the Paris Assize Court had breached his right to a fair trial. It followed from the wording of Article 630 of the Code of Criminal Procedure that the prohibition on any defence representation in the accused's absence was an absolute one and could not be disregarded by the Assize Court. The Court nonetheless found that the Assize Court, sitting without a jury, should have been entitled to authorise the applicant's lawyers to put forward his case at the

hearing, even in his absence, since the grounds of defence which they intended to raise were concerned with a point of law, namely an objection based on the principles of *res judicata* and *non bis in idem*. Indeed, the Government had not argued that, even if the Assize Court had permitted the applicant's lawyers to raise that objection, it would not have had jurisdiction to consider it. Lastly, the applicant's lawyers had not been permitted to represent their client at the Assize Court hearing concerning the civil claim either. Penalising the applicant's failure to attend the hearing by imposing such an absolute prohibition on any defence representation appeared manifestly disproportionate.

Conclusion: violation (unanimously).

Brennan v. United Kingdom

[Information Note No. 35- October 2001

Article 6(3)(c)

DEFENCE THROUGH LEGAL ASSISTANCE
Police supervision of detainee's consultation with lawyer: *violation.*]

Judgment 16. 10. 2001

(See below).

R.D. v. Poland

[Information Note No. 37- December 2001

Article 6(1) [criminal]

ACCESS TO COURT

Refusal to appoint legal aid lawyer for cassation appeal: *violation.*]

Judgment 18. 12. 2001

Facts: The applicant, who had been represented by court-appointed lawyers at his trial and appeal and had been exempted from payment of court fees and representation costs, lodged a notice of cassation appeal with the Court of Appeal. He also requested the court to appoint a lawyer, representation being obligatory in cassation proceedings. However, the Court of Appeal refused, considering that the applicant had not shown that he could not afford to pay for his own lawyer. The decision was served on the applicant eight working days before expiry of the time-limit for lodging a cassation appeal.

Law: Article 6(1) – The Court of Appeal had exempted the applicant from paying the costs of representation for his initial appeal, implying that it had sufficient basis for considering that it would constitute a disproportionate burden to

impose those costs on the applicant. The same court then refused further legal assistance for a cassation appeal, yet it did not appear that the applicant's financial situation had improved and it did not emerge from the court's decision on what concrete circumstances it had based its opinion. Consequently, there were reasonable grounds for considering that the applicant did not have sufficient means to pay for legal assistance. Since representation is compulsory, access to the cassation court was available only through a lawyer. It was therefore incumbent on the Court of Appeal to handle the applicant's request in a way that would enable him to prepare his cassation appeal properly. In fact, not only did the court refuse the request but the lack of sufficient time which it gave the applicant to find a lawyer after receiving the decision did not provide him with a reasonable opportunity of having his case brought to the cassation court in a concrete and effective way.

Conclusion : violation (unanimous).

Berlinski v. Poland

[Information Note No. 43- June 2002
Article 6(3)(c)
FREE LEGAL ASSISTANCE

Delay in appointment of legal aid lawyer:
violation.]

Judgment 20. 6. 2002

Facts: The applicants, two brothers, practise bodybuilding. The manager of an athletics club called the police after the applicant refused to leave. The applicants claim that they were beaten by several police officers, both on arrest and subsequently while lying handcuffed on the floor of the police van in which they were taken to the police station. An investigation into the alleged ill-treatment was discontinued due to lack of evidence, the prosecutor concluding that the police had been compelled to use force due to the applicants' resistance. Proceedings were also brought against the applicants. Their request for a free defence lawyer remained unanswered. A lawyer was appointed a year later due to the court's concern about their mental state. They were eventually convicted of resisting and assaulting police officers.

Law: Article 6(1) and (3)(c) – It was undisputed that the applicants lacked means to employ a lawyer for the criminal proceedings against them and that their request for an official lawyer to be appointed was ignored by the authorities, with the result that they had no defence

lawyer for more than a year. Given that a number of procedural acts were carried out during that period, there was no justification for this restriction, which deprived the applicants of the right to adequately defend themselves during the investigation and trial.

Conclusion: violation (unanimously).

P., C. and S. v. United Kingdom

[Information Note No. 44- July 2002

Article 6(1) [civil]

FAIR HEARING

Lack of legal representation in proceedings concerning child care: *violation.*]

Judgment 16. 7. 2002

Facts: The applicants are a married couple and their daughter, S., born in 1998. During P's pregnancy, the local authority was informed that her son from a previous marriage in the United States had been taken into protective custody there in 1994 as a suspected victim of induced illness abuse (Munchausen Syndrome by Proxy) and that she had subsequently been convicted in that connection. The local authority decided to place the unborn child on the Child Protection Register and undertake a full risk assess-

ment. As the parents were uncooperative, the local authority decided in April 1998 to take out an emergency protection order at birth. S. was born on 7 May 1998 by Caesarean section. The same day, the local authority applied for an emergency protection order and, as the hospital confirmed that it could not guarantee the child's safety, the authority decided to serve the order and removed the child. The parents were allowed supervised contact several times a week. The local authority applied for a care order and in November 1998 made an application for S. to be freed for adoption. During the hearing of the application for a care order in the High Court, P's legal representatives withdrew from the case. After granting an initial adjournment, the judge refused a further adjournment, considering that P. was able to conduct her own case (C. having withdrawn from the proceedings) and that delay was not in the child's interests. After the hearing, which lasted 20 days, the judge made a care order. One week later, the same judge heard the application for S. to be freed for adoption. He declined to defer the proceedings in order to allow P. and C. to obtain legal representation and, concluding that there was no realistic prospect of returning S. to their care, he issued an order freeing S. for adoption. S. was placed for adoption in September 1999

and an adoption order was made in March 2000. No provision was made for future direct contact between P. and C. and their child, such contact being at the discretion of the adoptive parents.

Law: Article 6(1) – There could be no doubt about the seriousness of the outcome of the proceedings for P. and C. P. was required as a parent to represent herself in proceedings of exceptional complexity and her alleged disposition to harm her own children, along with her personality traits, were at the heart of the case. In view of the complexity, the importance of what was at stake and the highly emotive nature of the subject matter, the principles of effective access to court and fairness required that she receive the assistance of a lawyer. Moreover, while P. and C. were aware that the application for freeing for adoption was likely to follow within a short time, this did not mean that they were in an adequate position to cope with the hearing on that matter, which also raised difficult points of law and emotive issues. The Court was not convinced that the importance of proceeding with expedition necessitated the draconian action of proceeding to a full and complex hearing within one week of the care order being made. It would have been possible for the judge to impose strict time limits and the

possibility of some months' delay in reaching a final conclusion was not so prejudicial to S.'s interests as to justify the brevity of the period between the two procedures. The procedures adopted not only gave the appearance of unfairness but prevented the applicants from putting forward their case in a proper and effective manner. The assistance of a lawyer during the hearings was thus indispensable.

Conclusion: violation (unanimously).

Ezeh and Connors v. United Kingdom

[Information note No. 44- July 2002
Article 6(3)(c)

CHARGED WITH A CRIMINAL OFFENCE
Refusal to allow convicted prisoners to be legally represented in prison disciplinary proceedings: *violation*.]

Judgment 15. 7. 2002

Facts: While serving lengthy prison sentences, the applicants were charged with offences under the Prison Rules. The first applicant was charged with threatening to kill a probation officer; the second applicant was charged with assaulting a prison officer. The applicants' requests to be

allowed legal representation for their respective adjudication hearings were refused by the Governor. They were both found guilty and were awarded 40 additional days' custody and seven additional days' custody respectively. They were subsequently refused leave to apply for judicial review.

Law: Article 6(3)(c) – With regard to the question of the applicability of Article 6 to the proceedings at issue, it was appropriate to apply the criteria laid down in the *Engel* case (Series A no. 22). Firstly, as far as the classification of the offences in domestic law was concerned, the parties did not dispute that the offences belonged to disciplinary law. Secondly, as far as the nature of the charges was concerned, while the offence of which the first applicant was convicted did not require certain elements of the equivalent criminal offence to be proven, it could not be excluded that the facts surrounding the charge against him could also lend themselves to criminal prosecution. As to the second applicant, it was undisputed that assault was also an offence under criminal law, although the charge against him involved a relatively trivial incident which might not have led to prosecution outside the prison context. Consequently, these factors, whilst not of themselves sufficient to lead to the conclusion that the

offences were “criminal”, did give them a certain colouring which did not entirely coincide with that of a purely disciplinary matter. It was therefore necessary to turn to the third criterion, namely the nature and severity of the penalty which the applicants risked incurring. That risk is determined by reference to the maximum potential penalty; while the actual penalty imposed is relevant, it cannot diminish the importance of what was initially at stake. As to the nature of the penalty, while the practice of granting remission created a legitimate expectation of release on a particular date, any “right” to release did not arise until the expiry of any additional days awarded. The legal basis for detention during those days therefore continued to be the original conviction and sentence. Nevertheless, the applicants were detained beyond the date on which they would otherwise have been released and the question arose whether the severity of the punishment was such as to render the guarantees of Article 6 applicable to the disciplinary proceedings. The maximum number of additional days was 42, and the applicants were awarded 40 and seven days respectively. Deprivations of liberty liable to be imposed as a punishment or deterrent, except those which by their nature, duration or manner of execution cannot be appreciably detrimental, belong to the criminal sphere and the presump-

tion was therefore that the charges against the applicants were criminal. As to the nature and manner of execution of the punishment, there was nothing to suggest that the further period of detention would be served other than in a prison and under the same prison regime. As to the duration, the Government's argument that the "appreciably detrimental" element had to be determined by reference to the length of the sentence already being served could not be accepted, since it would result in Article 6 applying to disciplinary proceedings against one prisoner but not to those against another charged with the same offence. It had not been demonstrated that the duration of the awards could be considered sufficiently unimportant or immaterial to displace the presumed criminal nature of the charges. The deprivations of liberty had therefore to be regarded as appreciably detrimental and the presumption that the charges were criminal had not been rebutted. Article 6 was consequently applicable. It was undisputed that both applicants' requests for legal representation were refused. Moreover, domestic case-law excluded any right to such representation for adjudications. The applicants were thus denied the right to be legally represented in the proceedings, in violation of Article 6(3)(c). It was unnecessary to consider whether the interests of justice required

that they be granted free legal assistance.

Conclusion: violation (unanimously).

Bertuzzi v. France¹

[Information Note No. 50- February 2003
(provisional version)]

Article 6(1)

ACCES A UN TRIBUNAL /

ACCESS TO COURT

Requérant ayant obtenu l'aide juridictionnelle pour introduire une procédure contre un avocat, ne trouvant pas à se faire représenter : *violation*.

Inability of applicant granted legal aid to bring an action against a lawyer to find someone to represent him: *violation*.]

Arrêt/Judgment 13. 2. 2003

En fait: En juin 1995, le requérant obtint l'aide juridictionnelle totale pour introduire une procédure en dommages-intérêts contre un avocat. Les trois avocats désignés successivement par le bâtonnier de l'ordre des avocats demandèrent à être relevés de leur mandat en aide juridictionnelle, en raison de leurs liens personnels avec l'avocat attaqué. En novembre 1995, le requérant sollicita le président du bureau d'aide juridictionnelle et le

bâtonnier afin qu'un autre avocat lui soit désigné. En mars 1997, le requérant obtint une seule réponse, celle du bâtonnier, l'informant que la décision lui attribuant l'aide juridictionnelle en juin 1995 était devenue caduque et qu'il lui appartenait donc de renouveler sa demande s'il souhaitait poursuivre la procédure.

En droit: Article 6(1) – Le bureau d'aide juridictionnelle avait alloué l'aide judiciaire au requérant alors même que la représentation par avocat n'était pas obligatoire et a donc estimé que l'assistance d'un professionnel était d'une importance primordiale dans cette procédure où le requérant désirait attacher un avocat. Le requérant a vu trois avocats se désister successivement et n'a pas obtenu qu'un conseil soit nommé et le représente effectivement. Averties du désistement de ces avocats, les autorités compétentes, le bâtonnier ou son délégué, auraient du pourvoir à leur remplacement afin que le requérant bénéficie d'une assistance effective. On ne saurait reprocher au requérant, compte tenu de l'attitude du bâtonnier et des avocats du barreau local, de n'avoir pas présenté une nouvelle demande après avoir été averti de la caducité de l'octroi de l'aide juridictionnelle. En bref, la possibilité de défendre

sa cause seul, dans une procédure l'opposant à un professionnel du droit, n'offrait pas au requérant un droit d'accès au tribunal dans des conditions lui permettant, de manière effective, de bénéficier de l'égalité des armes inhérente à la notion de procès équitable.

Conclusion : violation (unanimité).

· *No Violation*

Brennan v. United Kingdom

[Information Note No. 35- October 2001

Article 6(3)(c)

DEFENCE THROUGH LEGAL ASSISTANCE
Deferral of access to lawyer: *no violation.*]

Judgment 16. 10. 2001

Facts: The applicant was arrested in Northern Ireland in the early morning of 21 October 1990 under counter-terrorism legislation. Access to a lawyer was deferred for 24 hours. The applicant's lawyer, who was informed of the deferral, did not attend until 12.10 p.m. on 23 October. In the meantime, but after expiry of the deferral of access to a lawyer, the applicant had made a number of admissions. The first interview

with the lawyer took place within the sight and hearing of a police officer. The lawyer was not allowed to attend any of the police interviews, which were not recorded. At his trial, the applicant challenged the admissibility of the statements which he had made to the police, alleging that they had been obtained by coercion. In the course of a *voir dire* the applicant gave a detailed account of the alleged ill-treatment, which was denied by the police. The judge rejected the allegations and convicted the applicant of various offences, including murder. The disputed admissions were the only evidence. The applicant's appeal was rejected.

Law: Article 6(1) and (3)(c) (access to lawyer) – After the expiry of the initial 24-hour deferral the applicant was no longer being denied access to a lawyer and the fact that his lawyer only arrived a day later was not attributable to any measure imposed by the authorities. Moreover, the applicant had not made any admissions during the period when access to a lawyer was being denied. In the circumstances, the denial of access could not be regarded as infringing his rights.

Conclusion: no violation (unanimously).
Article 6(1) and (3)(c) (police interviews)

– In assessing the fairness of admitting the applicant's confessions in evidence, it was necessary to have regard to the safeguards which existed. Firstly, the circumstances in which the confessions were obtained were subjected to strict scrutiny in the *voir dire*. Secondly, the applicant was represented by experienced counsel at the trial and on appeal. Thirdly, the trial judge had heard the applicant and the police officers and was satisfied as to the reliability of the evidence and the fairness of admitting it. The applicant did not complain that there was any arbitrariness on the part of the courts or that there was inadequate inquiry into the circumstances in which the confessions were obtained. Moreover, while both the recording of interviews and the attendance of a lawyer provide safeguards against police misconduct, they are not indispensable pre-conditions of fairness. The adversarial procedure conducted before the trial court was capable of bringing to light any oppressive conduct by the police and in the circumstances the lack of additional safeguards had not been shown to have rendered the applicant's trial unfair.

Conclusion: no violation (unanimously).
Article 6(1) and (3)(c) (police supervi-

sion of interviews) – An accused’s right to communicate with his lawyer out of the hearing of third persons is part of the basic requirements of a fair trial and follows from Article 6(3)(c); if a lawyer were unable to confer with his client and receive confidential instructions without surveillance, his assistance would lose much of its usefulness. Indeed, the importance of such confidentiality is illustrated by various international provisions. The right of access to a lawyer may be subject to restrictions for good cause and the question is whether the restriction has, in the light of the proceedings as a whole, deprived the accused of a fair trial. In that respect, while an applicant need not prove that the restriction had a prejudicial effect on the course of the trial, he must be able to claim to have been directly affected by the restriction in the exercise of his defence rights. In the present case, the restriction served the purpose of preventing information being passed on to suspects still at large, but there was no allegation that the lawyer was in fact likely to collaborate in such an attempt. At most, it appeared that the presence of the police officer would have had some effect in inhibiting any improper communication of information. While there was no reason to doubt the good faith of the police, there was no compelling rea-

son for the imposition of the restriction. As to the proportionality of the restriction, although the police officer was present at only one interview, it was the first occasion on which the applicant had been able to seek advice from his lawyer and the presence of the police officer would inevitably have prevented the applicant from speaking frankly about matters of potential significance to the case against him. It was immaterial that it had not been shown that there were particular matters which the applicant and his lawyer were stopped from discussing. It was indisputable that the applicant was in need of legal advice at the time and that his responses in subsequent interviews, which were to take place in the absence of his lawyer, would continue to be of potential relevance to his trial and could irretrievably prejudice his defence. The presence of the police officer within hearing therefore infringed the applicant’s right to an effective exercise of his defence rights.

Conclusion: violation (unanimously).

Brennan v. United Kingdom

[Information Note No. 35- October 2001
Article 6(3) (c)]

DEFENCE THROUGH LEGAL ASSISTANCE
Use in evidence of confessions made to

police in absence of lawyer: *no violation*.]

Judgment 16. 10. 2001
(See above).

Del Sol v. France

[Information Note No. 39- February
2002

Article 6(1) [civil]

ACCESS TO COURT

Refusal to grant legal aid in cassation proceedings due to lack of serious grounds for cassation appeal: *no violation*.]

Judgment 26. 2. 2002

Facts: Mr and Mrs Del Sol were granted a divorce by the *tribunal de grande instance*. The applicant, Mrs Del Sol, appealed against the divorce decree but the court of appeal dismissed her appeal and upheld the decree. She decided to appeal on points of law against the Court of Appeal's judgment and made an application to the Court of Cassation's legal aid office for legal aid. While acknowledging that the applicant's means were insufficient, the legal aid office rejected her application, stating that there was no serious ground for an appeal on points of law against the impugned judgment. She then appealed against that decision. The Presi-

dent of the Court of Cassation dismissed her appeal, holding that the legal aid office's assessment of the facts of the case was not subject to review and that there did not appear to be any serious grounds for an appeal on points of law.

Law: Article 6(1) – The ground on which the application for legal aid had been rejected was expressly laid down in the applicable legislation and was undoubtedly inspired by the legitimate concern that public money should only be used for legal-aid purposes for appellants to the Court of Cassation whose appeals had reasonable prospects of success. Admittedly, in the case of *Aerts v. Belgium*, which had concerned the refusal of an application for legal aid on the ground that the appeal had not at that time appeared to be well-founded, the Court had found a violation of Article 6(1). However, it was important to give practical consideration to the quality of a State's legal-aid system. The system established by the French legislature offered individuals substantive guarantees – both through the composition of the legal aid office and by the fact that appeals could be lodged with the President of the Court of Cassation – to protect them from arbitrariness. Furthermore, the applicant had been able to have her case heard at first instance and on appeal. Consequently, the refusal to grant her legal

aid for an appeal to the Court of Cassation had not impaired the very essence of her right of access to a court.

Conclusion: no violation (5 votes to 2).

Essaadi v. France

[Information Note No.39- February 2002
Article 691) [civil]

ACCESS TO COURT

Refusal to grant legal aid in cassation proceedings due to lack of serious grounds for cassation appeal: *no violation.*]

Judgment 26. 2. 2002

This case raises the same legal issue as the *Del Sol* case, above.

Morris v. United Kingdom

[Information Note No. 39- February 2002

Article 6(3)(c)

DEFENCE THROUGH LEGAL ASSISTANCE

Adequacy of representation by army officer at court martial: *no violation*]

Judgment 26. 2. 2002

Facts: The applicant, a soldier, was arrested in 1996 after going absent without leave.

He was remanded for trial and his Commanding Officer appointed an army captain with no legal training as the “defending officer”. The applicant applied for legal aid to enable him to be represented by a solicitor and was offered legal aid subject to a down-payment of £240. His solicitor requested that this condition be reconsidered but before a reply had been received the applicant declined the offer of legal aid and signed a document in which he stated that he wished to be represented only by the defending officer. The court martial took place in May 1997. The court was composed of a President (a Permanent President of Courts Martial, appointed in January 1997 and due to remain until his retirement in September 2001), two army captains and a legally qualified civilian judge advocate. The applicant pleaded guilty and was sentenced to nine months’ detention and dismissal from the army. He then instructed a solicitor, who lodged a petition with the “reviewing authority”. The petition was refused and a single judge of the Court Martial Appeal Court refused leave to appeal.

Law: Article 6(1) – This provision was clearly applicable, since the proceedings involved a determination of sentence following a plea of guilty; although the applicant was not charged with an ordinary criminal offence, in the light of the custo-

dial sentence he received there was clearly a determination of a criminal charge. The concepts of independence and impartiality being closely linked, it was appropriate to consider them together. A military court can, in principle, constitute an independent and impartial tribunal, but only as long as sufficient safeguards are in place. In previous cases concerning courts martial in the United Kingdom concerns had centred around the multiple roles played by the “convening officer” and the changes introduced by the Armed Forces Act 1996 had gone a long way to meeting those concerns, the roles played by the “convening officer” and the “confirming officer” having been split, so that a separation now existed between prosecution and adjudication functions at a court martial. Moreover, advisory functions had also been reallocated and there were sufficient guarantees of independence in that respect. Consequently, the applicant’s general complaint about the relationship between senior army command and those involved in the court martial proceedings did not in itself give rise to a violation of Article 6. However, the question remained whether the members of the court martial collectively constituted an independent and impartial tribunal. As to the manner of their appointment, the fact that the head of the office responsible for the selection of the officers who sat on the court martial was appoint-

ed by the Defence Council did not in itself give rise to doubt as to the independence of the court, because he was in any event adequately separated from those fulfilling prosecution and adjudication roles. While he appeared to have had no fixed term of appointment and there were no clear guarantees against interference by senior army command, there was no evidence of such interference in the present case. Consequently, the manner in which the court martial was appointed did not give rise to any lack of independence. With regard to the terms of office of the members and the existence of safeguards against outside pressures, it was necessary to examine the positions of the President and the two army officers. As far as the President was concerned, the absence of a formal recognition of the irremovability of a judge does not in itself imply a lack of independence, provided it is recognised in fact and other guarantees are present. In the present case, the *de facto* security of tenure, together with the fact that the President had no apparent concerns as to future prospects in the army and was no longer subject to army reports, as well as his relative separation from the command structure, meant that he was in fact a significant guarantee of independence in an otherwise *ad hoc* tribunal. In contrast, the two army officers were not appointed for a fixed period but rather on an *ad hoc* basis, which made the

need for safeguards against outside pressure all the more important. The presence of a legally qualified civilian judge advocate and of the Permanent President provided such guarantees, as did the rules on eligibility and the oath taken by members, but they were insufficient to exclude the risk of pressure being brought to bear on the two relatively junior officers, who had no legal training and remained subject to army discipline and reports. This was of particular importance in a case directly involving a breach of military discipline. Finally, the fact that the review was conducted by the “reviewing authority” was contrary to the principle that the binding decision of a “tribunal” should not be open to review by a non-judicial body. These fundamental flaws were not corrected by the appeal to the Court Martial Appeal Court, which refused leave to appeal without a hearing. In conclusion, the applicant’s misgivings about the independence of the court martial and its status as a “tribunal” were objectively justified.

Conclusion. violation (unanimously).

Article 6(1) and (3)(c) – The terms of the legal aid offer were not arbitrary or unreasonable, bearing in mind the applicant’s income, but he refused the offer before receiving a reply to the request for reconsideration of the condition

imposed and indeed stated that he wished to be represented only by the defending officer. In these circumstances, there was no merit in his complaints about the independence of the defending officer or his handling of the case.

Conclusion. no violation (unanimously).

McVicar v. United Kingdom

[Information Note No. 42- May 2002
Article 6(1) [civil]

FAIR HEARING

Unavailability of legal aid for defendant
in defamation action: *no violation.*]

Judgment 7. 5. 2002

Facts: The applicant, a journalist and broadcaster, published a magazine article in which he suggested that a well-known athlete used banned performance-enhancing drugs. The athlete brought an action for defamation in the High Court against the applicant, the magazine’s editor and the publishing company. While the editor and the publishing company were represented by a lawyer specialising in defamation and media litigation, the applicant represented himself during the greater part

of the proceedings because he could not afford to pay legal fees and legal aid was not available for defamation actions. An order was made that the parties should exchange statements of witnesses of fact within a specified time-limit and could each call a number of expert witnesses, provided the substance of the experts' evidence was disclosed by a specified date. The applicant served one document purporting to be a statement of the nature of evidence to be adduced by another athlete and another document which he mistakenly believed to be acceptable in place of an expert's report. By the time of the trial, the applicant was the sole defendant, the editor having died and the publishing company being insolvent. The applicant instructed the lawyer who had acted for the other defendants. The lawyer then endeavoured to obtain full statements from the two witnesses. A statement obtained from the expert witness was served one hour before the commencement of the trial. However, the judge refused to admit either that evidence or the evidence of the other athlete and the applicant's appeal against those rulings was dismissed by the Court of Appeal. The applicant was not represented at the main trial in the High Court, due to lack of funds. The jury found that the article bore the meaning

that the athlete in question was "a cheat who ... used banned performance-enhancing drugs" and that the applicant had not proved that this was substantially true. Although the plaintiff had not sought damages, the applicant was ordered to pay the costs of the action and an injunction was issued, prohibiting him from repeating his allegations.

Law: Article 6(1) – The question whether or not this provision requires the provision of legal representation will depend on the specific circumstances of the case and, in particular, on whether the individual would be able to present his case properly and satisfactorily without the assistance of a lawyer. In the present case, the fact that the proceedings were held in the High Court before a judge and jury was not conclusive. Similarly, the fact that the burden was on the applicant to prove the truth of his allegations could not automatically require the provision of legal aid: the applicant was a well-educated and experienced journalist capable of formulating cogent argument. Moreover, the rules pursuant to which evidence was excluded were clear and unambiguous, as was the order setting out the timetable for the exchange of statements and expert reports. Thus, the applicant should have understood

what was expected of him in that connection. As far as the law of defamation was concerned, it was not sufficiently complex to require a person in the applicant's position to have legal assistance, the outcome of the action turning on whether he could show on the balance of probabilities that the allegations were substantially true. Furthermore, the applicant was represented in the period prior to commencement of the trial by the lawyer who had acted for the co-defendants. As to the exclusion of evidence, it was apparent that the applicant's failure to comply with the procedural requirements was not the only factor which weighed in the judges' minds when deciding to exercise their discretion to exclude the evidence. Finally, while the trial must have taken a greater toll on the applicant than it would have on an experienced lawyer, his emotional involvement was not incompatible with the degree of objectivity required by advocacy in court, having regard to his background and experience. In all the circumstances, the applicant was not prevented, by reason of his ineligibility for legal aid, from presenting his defence effectively or denied a fair trial.

Conclusion: no violation (unanimously).

2. DECISIONS

- *Communicated*

Dessalles v. France

[Information Note No. 26- January 2001
Article 6(3)(c)]

FREE LEGAL ASSISTANCE

Rejection of cassation appeal while examination of legal aid request still pending: *communicated*.]

The applicant's pathology laboratory was closed down by court order. The applicant appealed to the Court of Cassation on points of law against that decision and applied for legal aid. The Court of Cassation dismissed his appeal before the Legal Aid Office had dealt with his application. As the Court of Cassation had already given judgment, the Legal Aid Office dismissed the application on the ground that it had become otiose.

Communicated under Article 6(3)(c).

Stoidis v. Greece

[Information Note No. 28- March 2001
Article 6(1)]

ACCESS TO COURT

Complaint declared inadmissible on

the ground that the appellant was not represented by a lawyer despite the fact that the court had not replied to his request for a court-appointed lawyer: *communicated.*]

The applicant made an application to the authorities for a change of surname. As his application was not granted, he applied to the Legal Council of State for an order setting aside the refusal. He signed and filed his application himself as he said that he had been unable to find a lawyer willing to represent him. He then requested the President of the Legal Council State to assign him a lawyer to represent him at the hearing, but received no reply to his request. The Legal Council State declared the application inadmissible as the applicant had been unrepresented at the hearing.

Communicated under Article 6(1).

Boer Ausburger v. Spain

[Information Note No. 30- May 2001
Article 6(3)(c)

FREE LEGAL ASSISTANCE

Amparo appeal declared inadmissible because not lodged by a lawyer, despite two requests by the applicant for a lawyer to be appointed by the court on

the ground of his lack of means: *communicated.*]

The applicant was prosecuted for drug trafficking and convicted at first instance. He was sentenced to nine years' imprisonment, had his voting rights suspended and was ordered to pay a fine of 100 million pesetas. He had been represented by an officially assigned lawyer. On appeal, he complained *inter alia* that his request for his wife and parents to give evidence at the trial had been rejected and that the evidence had been assessed incorrectly. His appeal was dismissed. The Supreme Court found that he had not lodged an appeal, within the time allowed by domestic law, against the order rejecting his request to adduce certain pieces of evidence, and further held that the evidence was irrelevant as it was not directly connected to the trial. It added that the judgment had been based on sufficient, clear and reasonable grounds. With a view to lodging an *amparo* appeal, the applicant requested the Constitutional Court to assign him counsel and a solicitor. In January 2000 the Constitutional Court decided that the appeal should be lodged by the barrister and solicitor who had acted on behalf of the applicant in the trial court, and gave him ten days to notify it of their names.

In February 2000 the applicant informed the Constitutional Court that, owing to his insufficient financial resources, he had not been assisted by counsel of his choosing in the trial court. He therefore reiterated his request for the court to assign him counsel. In March 2000 the Constitutional Court found that the applicant had not satisfied the requirements set out in its decision of January 2000 and declared the *amparo* appeal inadmissible.

Boscolo v. Italy

[Information Note No. 36 - November 2001

Article 6(1) [criminal]

ACCESS TO COURT

Refusal of court-appointed lawyers to take up applicant's defence, leaving him without the necessary representation to introduce a damages action: *communicated*.]

The applicant requested legal aid and the appointment of a lawyer to lodge an action for damages against the lawyers and notaries who had acted on the sale of a house, of which he was co-owner, while he had been detained in a psychiatric hospital. The five lawyers officially assigned, in turn, to represent him each requested to be discharged from their

duties on grounds of incompatibility. Consequently, the applicant was unable to lodge a writ because representation by a lawyer was compulsory.

Communicated under Article 6(1).

Renda Martins v. Portugal

[Information Note No. 38 - January 2002
Article 6(1) [civil]

ACCESS TO COURT

Suspension of civil proceedings due to absence of legal representation, despite free legal assistance having been granted: *communicated*.]

In January 1996 the applicant, who had been injured in an industrial accident, applied to the civil chambers of the Lisbon Court for legal aid to have a lawyer assigned to lodge a claim in damages against his former employer. In December 1996 the court granted the applicant legal aid and requested the Bar Council to assign him a lawyer. Between March 1997 and January 1999 four lawyers were assigned in succession, all of whom asked to be discharged from their duties. In February 1999 the applicant, represented by a fifth officially assigned lawyer, lodged the civil action in question. The same

month the fifth lawyer asked to be discharged from his duties. In January 2000, when the seventh lawyer had asked to be discharged from his duties, the President of the Bar Council informed the court that, in view of the number of lawyers previously assigned, owing to the applicant's difficult personality, he did not intend to appoint a further lawyer to represent him. At the end of January 2000 the court invited the applicant to instruct a lawyer and, in November 2000, seeing that the applicant had not done so, decided to adjourn the proceedings.

Communicated under Article 6(1).

Steel and Morris v. United Kingdom

[Information Note No. 46 - October 2002
Article 6 (1) [civil]

FAIR HEARING

Lack of legal aid to defend lengthy and complicated libel action: *communicated*.]

Decision 22. 10. 2002

Facts: The applicants were sued for defamation by the MacDonalds corporation for their part in the publication of a leaflet by an organisation called Lon-

don Greenpeace in 1986 that was extremely critical of many aspects of its business (food quality, employment relations, advertising policy, impact on environment and economy in developing countries, etc.). Between 1989 and 1991, MacDonalds hired private investigators to discover who was responsible for the publication. Libel proceedings were instituted against the applicants in 1990. The applicants sought legal aid, but their request was rejected, legal aid not being available in the United Kingdom for defamation cases. Some funds were raised for the applicants to conduct their defence. In addition, they benefited from *pro bono* legal advice on a number of occasions. Before the trial began, in 1994, MacDonalds issued a press release and two further documents in which it alleged that the applicants had published a leaflet containing statements that they knew to be untrue. The applicants counter-claimed for damages for libel. The trial was the longest (civil or criminal) in English legal history, with 313 days in court, 20,000 pages of transcript, 40,000 pages of documentary evidence and 130 witnesses heard. The applicants claim that their lack of funds severely hampered their defence in many ways. In addition to having to represent themselves most of the time, they were also at a great disadvantage

regarding such important matters as note-taking, photocopying, finding expert witnesses and paying their costs, etc. The trial judge found against the applicants on most grounds and awarded a total of GBP 60,000 to MacDonalds. He further ruled that although MacDonalds had libelled the applicants, this was protected by qualified privilege. MacDonalds did not seek costs. The applicants appealed to the Court of Appeal, which allowed the appeal on several points and reduced the award of damages. The applicants sought to appeal further, but leave to do so was refused by both the Court of Appeal and the House of Lords.

Communicated under Article 6(1) and Article 10.

Leuschner v. Germany

[Information Note No. 47 - November 2002

Article 6(1) [civil]

ACCESS TO COURT

Refusal of legal aid: *communicated*.]

In 1990 the applicant sought restitution of his land in the GDR, which had belonged to him before it was acquired in 1987 by a couple from the GDR. In

June 1996, the Office for the settlement of unresolved property matters in the town of Magdeburg decided to reject the request for restitution of the land but to award the applicant compensation for the loss of the land. Restitution of the land was not possible because the current owners had acquired it in good faith, within the meaning of the applicable law. In July 1996, the applicant submitted a claim for compensation for the loss of his property. The proposed compensation presented by the Office in 1999 envisaged compensation of DEM 67,000 (EUR 34,256.56). In June 1999, the applicant applied to Magdeburg Administrative Court for legal aid to bring an action for failure to act against the Office. He enclosed with his application a draft action in which he maintained that the duration of the administrative procedure, nine years, was not justified, even though the offices for the settlement of unresolved property matters had received a large number of applications for restitution and compensation. In August 1999, the Administrative Court dismissed the applicant's application. It stated that it had been necessary to suspend the procedure owing to the large number of claims for restitution pending before the Office. The Office had first of all to determine applications in principle

before proceeding, in a second procedure which required full investigations, to determine the amount of compensation for each applicant. The court further stated that if it granted the applicant's application it would have to grant the applications of all the other persons in the same situation who had submitted requests to the administrative authorities on the same subject. That would mean that the excessive workload of the offices for the settlement of unresolved property matters would be transferred to the administrative courts, which would be of no help to anyone. The fact that the applicant had made application to the Magdeburg Office in 1990 and that he had reached a certain age could not be taken into account, since many other applicants were in the same position. Following a circular from the Federal Minister of Finance in August 1999, the proposed decision on compensation was revised. In November 1999, the Federal Constitutional Court decided not to admit the applicant's action. In December 1999, the decision of the Administrative Court was upheld.

Communicated under Articles 6(1) (access to a tribunal) and 1 of Protocol No 1.

- *Admissible*

Bertuzzi v. France

[Information Note No. 41 - April 2002

Article 6(1) [civil]

ACCESS TO COURT

Applicant granted legal aid to bring an action against a lawyer unable to find legal representation: *admissible*]

Decision 16. 4. 2002

In June 1995, the applicant was granted full legal aid to bring an action for damages against a lawyer. The three lawyers appointed successively by the chairman of the bar asked to be relieved of their legal aid duties on account of their personal ties with the lawyer in question. Following these withdrawals, in November 1995, the applicant submitted a request to the legal aid office for a new counsel, and this was passed on the chairman of the bar. In March 1997, the applicant received a reply from the chairman of the bar informing him that the decision to award him legal aid in June 1995 had lapsed and that he should therefore renew his request if he wished to continue proceedings against the lawyer concerned. The applicant had meanwhile requested legal aid in another case. This was refused on the grounds that he had

not produced the necessary documentation concerning his income. This decision was upheld on appeal.

Admissible under Article 6(1) regarding the decision to grant the applicant full legal aid: failure to exhaust domestic legal remedies - the Government had not supplied information to establish the effectiveness of the available remedies to secure damages on which it relied: an action for damages based on the chairman of the bar's civil liability and an action for negligence by the legal aid office (based on Article L 781-1 of the Judicial Code). The latter Code set very strict admissibility conditions (evidence of "gross negligence" or "refusal to decide a case") and the only domestic decision cited by the Government did not establish that, at least by the date that the application had been lodged, the French courts had interpreted the notions of "gross negligence" or "refusal to decide a case" sufficiently broadly to include, for example, the conduct of a chairman of the bar in a legal aid case. Besides, a disciplinary appeal against the chairman of the bar to the Prosecutor General at the Court of Appeal could not be deemed an available remedy since the applicant, who had not been assisted by a lawyer, could not have been expected to understand all the arcana of judicial or

disciplinary remedies against a chairman of the bar.

Inadmissible under Articles 6(1) and (3)(c) concerning the refusal to grant the applicant legal aid because he had failed to produce the necessary documentation concerning his income. The refusal to grant legal aid had been the consequence of the applicant's own failure to act. Moreover, the applicant had been fully familiar with the legal aid system since he had already been granted it in 1995 in connection with another case: manifestly ill-founded.

- *Inadmissible*

Alvarez Sanchez v. Spain

[Information Note No. 35 - October 2001

Article 6(10 [criminal]

DEFENCE THROUGH LEGAL ASSISTANCE /Failure of court-appointed lawyer to inform accused of notification of the judgment convicting him and of the time limit for lodging an *amparo* appeal: *inadmissible*]

Decision 23. 10. 2001

The applicant was found guilty of mur-

der, with the aggravating factor of having committed previous similar offences, and was sentenced to fifteen years' imprisonment. Represented by a barrister (*abogado*) and a solicitor (*procurador*) who were officially assigned, the applicant appealed on points of law to the Supreme Court. That court partly quashed the judgment appealed against by reducing the sentence to twelve years and one day. The judgment was served on the applicant's legal representative – the officially assigned solicitor – who did not, however, inform the applicant of the Supreme Court's judgment and did not lodge an *amparo* appeal with the Constitutional Court within the statutory time-period. The applicant's conviction was declared final by the first-instance court. The applicant subsequently found out from his fellow inmates that the Supreme Court had given judgment. He wrote to the Constitutional Court, stating that the Supreme Court's judgment had not been served on him and that he wished to appeal, and asked for his officially assigned barrister to represent him in the appeal proceedings. Very shortly afterwards he submitted a memorial containing his appeal, which he had written himself. He received a copy of the judgment appealed against; subsequently, the two representatives assigned at the Constitutional Court's request formally lodged an

amparo appeal, more than a year and a half after the judgment in question had been served on the applicant's legal representative. The appeal was declared inadmissible as being out of time: the Constitutional Court held that the twenty days allowed by law for lodging an *amparo* appeal had begun to run on the date on which the impugned judgment had been served on the applicant's legal representative. The applicant alleged that he had had no effective access to the remedy of an *amparo* appeal to the Constitutional Court, on account of shortcomings on the part of his legal representatives.

Inadmissible under Article 6(1) and (3)(c): Holding a State responsible for the inadequate manner in which an officially assigned solicitor, whose task was to represent rather than to defend an accused, dealt with a case would suggest that the State was at the same time empowered to supervise and regulate the solicitor's conduct if necessary. Such supervision would be incompatible with the independence of the solicitors' professional body *vis-à-vis* the State. In addition, problems might be created as regards equality of arms in judicial proceedings if a court were to point an officially assigned solicitor in a particular direction by suggesting that he lodge an *amparo* appeal with the Constitutional Court. In the

instant case the applicant had been assisted throughout the proceedings by officially assigned representatives who had obtained a reduction in his sentence on appeal. The purpose of the appeal to the Constitutional Court on which his complaints were based had been to secure a review not of the merits of his conviction or of the length of the sentence imposed on him but of whether his fundamental rights had been respected. The point in issue, therefore, was not the lack of effectiveness of the applicant's defence in a court with jurisdiction to try the merits of the case, but his access to a court with the specific function of protecting fundamental rights. The applicant's complaints that his officially assigned solicitor had, through negligence, infringed his right to effective legal assistance did not directly and immediately engage the State's responsibility. Having regard to the foregoing and to the differences between the instant case and the Artico, Daud and Kamasinski cases in terms of the seriousness of the problems raised by the shortcomings of officially assigned legal representatives and the question whether the effective enjoyment of the applicant's defence rights had been secured, the Court concluded that the complaints were manifestly ill-founded.

Correia de Matos v. Portugal

[Information Note No. 36 - November 2001

Article 6(3)(c)

DEFEND IN PERSON

Refusal to allow a lawyer to defend himself in criminal proceedings: *inadmissible*]

Decision 15. 11. 2001

The applicant, who is a lawyer and auditor, was struck off the Bar Council roll by a decision of 1993, published in 2000, on the ground that the exercise of the one profession was incompatible with the exercise of the other. In 1996 the applicant was committed for trial at the Ponte de Lima Court for insulting a judge and was officially assigned a lawyer despite having expressed the wish to defend himself. His appeals against the committal order were dismissed on the ground that they had not been lodged by a lawyer and the applicant could not defend himself. He then applied to the Constitutional Court, complaining of his inability to defend himself. On account of having been struck off the Bar Councilroll, he was requested to instruct a lawyer in accordance with the Supreme Court Act. His submission that the Act was incompatible with the Constitution was rejected. In the meantime, the Ponte de Lima

Court had set his case down for trial. On the first day of trial the applicant sought leave to defend himself, but his request was allegedly refused by the court. A lawyer was therefore officially assigned to represent him. The court found him guilty of insulting a judge and sentenced him to 170 day-fines and ordered to pay 600,000 Portuguese escudos in damages. His appeals were dismissed. The sentence, which had not been enforced, was extinguished pursuant to an amnesty law, but enforcement proceedings were instituted against him on the initiative of the prosecution for payment of the amount due in damages.

Preliminary objections: (a) (victim): The amnesty from which the applicant had benefited had not remedied all the unfavourable consequences for him resulting from the proceedings since he still had to pay damages: objection dismissed. (b) (non-exhaustion): The question of the possible non-exhaustion of domestic remedies therefore overlapped with the question raised by the complaint, which was whether the applicant could claim to be able to defend himself in the criminal proceedings: separate examination therefore not necessary.

Inadmissible under Article 6(1) and (3)(c): The decision whether to allow an accused to defend himself or whether to assign

him a lawyer fell within the margin of appreciation of the Contracting States, which were better placed than the Court to choose the means appropriate to enable their legal system to guarantee the rights of the defence, the main issue being that the interested party be in a position to present his defence in an appropriate manner and one in conformity with the requirements of a fair trial. In the case in question the grounds for requiring the applicant to be represented by a lawyer were sufficient and relevant. It was, among other things, a measure which was in the accused's interests and aimed at securing him an effective defence, so that the domestic courts were justified in considering that the interests of justice required the compulsory assignment of a lawyer. The fact that the accused was himself also a lawyer did not call that finding into question: the relevant courts were entitled to consider, within the scope of their margin of appreciation, that the interests of justice required the appointment of a representative for a lawyer charged with a criminal offence and who might therefore, on that very ground, not be in a position to make an accurate assessment of the interests at stake and, accordingly, prepare effectively his own defence. In the case in question the applicant had had a proper defence: he had not alleged having been

unable to present his own version of the facts to the courts and had been represented by an officially assigned lawyer at trial: manifestly ill-founded. [Confirmation of the precedents established by the Commission relating to compulsory representation by a lawyer and specific points for the case where the “accused” is himself a lawyer.]

Renda Martins v. Portugal

[Information Note No. 38 - January 2002

Article 6(1) [civil]

ACCESS TO COURT

Suspension of proceedings due to party's failure to appoint a lawyer after being granted legal aid: *inadmissible*

Decision 10. 1. 2002

Following an accident at work the applicant made an application for legal aid and requested that he be assigned a lawyer to bring an action in damages against his former employer. After being granted legal aid he asked the Bar Council to assign a lawyer to represent him. Over a period of almost two years four lawyers were assigned to him in turn but each asked to be released from acting. Eventually, the fifth lawyer assigned to represent him issued a civil action, but then

declined to act further. Subsequently, after a seventh lawyer had asked to be released from acting for the applicant the President of the Bar Council informed the judge that the reasons given by the assigned lawyers for seeking a release had “primarily” been the applicant's failure to cooperate and his obvious mental problems. One of the lawyers had complained of insulting and physically aggressive behaviour. The president said in conclusion that he would not assign any other lawyer to represent the applicant. The judge then invited the applicant to instruct a lawyer of his choice. Subsequently, noting that the applicant had not done so, he ordered a stay of the proceedings.

Inadmissible under Article 6(1): the State had afforded the applicant the right to assistance by a lawyer through the intermediary of the Bar Council. The decision to stay the proceedings issued by the applicant had been taken “primarily” because the applicant had been uncooperative and had not managed to find a lawyer prepared to represent him in the proceedings. Therefore, that decision had not been arbitrary. Above all, the applicant was still in a position to pursue the proceedings if he found a lawyer ready to represent him and had been granted legal aid by the State for that purpose. Further,

the applicant could not complain of the length of the proceedings, the main reason for the delays being his failure to cooperate with the lawyers who had been

assigned to him under the legal-aid scheme from which he had benefited: manifestly ill-founded.

NOTES

* The summary was prepared by INTERIGHTS, London. INTERIGHTS CEE Programme, March 2003 European Court of Human Rights Article 6 cases on legal aid/ January 2001- February 2003

¹ Available only in French

Strasbourg, 31 May 2002

[legal aid action plan E]



CDCJ(2002)21

Addendum III

EUROPEAN COMMITTEE ON LEGAL CO-OPERATION (CDCJ)

ACTION PLAN ON LEGAL ASSISTANCE SYSTEMS¹

1. GENERAL CONSIDERATIONS

1. The proper functioning of the judicial system and the effective access to justice for all has been of concern to the Council of Europe and its member States for some time.
2. Throughout the years and within the framework of the intergovernmental activities of the Council of Europe in the legal field, these questions have been dealt with in a variety of ways.
3. Many instruments adopted by the Committee of Ministers reflect the aim of contributing to a fairer and more efficient justice. Some of the measures recommended in these instruments concern the setting up of efficient legal assistance systems.

Other measures are aimed at reducing the excessive workload of courts, for example by encouraging the friendly settlement of disputes, either outside the judicial system or before or during court proceedings. For cases in which litigation is unavoidable, measures need to be taken to simplify the procedure whenever possible so as to ensure that certain rules of procedure in force in the member States do not impede effective justice. Simplification of the documents used in court proceedings and the proper dissemination of legal information including case law, in legal circles and among the general public may also help to improve the efficiency and fairness of justice. In addition, various measures are proposed to improve the operation of the appeal systems and procedures, partic-

ularly in civil and commercial cases, where delays are generally greater than in criminal proceedings.

4. Furthermore, the European Ministers of Justice, at their 23rd Conference which took place in London in June 2000, agreed that “access to justice should not be impaired by high legal costs” and reaffirmed “the need for all persons to have an effective access to justice and for States to find cost-effective methods to provide such access to justice”².

5. It is clear that the Rule of Law principle (in favour of which the Council of Europe has been working for more than 50 years) can be a reality only if individuals can effectively enforce their legal rights and challenge unlawful acts. In order to do so, there is a need to make a continuous effort to bring justice closer to individuals and improve the efficiency and the functioning of judicial proceedings, while taking into account the specific needs of each jurisdiction.

6. In practice, appropriate legal assistance systems are essential to ensure equal access to justice for all and may include:

- the provision of legal assistance,

including legal representation, by lawyers;

- providing information and legal advice at times and locations which take into account the needs of applicants, ensuring in particular that applicants are able to understand their lawyers;
- defending accused persons in criminal cases;
- preparing files in non-criminal cases and representing clients;
- assistance with dealings with public authorities, when a legal matter seems to be at issue;
- advice and assistance with regard to the enforcement, or challenges to the enforcement, of judgments, sentences or extra-judicial arrangements, including applications for remissions of sentence or pardons.

7. The situation in States varies considerably as regards the availability of legal assistance schemes. In certain European States, legal aid has become very expensive and therefore reforms are being undertaken to make it more cost effective. In certain States, legal assistance systems exist but may, in practice, be inefficient and fail to provide an effective access to justice. In some States, legal assistance systems have to be set up. In these States, there may

be serious economic problems which make it difficult to provide such a system and other solutions may be necessary such as the setting up of a legal aid system which, on a temporary basis, is financed by international funding.

8. The Council of Europe has developed throughout the years a *corpus juris* of principles and rules in the field of access to justice and legal assistance schemes to help national legislators when dealing with these matters³. The activities, which are currently being carried out by the Council of Europe in the field of Justice and the Rule of Law, have shown that in most European countries, the major obstacles to access to justice are the same: complexity, duration and costs. Each of these aspects influences the other. The complexity of proceedings and the consequent delays may result in an increase of costs⁴. Indeed, measures to reduce costs based on an analysis of their impact can be effective in ensuring that legal assistance is not a burden.
9. Furthermore it is important to recognise the unique and extensive contribution of the European Convention

on Human Rights and the case law of the European Court of Human Rights promoting access to justice and the protection of fundamental rights of every individual within the jurisdiction of a Council of Europe member State. This Convention enables individuals in member States to apply to the Court when their access to justice is denied.

10. This Action Plan is a practical follow up to the European Ministers of Justice who, at their 23rd Conference in London in June 2000, instructed the European Committee on Legal Cooperation (CDCJ) “to prepare an action plan aiming at assisting States in setting up or reforming their national system of legal advice and assistance or developing alternatives to legal advice and assistance.”

2. PREVIOUS INITIATIVES

11. The Council of Europe’s *acquis* in the field of legal aid is supplemented and strengthened through its inter-governmental activities, in particular the Multilateral Committee on the European Agreement on the Transmission of Applications for Legal Aid (T-TA)⁵ which regularly exam-

ines the functioning of the Agreement and actively proposes improvements to it.

12. To this end, the Committee has prepared the text of an Additional Protocol to the Agreement [ETS 179] which reinforces effective communication between lawyers and applicants as well as strengthening the application of Recommendation No. R(99) 6 of the Committee of Ministers on the improvement of the practical application of the European Agreement on the Transmission of Applications for Legal Aid⁶ which contains, *inter alia*, specific provisions on the possibility of transmitting such applications by electronic means (e-mail), reasons for the refusal to grant legal aid as well as a uniform legal aid application form.

13. In addition the Committee has also produced the “Guide to legal aid procedures in Europe” which contains useful information concerning the legal assistance systems of many States which are Parties to the Convention.

14. On a practical level, the Council of Europe also assists States in the development of their legal assistance systems through its Co-operation programmes to strengthen the rule of law⁷

inter alia by drafting rules (e.g. Rules of the Benefits Commission of Bosnia and Herzegovina), producing written recommendations on how best States could usefully improve the provision of legal assistance systems (e.g. Recommendations produced by the Council of Europe experts during the regional seminar with the countries of Visegrad – Czech Republic, Hungary, Poland and Slovak Republic – in Trencianske Teplice on 11 and 12 December 2000) and by developing tailor-made strategies with States through action plans for legal assistance schemes (e.g. Action Plan adopted by the participants of the regional legal seminar with the countries of Armenia, Azerbaijan and Georgia held in Tbilisi on 12 and 13 June 2000).

3. STRUCTURES FOR THE IMPLEMENTATION OF THE ACTION PLAN

15. This Action Plan is to be implemented by both the Council of Europe and its member States in the framework of their activities aiming at increasing the efficiency and improving the functioning of their judicial systems.

16. In doing so, the implementation of the Action Plan should be made in the

framework of the CDCJ, with the assistance of the CEPEJ.

closer to the public thereby fostering greater access to justice.

4. LEGAL ASSISTANCE SYSTEMS: ISSUES, OBJECTIVES AND ACTIONS

17. As part of its Action Plan on legal assistance systems to be implemented in the framework of the CDCJ, with the assistance of the CEPEJ, the CJ-EJ identified the following issues, objectives and actions which should be given high priority:
18. Setting up, developing and strengthening legal assistance systems

Introduction

18.1 The legal assistance systems of States vary considerably (e.g. as regards their budgets, infrastructure etc.) as a result of factors such as public demand for legal services, social and political considerations as well as historical and cultural traditions. In response to these changing factors and in order to comply with international obligations and commitments (e.g. Article 6 of ECHR) many States are currently setting up new and reforming existing legal assistance systems. In doing so, States have the opportunity of bringing these systems

Action

18.2 In accordance with paragraph 4 of Resolution No. 1 of the 23rd Conference of European Ministers of Justice on “Delivering justice in the 21st Century” (London, 8 and 9 June 2000), the Council of Europe could usefully assist States in reforming and developing their legal assistance systems by organising seminars (particularly at a regional level) and other forms of technical assistance between States to promote exchanges of experience and expertise that result in positive strategies for the development of future legal assistance systems (e.g. see the Action Plan adopted by the participants of the Council of Europe seminar with the countries of Armenia, Azerbaijan and Georgia on the setting up of a system of legal aid - Tbilisi, 12 and 13 June 2000).

18.3 It is clear that States may usefully learn from each other's experiences and expertise, and consequently, other Council of Europe forums organised by electronic means (e.g. Internet discussion groups) should equally be considered.

19. Practical organisation, administration and dispensation of legal assistance systems

Introduction

19.1 The organisation, administration and provision of legal assistance schemes (e.g. legal advice, legal assistance and legal aid) are often costly and unnecessarily complex. An examination and comparative analysis of certain aspects of legal assistance schemes in operation in the different States provides useful and cost-effective information to all States.

Action

19.2 To this end, the Council of Europe would obtain detailed information on the operation of legal assistance schemes. The aim will be to seek practical information to enable States to provide legal assistance schemes in a more efficient and cost effective manner that in particular benefit persons without sufficient financial means.

19.3 The information would be obtained from States which have developed forms of legal assistance

schemes which are of particular interest to other States (“best practices”).

This information would deal with the following matters:

- the notion of legal assistance schemes and what they cover in different States (e.g. the different persons and bodies providing such assistance, the different places where assistance may be obtained),
- types of legal assistance schemes available (e.g. legal advice, legal assistance and legal aid),
- improving as well as simplifying procedures for applications under legal assistance schemes (e.g. simple application forms prepared for legal assistance systems),
- improving the quality of legal assistance given to applicants (e.g. by promoting better training of (i) legal professionals such as lawyers and judges including their support staff and (ii) organisations such as Bar associations and NGO’s),
- controlling the costs of legal assistance systems and other related costs (e.g. eligibility and means testing criteria for applicants, consideration of the merits of the case, fixed fees or scales),

- preventing and discouraging abuses of legal assistance systems,
- alternative means of meeting legal costs (i) for persons (e.g. insurance schemes) and (ii) providers of legal assistance schemes (e.g. *pro bono* schemes),
- any other matters (e.g. reducing the need to use legal assistance schemes by the simplification of procedures, no fault procedures, decriminalisation).

19.4 Experts having information on the topics a) to h) above which could be of interest to States setting up, developing and strengthening legal assistance systems, were invited to send this information to the Secretariat (if possible by e-mail: cjej@coe.int).

20. Provision of information concerning legal assistance systems on the website

Introduction

20.1 Public awareness of the availability of legal assistance systems varies considerably from State to State. Often there is a lack of proper information and education concerning the right to appropriate

assistance in this field.

20.2 Therefore there is a clear need for States to raise greater public awareness by making legal information and advice more freely and openly available at both a national and international (cross-border) level⁸. For this purpose the use of a website is particularly important.

Action

20.3 To this end, all information, which could be usefully included on websites for the information of applicants and those persons assisting them, should be identified and in particular the following steps should be taken:

- the development, in the framework of the Council of Europe website, of legal assistance systems website linking selected Internet websites and resources in this field;
- the extension of these websites to the 14 Council of Europe Information and Documentation Centre points currently operating in Central and Eastern European States;
- the provision by certain States of information to other States interested in setting up, developing and

strengthening websites concerning legal assistance systems.

21. Cross-border legal assistance (legal aid)

Introduction

21.1 There are variable levels of international co-operation when assisting cross-border legal assistance applicants in particular as regards the process of applying for and being granted legal assistance.

21.2 A greater degree of information concerning cross-border legal assistance in all States (e.g. guidelines on using legal aid or assistance forms and procedures⁹, information from institutions such as Bar associations) could help to make the process more transparent, easier to understand and more accessible. Moreover, certain processes and forms could be used to improve the quality, efficiency and transparency of cross-border legal assistance services.

Action

21.3 To this end the CDCJ, together with the CEPEJ, should elaborate ways in which information could be disseminated including information relating to any bilateral or multilateral agreements between States taking into account:

- the persons entitled to claim legal assistance in cross border cases;
- the identification of any cases in which legal assistance could be automatically granted in States;
- merit and means forms and testing when deciding on the eligibility of legal aid applications.

Experts having information on the topics a) to h) in paragraph 19 below which could be of interest to States setting up, developing and strengthening legal assistance systems are invited to send this information to the Secretariat (if possible by e-mail: cjej@coe.int).

NOTES

- ¹N.B. The words “legal assistance systems” have been used to include not only legal aid but similar systems (see paragraph 19.3 for further information)
- ² See Resolution No. 1 on “Delivering justice in the 21st century” adopted by the European Ministers of Justice at their 23rd Conference which took place in London on 8-9 June 2000.
- ³ See in particular Council of Europe Resolution (76) 5 on Legal aid in civil, commercial and administrative matters, Resolution (78) 8 on Legal aid and advice, Recommendation (81) 7 on Measures to facilitate access to justice, Recommendation (93) 1 on Effective access to the law and to justice for the very poor, and Recommendation (2000) 21 on The freedom of exercise of the profession of lawyer.
- ⁴ See in this context the *Airey* judgment of the European Court of Human Right of 9 October 1979, Series A, no. 32.
- ⁵ The European Agreement of the transmission of applications for legal aid (ETS 92) is designed to assist persons to obtain legal aid abroad in civil, commercial or administrative matters. The Agreement may be used by persons, who qualify for legal aid and who are habitually resident in the territory of one Contracting Party to apply for legal aid in the territory of another Contracting Party.
- ⁶ Adopted by the Committee of Ministers on 23 February 1999, at the 660th meeting of the Ministers’ Deputies.
- ⁷ These activities were formerly known as Activities for the Development and Consolidation of Democratic Stability (ADACS).
- ⁸ To be carried out in harmony with the “information campaigns” and “user guides” referred to in the Conclusions of the Tampere European Council meeting of 15 and 16 October 1999.
- ⁹ Furthermore, the T-TA agreed “the T-TA could collect information on the merit tests provided by the States Parties to the Agreement in their internal law”, as “it would be helpful for Central Authorities to know the requirements needed in foreign countries for legal aid applications to be successful” (see T-TA(98)3).

COUNCIL OF EUROPE

COMMITTEE OF MINISTERS

RECOMMENDATION NO. R (93) 1

OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON EFFECTIVE ACCESS TO THE LAW AND TO JUSTICE FOR THE VERY POOR ¹

(adopted by the Committee of Ministers on 8 January 1993 at the 484th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

1. Recalling that, under the European Convention on Human Rights, member States proclaimed their attachment to human rights and fundamental freedoms;
2. Referring to Resolutions (76) 5 on legal aid in civil, commercial and administrative matters and (78) 8 on legal aid and advice, to Recommendation No. R (81) 7 of the Committee of Ministers to member States on measures facilitating access to justice and to the United Nations Resolutions on human rights and extreme poverty, in particular Resolution 46/121 of 17. 12. 1991 of the General Assembly and Resolution 1992/11 of 18. 2. 1992 of the Commission on Human Rights, as well as to the study prepared by the International Movement ATD-Fourth World entitled "Towards justice accessible to all: legal aid machinery and certain local initiatives as seen by families affected by severe poverty" [H(92)2];
3. Concerned at the situation of the very poor, understood to mean persons who are particularly deprived, marginalised or excluded from society both in economic and in social and cultural terms;
4. Considering that this situation of severe poverty continues to deprive men and women of the effective enjoyment of human rights which must be secured for all without distinction, in accordance with Article

14 of the European Convention on Human Rights;

5. Convinced that efforts to promote access to the law and to justice will only be fully effective as part of a comprehensive, coherent and forward-looking policy aimed at combating severe poverty in co-operation with the population groups concerned;
6. Recalling the principle of the indivisibility of human rights which implies that the enjoyment of civil and political rights such as those enshrined particularly in Articles 6(3)c and 13 of the European Convention on Human Rights is not effective if economic, social and cultural rights are not equally protected;
7. Reaffirming that attachment to human rights is linked to respect for human dignity, especially as regards access to the law and to justice for the very poor;
8. Recalling that in addition to the right of access to the law and to justice provided for in Article 6 of the European Convention on Human Rights, the other provisions of the Convention and particularly Articles

2, 3 and 8 are equally applicable to the very poor, as are the other legal instruments of the Council of Europe such as the European Social Charter;

9. Considering that this Recommendation is intended to improve, especially with regard to the very poor, existing legal advice and legal aid systems, and therefore to complement existing machinery with regard to the other categories of people for which the systems were designed,

Recommends that the governments of member States

- I. Facilitate access to the law for the very poor (“the right to the protection of the law”) by:
 - a. promoting, where necessary, action to make the legal profession aware of the problems of the very poor;
 - b. promoting legal advice services for the very poor;
 - c. defraying the cost of legal advice for the very poor through legal aid, without prejudice to the payment of a modest contribution by the persons benefiting from such advice where this is required by

- domestic law;
 - d. promoting the setting up where the need seems to appear of advice centres in underprivileged areas;
- II. Facilitate effective access to quasi-judicial methods of conflict resolution for the very poor by:
- a. increasing the involvement of non-governmental organisations or voluntary organisations providing support to the very poor in quasi-judicial forms of conflict resolution such as mediation and conciliation;
 - b. extending the benefit of legal aid or any other form of assistance to such methods of conflict resolution;
- III. Facilitate effective access to the courts for the very poor, especially by the following means:
- a. extending legal aid or any other form of assistance to all judicial instances (civil, criminal, commercial, administrative, social, etc.) and to all proceedings, contentious or non-contentious, irrespective of the capacity in which the persons concerned act;
 - b. extending legal aid to very poor persons who are stateless or aliens, in any event where they are habitually resident in the territory of the member State in which the proceedings are to be conducted;
 - c. recognising the right to be assisted by an appropriate counsel, as far as possible of one's choice, who will receive adequate remuneration;
 - d. limiting the circumstances in which legal aid may be refused by the competent authorities chiefly to those cases in which the grounds for refusal are inadmissibility, manifestly insufficient prospects of success, or cases in which the granting of legal aid is not necessary in the interests of justice;
 - e. simplifying the procedure for granting legal aid to the very poor, and considering the immediate granting of provisional legal aid wherever possible;
 - f. considering the possibility of enabling non-governmental organisations or voluntary organisations providing support to the very poor, to give assistance, in the context of access to the courts, to persons who are in a position of such dependence and deprivation

that they cannot defend themselves; this appraisal should concern both proceedings before national tribunals and proceedings before the European Commission and Court of Human Rights and other international instances of judicial nature;

IV. Consult whenever possible, in the framework of their general policy aimed at combatting severe poverty, non-governmental organisations interested by the field covered by the present Recommendation and voluntary organisations providing support to the very poor.

NOTES

¹ When this Recommendation was adopted, and in application of Article 10.2.c. of the Rules of Procedure for the meetings of

the Ministers' Deputies, the Representative of Austria reserved the right of his Government to comply with it or not.

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 19. 2. 2003
COM(2003) 75 final

GREEN PAPER FROM THE COMMISSION

PROCEDURAL SAFEGUARDS FOR SUSPECTS AND DEFENDANTS IN CRIMINAL PROCEEDINGS THROUGHOUT THE EUROPEAN UNION

INTRODUCTION

This Green Paper is the next step in the consultation process on achieving minimum common standards of procedural safeguards throughout the Member States in respect of persons suspected of, accused of, prosecuted for and sentenced in respect of criminal offences. It will consider what those minimum common standards could be and the areas in which they may be applied.

It is important for the judicial authorities of each Member State to have confidence in the judicial systems of the other Member States. From May 2004, this will apply to twenty-five rather than fifteen Member States. Faith in procedural safeguards and the fairness of proceedings operate so as to strengthen that confidence. It is therefore desirable to have certain minimum

common standards throughout the European Union, although the means of achieving those standards must be left to the individual Member States.

For the past year, the Commission has been carrying out a review of procedural safeguards. To this end, it published a broad Consultation Paper in several languages on the Justice and Home Affairs website in January and February 2002. That paper set out the areas that might become the focus of subsequent measures and asked for comments and responses from interested parties.

At the same time, a questionnaire on various aspects of trial procedures under their own existing domestic system was sent to the Member States.

Using the responses to those two documents, the Commission identified the following areas as appropriate for

immediate consideration:

- access to legal representation, both before the trial and at trial;
- access to interpretation and translation;
- notifying suspects and defendants of their rights (the “Letter of Rights”);
- ensuring that vulnerable suspects and defendants in particular are properly protected;
- consular assistance to foreign detainees.

Accordingly, after a discussion of why EU action in this area is appropriate, this Green Paper will focus on these five areas and consider how to evaluate whether the Member States are complying with their obligations. The remaining rights identified as needing to be examined will form the basis of subsequent Commission work. Priorities will need to be reviewed in the light of enlargement.

The Green Paper lists a number of specific questions. Answers to these questions and general comments can be sent, preferably by 15 May 2003, to the following address:

European Commission
Justice and Home Affairs Directorate-General
Unit B3 - Judicial cooperation in criminal matters
B-1049 Brussels
Belgium
Fax: + 32 2 296 7634
Marked for the attention of Caroline Morgan
Or by email to:
caroline.morgan@cec.eu.int

The Commission intends to organise a public hearing on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union in 2003.

1. WHY EU ACTION IN THIS AREA IS APPROPRIATE

1.1. Background

For many years, the European Union, or European Community, did not have any explicit jurisdiction as far as the human rights aspects of criminal proceedings were concerned. The European Court of Justice (ECJ) was occasionally called upon to consider the relationship between the Community legal order and human rights and it made some constructive pronouncements¹ but there was no European Community instrument or position on fair trial rights. However, the ECJ had held that it was important that these be respected². In the absence of any relevant treaty provisions, the ECJ had been the main source of any Community fair trial rights policy. In 1996, the ECJ ruled that “as Community law now stands”, the Community lacked competence to accede to the European Convention on Human Rights (ECHR)³, but by then fair trials provisions had started to apply at Community level. Signed in 1992, the Maastricht Treaty⁴ provided that matters in the newly created field of Justice and Home Affairs were to be “dealt with in compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 Novem-

ber 1950”⁵. These “matters of common interest” included judicial co-operation and police co-operation for the purposes of combating terrorism and other forms of serious crime. In 1997, the Amsterdam Treaty explicitly amended the Treaty on European Union (TEU) strengthening the EU’s competence in police and judicial cooperation in criminal matters so as to create an area of freedom, security and justice. One of its underlying principles, expressed in Article 6, was that human rights and fundamental freedoms would be respected within the Union.

1.2. The Treaty on European Union

From 1997, date on which the Amsterdam Treaty was signed, the European Union, declaring itself to be “founded on” respect for human rights and fundamental freedoms, has set about ensuring that those rights and freedoms are respected within its borders. Article 7 TEU lays down very strict sanctions for breaches of the obligation to respect those rights. The history of this initiative can be traced back to that declaration.

The TEU, as amended by the Nice Treaty, came into force in February 2003. Its Articles 6 and 7 provide:

“Article 6

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States.
2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to Member States, as general principles of Community Law.

(...)

4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

Article 7

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission, the Council, acting by a majority of four fifths of its members after obtaining the assent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of principles mentioned in Article 6(1), and address

appropriate recommendations to that State. Before making such a determination, the Council shall hear the Member State in question and, acting in accordance with the same procedure, may call on independent persons to submit within a reasonable time limit a report on the situation in the Member State in question. The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The Council, meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1), after inviting the government of the Member State in question to submit its observations.
3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of this Treaty to the Member State in question, including the voting rights of the

representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.
5. For the purposes of this Article, the Council shall act without taking into account the vote of the representative of the government of the Member State in question. Abstentions by members present in person or represented shall not prevent the adoption of decisions referred to in paragraph 2. A qualified majority shall be defined as the same proportion of the weighted votes of the members of the Council concerned as laid down in Article 205(2) of the Treaty establishing the European Community. This paragraph shall also apply in the event of voting rights being suspended pur-

suant to paragraph 3.

6. For the purposes of paragraphs 1 and 2, the European Parliament shall act by a two-thirds majority of the votes cast, representing a majority of its Members.”

1.3 The Charter of Fundamental Rights of the European Union

In December 2000, the European Commission, the Council and the Parliament jointly signed and solemnly proclaimed the Charter of Fundamental Rights of the European Union (CFREU). The CFREU covers the whole range of civil, political, economic and social rights of European citizens, by synthesising the constitutional traditions and international obligations common to the Member States. A significant aspect of the Charter is that it affirms that the European Union is indeed a political community, rather than solely an economic organisation. Moreover, it asserts that respect for fundamental rights will be at the foundation of all European law.

The rights described are divided into six sections: Dignity, Freedoms, Equality, Solidarity, Citizen's Rights and Justice. The relevant section of the CFREU here

is that entitled “Justice” (Articles 47-50). Like the ECHR, it lays down the right to a fair trial. It provides for the presumption of innocence, legality and proportionality of criminal offences and penalties. Furthermore, it extends the principle of *ne bis in idem* to the whole of the EU.

1.4 The Commission Communication “Towards an Area of Freedom, Security and Justice”

In July 1998, the Commission set out its vision for an “Area of Freedom, Security and Justice” in a Communication⁶. It stated that its aims were to examine what the area of “justice” should seek to achieve. “The ambition is to give citizens a common sense of justice throughout the Union”. This was to be achieved by facilitating the bringing to justice of those who threaten the freedom and security of individuals and society whilst ensuring that individual rights were respected. A minimum standard of protection for individual rights was the necessary counterbalance to judicial co-operation measures that enhanced the powers of prosecutors, courts and investigating officers. The Communication committed the Commission to pursuing “respect for individual rights”.

1.5 The Tampere Conclusions

The 1999 Conclusions of the Tampere European Council⁷ endorsed the principle of mutual recognition as “the cornerstone of judicial co-operation”⁸ and went on to say that “enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate cooperation between authorities and *the judicial protection of individual rights*”⁹ (point 33).

1.6 The Mutual Recognition Programme of Measures

The Commission Communication to the Council and the European Parliament dated 26 July 2000 on Mutual Recognition of Final Decisions in Criminal Matters¹⁰ provides, in its paragraph 10, entitled “Protection of Individual Rights” that “it must therefore be ensured that the treatment of suspects and the rights of the defence would not only not suffer from the implementation of the principle [of mutual recognition] but that the safeguards would even be improved through the process”.

The Council’s Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters¹¹ dated 15 January 2001 provided, in its preamble, that “Mutual

recognition is designed to strengthen co-operation between Member States but also to enhance the protection of individual rights".¹² The Programme listed 24 specific mutual recognition measures, some of which, such as the European Arrest Warrant, have been achieved¹³. It is also stated that "in each of these areas the extent of mutual recognition is very much dependent on a number of parameters which determine its effectiveness". These parameters include "mechanisms for safeguarding the rights of [...] suspects" (parameter 3) and "the definition of common minimum standards necessary to facilitate the application of the principle of mutual recognition" (parameter 4). It is important now to ensure that the Programme's stated aim of enhancing the protection of individual rights should be given a concrete form, taking appropriate account of these parameters.

In order to implement the commitment given in the foregoing measures, the Commission launched this initiative with a view to setting minimum safeguards for suspects and defendants in criminal proceedings throughout the European Union. The preliminary work in the area has given rise to a number of underlying considerations that it is now appropriate to cover.

1.7 Enhancing mutual trust

Mutual recognition rests on mutual trust and confidence between the Member States' legal systems. In order to ensure mutual trust, it is desirable for the Member States to confirm a standard set of procedural safeguards for suspects and defendants. The desired end result of this initiative is therefore to highlight the degree of harmonisation that will enhance mutual trust in practice. The Member States of the EU are all signatories of the principal treaty setting these standards, the European Convention on Human Rights, as are all the acceding states and candidate countries, so the mechanism for achieving mutual trust is already in place. The question is now one of developing practical tools for enhancing the visibility and efficiency of the operation of those standards at EU level. The purpose of this Green Paper is also to ensure that rights are not "theoretical or illusory" in the EU, but rather "practical and effective". Differences in the way human rights are translated into practice in national procedural rules do not necessarily disclose violations of the ECHR. However, divergent practices run the risk of hindering mutual trust and confidence which is the basis of mutual recognition. This observation justifies the EU taking action pursuant to Article 31(c) of the

TEU. This should not necessarily take the form of intrusive action obliging Member States substantially to amend their codes of criminal procedure but rather as “European best practice” aimed at facilitating and rendering more efficient and visible the practical operation of these rights. It goes without saying that the outcome will in no case reduce the level of protection currently offered in the Member States.

1.8 Freedom of movement

As the Commission indicated in its Communication of 14 July 1998, Towards an Area of Freedom, Security and Justice “procedural rules should respond broadly to the same guarantees ensuring that people will not be treated unevenly according to the jurisdiction dealing with their case”. European citizens and residents can reasonably expect to encounter equivalent standards in respect of safeguards in criminal proceedings throughout the EU

1.9 Acceding states

At the 1993 Copenhagen European Council, the Member States laid down the accession criteria¹⁴ for candidate countries, including a guarantee that human rights will be respected. At the 2002

Copenhagen European Council, accession negotiations were completed with 10 countries¹⁵. They will accede on 1 May 2004, subject to the respective ratification procedures. Obviously, the conclusion of negotiations implies that the acceding states are deemed to satisfy the accession criteria.

The Accession Treaty will include a safeguard clause on Justice and Home Affairs for cases where in a new Member State there are serious shortcomings, or an imminent risk thereof, regarding the transposition, implementation or application of the *acquis* on mutual recognition in civil or criminal matters.

The Commission will continue, up to accession, its monitoring of commitments taken in the negotiations by the acceding states, including in the area of Justice and Home Affairs.

1.10 Responding to the demand

There is a growing demand from several quarters (for example civil society and human rights organisations, relevant media and the European Parliament) for the Commission to take action in this direction. This is all the more so since it is the logical counterbalance to other mutual recognition measures¹⁶. There is also an argument that it is appropriate for the Commission to take the initiative in

order to ensure that equivalence is achieved throughout the EU, and so that any agreement reached eschews the risk of any particular national or geographical legal tradition affecting the final text. It is to be hoped that a Commission initiative will ensure neutrality.

1.11 The Commission Green paper on a European Prosecutor

In its Green Paper on criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor, which was adopted on 11 December 2001¹⁷ the Commission also addressed the problem of appropriate procedural safeguards at EU level, from the particular viewpoint of a possible future European Prosecutor who would direct investigations throughout the Union. The consultation process launched with the Green Paper on the European Prosecutor further stimulated the debate on the general question of the appropriate EU wide protection of individual rights, and thus contributed to highlight the need of a specific initiative on this issue. .

1.12 Subsidiarity

Notwithstanding the above, some consideration must be given to the argument

that the principle of subsidiarity dictates that Member States should be entitled to exercise autonomy in this area¹⁸. The subsidiarity principle is intended to ensure that decisions are taken as closely as possible to the citizen and that, if action is taken at the Community level, it is justified, having regard to the options available at national, regional or local level. This means that the EU should not take action unless to do so would clearly be more effective than action taken at national, regional or local level. It is closely bound up with the principles of proportionality and necessity, which require that any action by the EU should not go beyond what is necessary to achieve the objectives of the Treaty.

The Commission considers that in this area, only action at the EU level can be effective in ensuring *common* standards. To date, the Member States have complied with their fair trial obligations, deriving principally from the ECHR, on a national basis and this has led to discrepancies in the levels of safeguards in operation in the different Member States.

As explained above under point 1.7, such discrepancies may prevent the process of mutual recognition to be fully developed in practice. Therefore there is a perceived need to support, by way of concrete measures aimed at defining common standards, a genuine mutual confidence in the

way those rights are respected throughout the EU. Any Commission proposals would take account of national specificities. The Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice¹⁹ specifically states that: “the principle of subsidiarity, which applies to all aspects of the union’s action, is of particular relevance to the creation of an area of freedom, security and justice”. As regards the specific objectives of the TEU, which form the legal basis and the justification for this initiative, the relevant provisions are:

Article 31 TEU:

“Common action on judicial cooperation in criminal matters shall include:

(a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions;

[..]

(c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such co-operation;[...]” which must be balanced against:

Article 33 TEU:

“This Title [Title VI] shall not affect the

exercise of the responsibilities incumbent upon the Member States with regard to the maintenance of law and order and the safeguarding of internal security”

Making procedural rules more comparable is a way of “ensuring their compatibility” and this can only be achieved by action at the EU level.

1.13 Compliance and monitoring

It is essential that rights may be enforced expeditiously and in a uniform manner in the Member States. Member States have a duty to ensure that their domestic criminal justice schemes operate efficiently and fairly so that the ECtHR retains its function as a court of last resort and is not so submerged by applications that it too becomes unwieldy. The final area for consideration in this Green Paper will therefore be how to measure and ensure compliance with any subsequent EU measure taken. It is appropriate for the Commission to have a role in monitoring and evaluation, using information provided by the Member States or by an independent team of experts. Once a Framework Decision is adopted, it is incumbent on the Commission to ensure both that the Member States have adopted the necessary legislation to give effect to the Framework Decision and that it is properly implemented..

Question 1:

Is it appropriate to have an initiative in the area of procedural safeguards at European Union level?

2. IDENTIFYING THE BASIC RIGHTS

2.1 Introduction

This Green Paper is the outcome of a lengthy consultation process, both with interested parties (such as lawyers and experts in the fields) and with government representatives. The Commission needed information on what rights were currently protected by the legislation of the Member States and what rights were considered by experts in the field to be essential for fair trials. Additionally, the Commission wanted to act as fast as possible since this measure was at the heart of the programme of mutual recognition, and several of the measures forming the mutual recognition programme were underway. Largely for this reason, the Commission decided not to carry out a survey. Experience has shown that a survey, undertaken by an independent research institute, can be a lengthy process and the results are variable. The Commission therefore decided to carry out as much research as it could itself and to consult widely in order to have the

benefit of the views of as many parties as possible. Its main research tool was therefore consultation, in particular via its website, but it also received experts from various NGOs and was glad to have their views, and sent representatives to relevant conferences and seminars. The Commission also carried out a modest survey of the current provisions in the Member States by way of a questionnaire.

In early 2002, a Consultation Paper was posted in several languages on the JAI website²⁰ to which there was a considerable response. The Commission received about 100 contributions (from government departments, professional bodies, NGOs and individuals).

At that time, the Commission also sent the questionnaire to the Ministries of Justice of all the Member States on the current situation within their criminal justice systems. Once the Commission had received and analysed replies to the Consultation Paper and the questionnaire it was able to convene a group of experts for an intensive discussion.

An experts' meeting was held on 7/8 October, gathering 50 experts made up of

nationally appointed representatives (1 per Member State), academics/professionals chosen by the Commission (1 per Member State) and representatives from NGOs.

2.2 The JAI Website Consultation

The Consultation Paper was the first step in collecting the views of experts. At that early stage, the Commission was not sure what areas would be perceived as priorities, nor how much could be covered in a single measure. It therefore listed all the rights that might be covered in any future Green Paper in the Consultation Paper with a view to assessing external perceptions of the most important rights to be safeguarded at the European level.

The Commission received over 100 replies, ranging from simple enquiries to lengthy discussion papers covering all the issues raised in the Consultation Paper. The responses come from students, practitioners, lawyers' professional associations (such as Bar Associations), government departments, civil liberties organisations and academics. There were responses from nationals of nearly all the Member States.

In its Consultation Paper, the Commission specifically sought comments on the following areas:

- (i) whether it was appropriate to introduce a mechanism ensuring that suspects/defendants were aware of their rights ("the Letter of Rights"),
- (ii) how to offer vulnerable groups a high degree of protection, and
- (iii) these specific rights:
 - a. The right to be presumed innocent until proved guilty;
 - b. The right to have someone informed of the detention;
 - c. The right to legal advice and assistance;
 - d. The right to a competent, qualified (or certified) interpreter and/or translator;
 - e. The right to bail (provisional release) where appropriate;
 - f. The right against self-incrimination;
 - g. The right to consular assistance (if not a national of the State of prosecution);
 - h. Fairness in obtaining and handling evidence (including the prosecution's duty of disclosure);
 - i. The right to review of decisions and/or appeal proceedings;
 - j. Specific guarantees covering detention, either pre- or post-sentence;
 - k. *Ne bis in idem*.

The Commission was also interested in hearing about *in absentia* proceedings. The

Consultation Paper was greeted enthusiastically by those working in the field and the Commission was very grateful to respondents for offering such constructive encouragement and advice. The translators' and interpreters' organisations were particularly helpful, as this specialist area was the one the Commission had the least information about. Numerous respondents considered that the suggestion of a "Letter of Rights", a short document to be given to suspects as early as possible, possibly on arrest, was a good one. For this reason, and because it appeared to be a cost-effective and easily implemented measure, the Commission decided to include it among the proposals to be made in the Green Paper.

2.3 The questionnaire to the Member States

Also in early 2002, a questionnaire was sent, via the representations of the Member States in Brussels to their governments. It contained questions covering many aspects of their criminal justice systems, including the budget devoted to legal aid, to the provision of legal aid, to the provision of translation/interpretation in criminal proceedings and the identification and treatment of vulnerable suspects. In most cases, the questions were answered by the Ministries of Justice and of the

Interior in the Member States, but some questions also had replies from the governments' statistical and other services.

From the replies the Commission was able to build up a picture of existing levels of provision and identify where action from the Commission would be most effective. In particular, it became clear that legal aid was provided in very different ways in the different Member States and that when it came to vulnerable suspects, there was only unanimity in considering children to be vulnerable.

2.4 The experts' meeting

A Discussion Paper was drafted in preparation for the experts' meeting. By then it had already become clear that the most promising areas for immediate consideration were the provision of legal aid, the provision of translators and interpreters, the "Letter of rights" and the identification of vulnerable suspects. From the European vantage point, it was also clear to the Commission that foreign suspects could easily be at a disadvantage, and may be particularly vulnerable. The Commission planned to consider the question of translators and interpreters and the inclusion of non-nationals in our categories of vulnerable suspects. It was also decided to complement these measures with another that applied to foreign suspects - that of

ensuring that they were offered consular assistance, in accordance with an existing convention to that effect and to which all Member States were already parties.

The Discussion Paper therefore set out the five areas the Commission had decided to focus on at this stage and these formed the basis of our discussions.

2.5 The “basic rights”

The Commission concluded that whilst all the rights that make up the concept of “fair trial rights” were important, some rights were so fundamental that they should be given priority at this stage. First of all among these was the right to legal advice and assistance. If an accused person has no lawyer, they are less likely to be aware of their other rights and therefore to have those rights respected. The Commission sees this right as the foundation of all other rights. Next, the suspect or defendant must understand what he is accused of and the nature of the proceedings so it is vital for those who do not understand the language of the proceedings to be provided with interpretation of what is said and translation of essential documents. The consultation showed a high level of support for the “Letter of Rights” by which a suspect would be given information regarding his fundamental rights in writing and in a language he understands.

Several respondents agreed with us that rights are only effective if the suspect is aware of them - this seemed to the Commission to be a simple, inexpensive way of ensuring that all suspects were aware of their rights. The Commission wanted to include a section on the most vulnerable in society, although it has not proved easy to identify who is actually covered by this. The Commission has therefore suggested that Member States require their police authorities and judicial authorities to consider the question of a suspect or defendant’s potential vulnerability and to take appropriate measures without going as far as to lay down exactly who is to be considered “vulnerable”. The Commission considers that if the potential vulnerability is raised at an early stage of proceedings, together with a duty to take appropriate action, this will constitute an improvement for the persons concerned. Finally, having identified non-nationals as at a disadvantage in criminal proceedings, the Commission wanted to include a measure that is of undoubted assistance to the foreigner, namely the offer of consular assistance. This right has existed in principle for many years but the Commission wanted to take this opportunity to ensure that it was fully complied with by including it in this Green Paper as a corollary of the other rights for non-nationals that it proposes.

This Green Paper does not seek to create new rights nor to monitor compliance with rights that exist under the ECHR or other instruments, but rather to identify the existing rights the Commission sees as basic and to promote their visibility.

2.6 Rights not covered in the Green Paper

All the rights set out in the Consultation Paper will in time be covered by the Commission in accordance with the priorities emerging from a European Union with 25 Member States .

Two of the rights the Commission had identified appeared to warrant separate measures of their own in order to do them justice. These were the right to bail (provisional release pending trial) and the right to have evidence handled fairly.

The work on the right to bail (which also covers detention conditions), which is an important and substantial one in its own right, was separated from the work on other safeguards at an early stage. It forms the subject-matter of a measure in the Mutual Recognition programme (measure 10) and would be more appropriately dealt with as a single issue. A Communication on the subject is included in the Commission's Work Programme for 2003. Also in the Work programme for this year is a Communication on approximation, ex-

ecution and recognition of criminal sanctions in the EU. This is designed to ensure equality of treatment for convicted persons throughout the EU so that, for example, those sentenced in a Member State other than their own are not discriminated against by virtue of their foreign nationality.

Fairness in handling evidence actually covers many rights and many aspects of the proceedings. It soon became clear that this area should be covered in a separate measure, as it was too vast to cover in a Green Paper that already proposed several rights. The Commission therefore decided to devote more time and a specific study to this topic as soon as the first stage of the procedural safeguard work was completed. The Commission has now started work on a study of safeguards in fairness in gathering and handling of evidence. This will cover, *inter alia*, the right to silence, the right to have witnesses heard, the problem of anonymous witnesses, the right to disclosure of exculpatory evidence, how the presumption of innocence is to be understood (whether there are circumstances where the burden of proof may be reversed) and many other aspects of the law of evidence. Article 48 of the CFREU provides that "everyone who has been charged shall be presumed innocent until proved guilty according to law". The treatment of non-convicted defendants in

relation to remands in custody and the question of the reversal of the burden of proof are aspects of the same principle and will be considered both in the work on the right to bail and on evidence.

A study of *ne bis in idem* (a measure included in the Mutual Recognition Programme) is also underway. Article 50 CFREU provides that “no-one shall be liable to be tried or punished again criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law”. Greece has announced that it will soon table an initiative on the subject, which will be taken into account to assess the necessity of submitting additional proposals in the light of very recent case law. On 10 February 2003, the ECJ gave its judgment in joined Cases C-187/01 and C-385/01 on the implementation of Article 54 of the Convention implementing the Schengen Agreement. It held that a person may not be prosecuted in a Member State on the same facts as those of which his case has been “finally disposed of”, even if no court has been involved in the procedure, in another Member State.

In absentia (or default) judgments were not considered to be among the first priorities for the work on safeguards and consequently were postponed to a later date. It is now hoped to devote a Green

Paper to the subject in 2004, with a view to a proposal for legislation perhaps at the end of 2004 or early in 2005.

As far as victims of crime are concerned, there have been a number of initiatives undertaken, further to the Commission Green Paper on Crime Victims in the EU – reflections on standards and action²¹. A Framework Decision on the Standing of Victims in Criminal Proceedings was adopted on 15 March 2001²². On October 16 2002, the Commission proposed a Council Directive on Compensation to Crime Victims²³.

3. TREATY OBLIGATIONS AND EXISTING PROVISIONS

3.1 Introduction

The TEU provides, in its Article 6 that “The Union shall respect fundamental rights, as *guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms* signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to Member States, as general principles of Community Law”. For that reason, the Commission has taken the ECHR as the starting point for assessing common minimum standards. It sets minimum standards, which are common by virtue of

the fact that all Member States are parties to it. The ECHR is fleshed out by the case law so where clarification is needed, it may often be found in the judgments of the European Court of Human Rights (ECtHR). That said, the Green Paper is not designed to ensure that Member States comply with the ECHR but rather to make sure that those rights identified here are applied in a more consistent and uniform manner throughout the European Union.

3.2 The European Convention for the Protection of Human Rights and Fundamental Freedoms

Article 6 of the ECHR lays down fair trial guarantees. It is worded as follows:

Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the

parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and the facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

The various rights of which a non-exhaustive list appears in paragraph 3 reflect certain of the aspects of the notion of a fair trial in criminal proceedings²⁴. The “purpose” of the ECHR is set out forcefully in the case of *Artico v. Italy*²⁵ in which the ECtHR held: “The Court recalls that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive.”

3.3 The Charter of Fundamental Rights of the European Union

The legal status of the Charter has been under consideration for some time.

Already the CFREU has been cited with increasing frequency by the Court of First Instance of the European Communities (CFI)²⁶, and in numerous Opinions of the Advocates General²⁷.

Where they have discussed its status, they have consistently declared it not to be binding²⁸. Nevertheless, they have stated that the Charter “includes statements which appear in large measure to reaffirm rights which are enshrined in other instruments”²⁹ and that certain articles of the Charter proclaim generally recognised principles³⁰. The ECJ itself has not, to

date, referred to the Charter at all, even in cases where the Advocate General’s Opinion had done so.

At the Laeken European Council on 15 December 2001, the Heads of State of the EU Member States made a Declaration on the future of Europe in which it is stated that : “Thought would also have to be given to whether the Charter of Fundamental Rights should be included in the basic treaty and to whether the European Community should accede to the European Convention on Human Rights.”

The Praesidium proposed on 6 February 2003 a draft text of the first articles of the treaty establishing a constitution for Europe to the Members of the Convention on the future of Europe³¹. It proposes that the CFREU should be an integral part of the constitution:

“Article 5: Fundamental rights

1. The Charter of Fundamental Rights shall be an integral part of the Constitution. [...]
2. The Union may accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Accession to that Convention shall not affect the Union’s competences as defined by this Constitution.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

There is a growing consensus in support of this draft.

3.4 Other instruments

Other international instruments offering procedural safeguards to individuals involved in criminal proceedings to which all Member States³² are parties are:

- the 1945 Charter of the United Nations;
- the 1966 International Covenant on Civil and Political Rights, ("ICCPR");
- the 1963 Vienna Convention on Consular Relations, ("VCCR");
- the 1993 Statute of the International Criminal Tribunal for the former Yugoslavia, ("ICTY Statute"). Member States are bound to comply with the Statute by virtue of Articles 25 and 103 of the Charter of the United Nations;
- the 1994 Statute of the International Criminal Tribunal for Rwanda ("ICTR Statute"). Member States are bound to comply with the Statute by virtue of Articles 25 and 103 of the Charter of the United Nations.

- the 1998 Rome Statute for an International Criminal Court ("Rome Statute").

The International Covenant on Civil and Political Rights

This instrument was adopted as a resolution of the General Assembly of the United Nations³³. This means that it is not generally binding³⁴ but since the rights it lays down are codified in a treaty, it is binding on the states that ratify or accede to it. Furthermore, it establishes the Human Rights Committee, a body providing authoritative guidance on fair trial rights. The relevant articles for present purposes are Articles 9 and 10 which may be found in the Annex to this Green Paper.

The Rome Statute

Under the Rome Statute, suspects and defendants have extensive rights under Article 55 (Rights of a person during an investigation) and Article 67 (Rights of the accused) which may be found in the Annex. It is clear that the Rome Statute goes somewhat further than the ECHR. It is interesting to note that this instrument, decided on an intergovernmental basis, provides very comprehensive safeguards to persons accused of serious violations of international humanitarian law. It was drawn up by representatives of the international community, including all the Member States. It is worth noting that the

international community has accepted these safeguards as the “minimum” for future suspects and defendants at the International Criminal Court whilst suspects and defendants in “ordinary” criminal proceedings throughout the European Union do not always benefit from this level of protection.

4. THE RIGHT TO LEGAL ASSISTANCE AND REPRESENTATION

4.1 Introduction

The key issue is probably that of access to legal assistance and representation. The suspect or defendant who has a lawyer is in a far better position as regards enforcement of all his other rights, partly because his chances of being *informed* of those rights is greater and partly because a lawyer will assist him in having his rights *respected*. It would therefore seem appropriate to start by considering the right of access to legal assistance and representation.

4.2 Existing provisions

The right to a lawyer is well established – it is contained in the ECHR and stated again in the Charter of Fundamental

Rights of the European Union as well as in other instruments³⁵.

4.2.1 Under the ECHR. Article 6(3) lays down the “minimum rights” of “everyone charged with a criminal offence”:

“3. Everyone charged with a criminal offence has the following minimum rights:
[...]

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; [...]”³⁶

4.2.2 Under the CFREU. Article 47(Right to an effective remedy and to a fair trial) provides:

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

4.2.3 The European Court of Justice. In *Hoechst v. Commission*³⁷, the ECJ held explicitly that the right to legal representation is one of the basic rights governing the administrative procedure, the violation of which may lead to the imposition of penalties. The proceedings were not criminal ones, but the ECJ's statement was broad "although certain rights of the defence relate only to the contentious proceedings which follow the delivery of the statement of objections, other rights, such as the right to legal representation [...] must be respected as from the preliminary inquiry stage" ..

4.2.4 Under other international instruments

ICCPR

Article 14 of the ICCPR provides as follows:

"3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality

[...]

d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by

him in any such case if he does not have sufficient means to pay for it . . ."

The Rome Statute

The rights of the accused are covered in two articles of the Rome Statute. Article 55(2), which covers the pre-trial stage, provides, as follows:

[..]2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:[...]

(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and

(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel."

And Article 67, which covers the trial, provides:

“1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: [...]

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused’s choosing in confidence;

(c) To be tried without undue delay;

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused’s choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it; [...]

The ICTY Statute

Article 18 of the ICTY Statute provides as follows:

“3. If questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it, [...].”

The ICTR Statute lays down similar rights in its Article 20.

4.2.5 Legal representation in civil cases at EU level – a comparison.

In January 2002, the Commission presented a Proposal for a Council Directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid and other financial aspects of civil proceedings throughout the EU³⁸. This measure, was adopted on 27 January 2003³⁹. It provides that “natural persons” are to be entitled to “appropriate legal aid” in certain conditions. Although the conditions for granting legal aid in civil proceedings are somewhat different from those applying to criminal proceedings, and civil proceedings come under the ambit of the first pillar, this will provide a model of harmonisation in relation to standards for legal representation. Naturally different considerations apply in the civil law sphere and in areas coming within the ambit of the first pillar.

4.3 Discussion and questions

The ECHR and the case-law of the ECtHR lay down the right to legal assistance and representation. In recent years, the international community has seen the creation of the two *ad hoc* tribunals for the

former Yugoslavia and Rwanda and the establishment of the International Criminal Court and for all of them, the statute provides that the accused has the right to be represented by Counsel, and to have that legal assistance free of charge if he has not the means to pay for it. This reflects acceptance of the right to legal assistance and representation as a fundamental right. The issue here is therefore not should this right arise but how may it best be enforced.

4.3.1 When does the right arise? The right to legal representation arises immediately on arrest (whether this is actually in a police station or elsewhere)⁴⁰ although of course a reasonable time must be allowed for the lawyer to arrive. Pre-trial proceedings are covered⁴¹. A suspect is entitled to have legal representation throughout the questioning and interview stages of the proceedings. If the suspect has declined the offer of legal assistance at this early stage, is then charged with the offence, and still does not have legal representation, he should be reminded of his right and provided with a lawyer as soon as possible if he then wants to exercise that right.

4.3.2 What is the accused entitled to? The rights conferred by Article 6(3)(c) ECHR, taking into account its “basic pur-

pose” of ensuring a fair trial, and by other relevant provisions cited above, can be summarised as follows:

The defendant, once charged with a criminal offence, has:

- the right to defend himself in person, if he so chooses, or
- by counsel of his own choosing, and
- if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

Art. 6(3)(b) ECHR lays down the right “to have adequate time and facilities for the preparation of his defence”. This right must be respected without the time between charge and trial being excessive since Article 5(3) ECHR and Article 9(3) ICCPR both provide that persons arrested or detained should be tried “promptly”.

The right to defend oneself

Should the accused decide to avail himself of this right, he must be present at the proceedings in order to “defend himself in a practical and effective manner”. It goes without saying that the right conferred by Art. 6(3)(b) ECHR “to have adequate time and facilities for the preparation of his defence” is of vital importance to the defendant choosing to defend himself.

The Commission, whilst recognising the right to defend oneself, is, for obvious reasons, not concerned with the situation of the defendant seeking to defend himself. The situation which causes concern is the reverse, of the defendant wanting legal assistance and representation and not able to exercise this right.

The right to counsel of his own choosing

Art. 6(3)(c)ECHR, Art. 14 ICCPR, Art. 55 Rome Statute and Art. 18 ICTY Statute explicitly provide for the defendant's right to choose his legal counsel. However, this right generally only applies when the defendant has the means to pay for his legal representation.

The right to free legal representation

Art. 6(3)(c)ECHR, Art. 14 ICCPR, Art. 55 Rome Statute and Art. 18 ICTY Statute and other instruments explicitly provide for the defendant's right to free legal representation "if he has not sufficient means to pay for legal assistance".

The defendant does not have to prove "beyond all doubt" that he lacks the means to pay for his defence⁴². Some Member States operate a means test to establish whether the defendant "has not sufficient means to pay for his defence". Others provide free legal representation to all on the basis that a means test is expensive to operate and that some of the costs can be

recovered from the defendant in certain circumstances. This would seem to be an area where it is appropriate for Member States to operate the system that appears to them to be the most cost effective.

The right to free legal representation is not unconditional. The ECHR, the ICCPR and the Rome Statute all provide that this right arises "when the interests of justice so require". The difficulty lies in establishing criteria that may be applied throughout the EU for determining when the "interests of justice" so require. In *Quaranta v. Switzerland*, the ECtHR indicated three factors which should be taken into account:

- the seriousness of the offence and the severity of the potential sentence;
- the complexity of the case; and
- the personal situation of the defendant⁴³.

It should be noted that these categories are broad and cover many cases where perhaps free legal aid is not currently being granted.

The right to free legal representation does not confer a right to a choice of lawyer, but some Member States will allow this and in any event, any lawyer appointed, whether by the defendant or under a national legal aid scheme, must offer "effective assistance"⁴⁴.

In *Benham v United Kingdom* (1996) the ECtHR held that "Where the deprivation

of liberty is at stake, in principle the interests of justice call for legal representation”. Some Member States extend this principle to cover offences that carry not only a risk of a custodial sentence but also loss of employment or livelihood. Some Member States extend it even further to cover all offences except “minor” ones such as road traffic offences or shoplifting⁴⁵.

Minimum requirements

It is not enough that the State appoint a lawyer – the legal assistance provided must also be effective and the State is under a duty to ensure that the lawyer has the information necessary to conduct the defence⁴⁶. The accused should receive from his lawyer all the information necessary to understand the nature and consequences of the accusation he faces. He should be advised of any right to silence he may have (or conversely of the adverse inferences that may subsequently be drawn from his silence), of the consequences of making any confession and of the weight to be given in any subsequent proceedings to any answers he makes.

Art 6 read in conjunction with other Articles

Article 1 ECHR (Obligation to respect human rights) provides:
“The High Contracting Parties shall secure to everyone within their jurisdiction the

rights and freedoms defined in Section I of this Convention”.

Article 14 ECHR (Prohibition of discrimination) provides:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

These Articles taken together imply that the fair trial safeguards provided by Article 6 must be guaranteed to all persons within the territory of a Member State, regardless of their nationality and whether they are lawfully on the territory of the State. Consequently, the right to legal representation in criminal proceedings, and all the attendant rights discussed above must be available to everyone in the country. Article 14 precludes most forms of discrimination.

4.3.3 What provision should the Member States make? In the Commission’s questionnaire to the Member States, there was a question about access to legal assistance and representation. The arrangements in the Member States varied considerably. The Commission is interested in the idea of having national

schemes in the Member States so that the rules on eligibility are applied uniformly throughout one Member State. This would lead to a more equitable system, since all arresting officers would be familiar with the nationally applicable provisions. If these were also explained in writing to arrested persons (see Part 6 - The Letter of Rights - below), this would lead to a situation of greater transparency and increased general awareness of the right.

In some Member States, legal advice on arrest is given on a *pro bono* basis by trainees and students. Lawyers giving legal assistance in these circumstances must be competent in order for the proceedings to comply with the ECHR. If there are not enough qualified lawyers prepared to undertake this type of work, this could be in part because the remuneration is not attractive enough. In the case of trainees giving legal assistance to arrested persons, and indeed for all lawyers undertaking this work, there should be some form of quality control. This quality control must apply also to the preparation for trial

and the trial itself. A mechanism for ensuring competence should therefore be established by the Member States.

The Commission recognises that schemes that provide legal assistance and representation at the State's expense are very costly. Naturally, this begs the question of whether the duty extends to those who can afford to pay for some or all of their legal costs and to persons charged with minor offences only. Some Member States apply a means test, such as "earning less than twice the minimum monthly salary" as the threshold for eligibility. Others have no threshold and deem it more expensive to assess the defendant's means than to grant legal aid without a means test. The Commission wonders whether in view of the costs of the system, there should be common standards regarding the level of seriousness of the offence for which free legal representation should be provided, and whether certain trivial offences can be excluded. The following questions reflect these concerns.

Question 2:

In order to ensure common minimum standards of compliance with Article 6(3)(c) ECHR, should all Member States be required to establish a national scheme for providing legal representation in criminal proceedings?

Question 3:

If Member States are required to establish a national scheme for providing legal representation in criminal proceedings, should the requirement extend to verifying that remuneration is enough to make participation in the scheme attractive for defence lawyers?

Question 4:

If Member States are required to establish a national scheme for providing legal representation in criminal proceedings, should the requirement extend to verifying the competence, level of experience and/or qualifications of the lawyers participating in the scheme?

Question 5:

Article 6(3) of the ECHR provides that a person charged with a criminal offence be given free legal representation “if he has not sufficient means to pay for legal assistance”. How should Member States determine whether the defendant is able to pay for legal representation or not?

Question 6:

Article 6(3) (c) of the ECHR provides that a person charged with a criminal offence be given free legal representation “when the interests of justice so require” Should this right be limited to offences which carry a risk of a custodial sentence or extended to cover, for example, a risk of loss of employment or loss of reputation?

Question 7:

If free legal representation is to be provided for all offences except “minor” ones, what definition of “minor offences” would be acceptable in all Member States?

Question 8:

Should there be sanctions, other than any findings of the ECtHR, if a Member State fails to provide legal assistance and representation where a person is entitled to it?

5. THE RIGHT TO A COMPETENT, QUALIFIED (OR CERTIFIED) INTERPRETER AND/OR TRANSLATOR SO THAT THE ACCUSED KNOWS THE CHARGES AGAINST HIM AND UNDERSTANDS THE PROCEDURE

5.1 Introduction

The right of access to a competent interpreter and translation of the key documents is fundamental. It is clear that the suspect or defendant must understand what he is accused of. This right is well established – it is contained in the ECHR as well as in other instruments set out below. It is all the more pertinent today when many more people travel from one country to another, not only on holiday or to look for work, but to make another country their home. The difficulty is not in establishing the existence of this right, but rather one of implementation. The professions of legal translator and interpreter are not as well established as other branches (such as conference interpreter), but they are in the throes of getting organised, drawing up common standards of education, devising methods of registration or certification and drafting a code of conduct. The aim of this section is to consult on this specific point rather

than to confirm the right of access to translation and interpretation. However, a short review of the legal provisions is necessary to set out the minimum requirements.

(The rights of deaf people, who also need a sign language interpreter, will be covered in Part 6 – Proper Protection for Especially Vulnerable Groups.)

Under the ECHR

Article 5 (2) stipulates that:

“Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.”

And Article 6:

“(3) Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

[...]

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court”.

Other international instruments

Under the ICCPR

Article 14 (3) provides:

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; [...]

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court”

Under the Rome Statute

Article 55 (Rights of persons during an investigation) provides:

“1. In respect of an investigation under this Statute, a person:

[...](c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; [...]

and Article 67 (Rights of the accused [at trial]) provides:

“1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail of the nature, cause and content of the

charge, in a language which the accused fully understands and speaks; [...]

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks; [...].”

Grotius Projects 98/GR/131 and 2001/GRP/015

The Commission’s Grotius Programme supported a two-year study of how to promote equivalent standards in legal interpreting and translation throughout the Member States. The participating institutions were from Belgium, Denmark, Spain and the United Kingdom. The results of that project (98/GR/131) are published in book form under the title *Aequitas – Access to Justice Across Language and Culture*⁴⁷. The recommendations of the project cover selection, training, assessment and accreditation of legal translators and interpreters. It offers a model Code of Conduct and Good Practice, together with suggested registration and disciplinary procedures and an analysis of interdisciplinary arrangements between legal services and linguists. A second phase of this work is being

financed under the Grotius Programme (2001/GRP/015) to disseminate the information gathered in the first phase. This research project has very much informed the Commission's position on provision of legal translators and interpreters.

5.2 Discussion and questions

Defendants who do not speak or understand the language of the proceedings (e.g. either because they are non-nationals) are clearly at a disadvantage. They might be on holiday or in the foreign country for a temporary work assignment and due home shortly. There is every chance that they do not have any knowledge of the country's legal system or court procedures. Whatever their circumstances, they are especially vulnerable. Consequently, this right, which is enshrined in numerous instruments as set out above, strikes the Commission as particularly important. The difficulty is, as already alluded to, not one of acceptance on the part of the Member States⁴⁸, but one of levels and means of provision, and perhaps most importantly, costs of implementation. Accordingly, the questions fall into two categories, the first considering the level of provision, the second considering the means of provision.

5.2.1 Level of provision

When should language assistance be provided? The Commission is not aware of any mechanisms for determining whether a suspect or defendant “cannot understand or speak the language used in court”⁴⁹. This seems to be decided on an *ad hoc* basis by the people the suspect or defendant comes into contact with (police officers, lawyers, court staff etc.)⁵⁰. The ultimate duty to ensure fairness of the proceedings, in this respect as in others, rests with the trial judge who have a duty to consider this matter with “scrupulous care”⁵¹. However, clearly it is desirable for any language difficulties to come to light long before the trial begins.

Should the assistance of an interpreter be free? In the case of *Luedicke, Belkacem and Koç v. Germany*, the ECtHR held that Article 6(3)(b) entails that “for anyone who cannot speak or understand the language used in court, the right to receive the free assistance of an interpreter, without subsequently having claimed back from him payment of the costs thereby incurred”⁵². In that case, the State (Germany) tried unsuccessfully to recover the costs of interpretation after conviction. Then in *Kamasinski v. Austria*⁵³, the ECtHR held that the principle also extended to translation of “documentary material”. All

other instruments that refer to interpretation and translation provide that, in the normal course of events, the defendant should not have to pay for these services. It can therefore be stated categorically that the assistance of legal translators and interpreters during the criminal proceedings must be free of charge to the defendant.

Extent of the duty to provide translators and interpreters. The ECtHR has held that Art. 6(3)(e) “does not go so far as to require a written translation of all items of written evidence or official documents in the procedure”.

As regards translation, the ECtHR has held that “documentary material” must be translated but this duty is limited to those documents which the defendant must understand in order to have a fair trial⁵⁴. The rules on how much material is translated vary from one Member State to the next and also in accordance with the nature of the case. This variation is acceptable as long as the proceedings remain “fair”.

As regards interpretation, all the oral proceedings have to be interpreted. If a conflict of interest may arise, two interpreters may be needed, one for the defence and one for the prosecution (or the court, depending on the legal system). It is not sufficient only to provide

interpretation of questions directly put to the defendant and answers given by the defendant.

The defendant must be in a position to understand everything that is said (such as speeches by both prosecuting and defending lawyers, what the judge says and the testimony of all witnesses). The ECtHR held that “the interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of events”⁵⁵.

5.2.2 Means of provision

Training, accreditation and registration. The Commission considers that in order to comply with the requirements of the ECHR and numerous other international instruments, all Member States should ensure that training, accreditation and registration of legal translators and interpreters is provided. The Aequitas proposals set out the following minimum requirements:

- A. that Member States must have a system of training specialist interpreters and translators, with training in the legal system, visits to courts police stations and prisons, leading to a recognised qualification;

- B. that Member States must have a system of accreditation/certification for these translators and interpreters;
- C. that Member States should operate a registration scheme that is not unlimited (for 5 years for example) so as to encourage professionals to keep their language skills and knowledge of court procedures up to date in order to renew their registration;
- D. that Member States should institute a system of Continuous Professional Development, so that legal translators and interpreters can keep their skills up to date;
- E. that Member States adopt a Code of Ethics and Guidelines for Good Practice, which should be the same or very substantially similar throughout the EU;
- F. that Member States undertake to offer training to lawyers and judges so that they can better understand the role of the translator and interpreter and consequently work with them more efficiently.
- G. that Member States adopt an interdisciplinary approach to the above requirements, involving either the Ministry of Justice or of the Interior in the recruitment, training and accreditation of legal translators and interpreters.

Two different professions. Although they are often considered as one group, interpreters and translators, having different skills and different roles to play during the criminal proceedings, should be treated as two distinct professional groups.

- A. Interpreters are required during the police investigation stage (questioning of suspect, and maybe of witnesses) and during all court hearings. Additionally, the defendant may need an interpreter present when he instructs his lawyer (at the police station, in prison if he remains in custody, at the lawyer's office and in court).
- B. Translators are required to translate all the procedural documents (charge sheet, indictment) in the file, but also all the statements of witnesses that are provided in writing, and evidence to be tendered by both sides. Any national registers should take account of this, and indeed it may be more efficient for Member States to operate two separate registers.

Special linguistic regime. Some languages can present a problem. It is for the Member States to make arrangements to cover such languages, either by ensuring that they have on their register at least a minimum cover for all languages or by using methods such as "relay interpreting" via a

more common language. It may also be possible to relax the qualifications required for unusual languages in order to be able to provide translators and interpreters able to work in them. The Commission is aware of the special problem raised by these languages, but considers that the principle of subsidiarity dictates that arrangements are more appropriately to be made at the national level.

Costs. Cost is often mentioned as a reason why Member States do not fulfil their ECHR obligations in this respect. Member States must make funds available for this purpose. Court interpreters and translators must be offered competitive rates of pay so as to make this career option more attractive to language graduates. But it should not be limited to language graduates. Law graduates who find that practice is not for them, but who have excellent

language skills should be encouraged to join the profession and offered appropriate training. The European Communities have a term for these professionals with dual qualifications – “juristeslinguistes” or “lawyer-linguists”.

Recruitment. Apart from the costs of full provision, Member States contend that they do not have enough translators and interpreters at their disposal. It is therefore important to promote recruitment into the profession. The drive to recruit well-qualified professionals should not be seen simply as a question of salary. Better rates of pay will attract more people into the profession, but there are other factors too such as treating language professionals with more respect, consulting them about court procedures and involving them in such a way as to ensure that their specialist skills are acknowledged and valued.

Level of provision:

Question 9:

Should there be a formal mechanism for ascertaining whether the suspect/defendant understands the language of the proceedings sufficiently to defend himself?

Question 10:

Should Member States adopt criteria to determine how much of the proceedings, including those prior to the trial, should be interpreted for the suspect/defendant?

Question 11:

What criteria can be used to determine when it is necessary for the defendant to have separate translators and interpreters from the prosecution/court (depending on the legal system)?

Question 12:

Should Member States be required to provide translations of certain clearly defined procedural documents in criminal proceedings? If so, which documents represent the minimum necessary for a fair trial?

Means of provision:

Question 13:

Should Member States be required to draw up national registers of legal translators and interpreters? If so, should a system of accreditation, renewable registration and continuous professional development be established?

Question 14:

If Member States set up national registers of legal translators and interpreters, would it be preferable to use those registers as a basis for drawing up a single European register of translators and interpreters or to have system of access to the registers of other Member States?

Question 15:

Would there be any benefit if Member States were required to establish a national scheme for training legal translators and interpreters?

Question 16:

Should the Member States be required to appoint an accrediting body to govern a system of accreditation, renewable registration and continuous professional development? If so, is it desirable that the Ministry of Justice or Interior works with the accred-

iting body so as to ensure that the views and needs of the legal and linguistic professions are both taken into account?

Question 17:

If Member States are required to establish a national scheme for providing legal translators and interpreters in criminal proceedings, should the requirement extend to verifying that remuneration is enough to make participation in the scheme attractive for translators and interpreters?

Question 18:

How may and by whom should a Code of Conduct be drawn up and regulated?

Question 19:

The Commission understands that there is a dearth of appropriately qualified legal translators and interpreters. What can be done to make this a more attractive profession?

Question 20:

Should there be sanctions, other than any findings of the ECtHR, if a Member State fails to provide adequate interpretation and translation where a person is entitled to it?

6. PROPER PROTECTION FOR ESPECIALLY VULNERABLE CATEGORIES

6.1 Introduction

In the Consultation Paper, the Commission asked whether it was appropriate to require Member States to provide vulnerable groups with proper degree of protection as

far as procedural safeguards were concerned to offset their disadvantages. This suggestion was well received but it presents two substantial difficulties: (1) defining vulnerable groups and (2) establishing the mechanisms for offering this level of protection.

A non-exhaustive list of potentially vulnerable groups could include:

A. *Foreign nationals, especially but not limited to those who do not speak the language.*

The foreign national is vulnerable by virtue of his nationality, linguistic disadvantage and also possibly other factors (on holiday or only temporarily in the country so may be at risk of losing his employment or livelihood etc. in his country of origin). Other than being offered linguistic assistance, foreign nationals may be assisted by their Consulate (see Part 7 below).

Practical assistance should be available, under the auspices of the relevant Consulate or other appropriate organisation. The legal systems of the Member States could be required as a minimum requirement, not to allow this assistance to be impeded.

B. *Children.*

The especially vulnerable position of children has already been recognised in the UN Convention on the Rights of the Child⁵⁶. The relevant provision, Article 40, may be found in the Annex. Under the Convention on the Rights of the Child, all persons under the age of eighteen are considered children, except where the national legislation provides for a lower age of majority. The higher level for protection envisaged should apply to all “children” under the Convention definition. However, the age of criminal liability varies throughout the

EU from 8 in Scotland to 16 in Portugal, which means that there are substantial differences inherent in the legal systems of the Member States.

C. *Those who are vulnerable as a result of their mental or emotional state (for instance the mentally handicapped, those suffering from a psychiatric condition such as schizophrenia, persons of subnormal IQ and persons with a disability on the autistic spectrum).*

Defendants with a low IQ, low reading age or a poor understanding may be more likely to make damaging assertions, including false confessions, at the police interview stage⁵⁷. One suggestion would be to require police officers arresting a suspect to have to answer a specific question on the suspect’s mental state in the custody record on arrest. If police officers are required to consider the question (and make a written note of their assessment), it may be that suspects who are vulnerable for those reasons will become easier to identify over time. With this category, there is a real problem with identification. Training of police officers and lawyers should go some way towards solving it.

D. *Those who are vulnerable as a result of their physical state (the physically handicapped, including the deaf, those with illnesses such as diabetes, epilepsy, pacemakers etc. and persons with speech impediments, as well as more obviously physically handicapped suspects).*

This group also includes suspects with very serious medical conditions such as HIV/AIDS, necessitating frequent medication and/or monitoring and pregnant women, especially those who are at risk of miscarrying.

Suspects stating that they have a health problem, even one which has no visible signs or symptoms, could be given the automatic right to be examined by a doctor. The medical examination could be used to establish that the person is well enough to be questioned and also well enough to be kept in custody (especially if the period of custody is to be longer than a few hours).

Police keeping a person who says that they have a health problem in custody could be required to ensure that the person is also offered medication. Monitoring may also be required. Given that police officers cannot have the necessary expertise, it may be necessary to ensure a mechanism for offering a medical examination to all suspects stating that they have a health problem.

E. *Those who are vulnerable by virtue of having children or dependants (for example pregnant women and mothers of young children, especially single mothers, and, where the father has sole charge of young children, single fathers).*

The risk arises, especially in police custody, that a person with sole care of young children will take steps that they

perceive as likely to shorten the time in custody. This is particularly so where the person in custody believes they can be released on bail rapidly if for example they confess to the offence or make some other statement that seems to be required by the police.

F. *Persons who cannot read or write.*

Those falling into this category may be more vulnerable by virtue of not fully understanding the proceedings.

G. *Persons with refugee status under the 1951 Refugee Convention, other beneficiaries of international protection and asylum seekers*⁵⁸.

Refugees and other persons in need of international protection, including asylum seekers, are vulnerable for a number of reasons. These include: possible language and cultural difficulties, fears of antagonism on the part of law enforcement officers and owing to the limited rights they enjoy within the host State, having lost the protection of their country of origin and not being able to avail themselves of consular protection of their country of origin. A person in need of international protection may be suspected by the authorities of being unlawfully in the country, whether this is the case or not, and may therefore feel particularly vulnerable in relation to the offence for which he is a suspect or a defendant. As a consequence of prosecution or conviction, these individuals

may be excluded from or at risk of losing “refugee” status⁵⁹ or subsidiary protection status. “Temporary protection” within the meaning of Council Directive 2001/55/EC⁶⁰ may be excluded for a person having committed a “serious non-political crime” (Article 28). Consequently, the stakes are higher for persons in need of international protection for whom a conviction may be a heavier burden than for other suspects/defendants. Additionally, the threat of double jeopardy (deportation once the sentence is served) or “double peine” raises specific questions owing to the fact that refugees and persons in need of international protection cannot, in principle, be returned to their country of origin.

H. *Persons dependent on alcohol or drugs (alcoholics and drug addicts, especially if under the influence of drugs/alcohol during questioning).* Persons falling into this category may be vulnerable for a number of reasons. The extent of the vulnerability will depend on a number of factors such as the level of addiction, age, underlying general health and of course whether the individual is suffering from withdrawal symptoms. They may be unwell and not fit to answer police questions, in which case, they should be treated as persons with a health problem and offered medical assistance, as in (d)

above. This can only be done if the person states that they have a health problem or police officers have sufficient training to make this assessment themselves. Additionally, the provision of medical assistance in these circumstances must be unconditional and should never be part of a trade-off for agreeing to answer questions or provide information. In the case of drug addicts, they may be subject to various pressures to disclose the source of the drugs with a view to locating and prosecuting the pushers and traffickers. Alternatively, they may have been threatened by pushers and traffickers about retribution in the event of any disclosures made to the police.

However, the criminal proceedings may be the opportunity for the suspect/defendant to be offered help, or to feel motivated to seek help for the addiction. Accordingly, sensitivity should be shown in relation to suspects in this category.

6.2 Discussion and questions

The Commission proposes that there be a general obligation for Member States to ensure that their legal system recognises the higher degree of protection that must be offered to all categories of vulnerable suspects and defendants in criminal pro-

ceedings. The Commission acknowledges that the assessment of vulnerability can be difficult to make and that simply using a category-based method may not always be appropriate. The ECtHR, in considering whether a young man should have been awarded free legal aid, identified “the personal situation” of the defendant as a factor to be taken into account in assessing whether it was in the interests of justice to make such an award⁶¹. In the judgment, the defendant is described as “a young adult of foreign origin from an underprivileged background, [having] no real occupational training and a long criminal record. He has taken drugs since 1975, almost daily since 1983, and, at the material time, was living with his family on social security benefit”. Some aspects of this description are covered by the categories listed above, some are not. However, it is clear that the ECtHR considers legal aid awarding authorities capable of making an assessment of the “personal situation” of suspects and defendants. Police and law enforcement officials could also be called upon to make this type of assessment.

Prior to charge, that is to say, while the suspect is under arrest, at the police station or otherwise being questioned (or having his property searched) law enforcement officers should consider the question of the suspect’s potential vul-

nerability. They could be required to show, by making a written record, that they have made an assessment of the suspect’s vulnerability. If a finding that the suspect is particularly vulnerable has been made, law enforcement officers could be required to demonstrate that they have taken the appropriate steps (for example medical assistance, contacting family, enabling the suspect to inform someone of the detention etc) to provide for the higher degree of protection. They should be required to make a written note, which can be verified subsequently, of the steps they deemed it necessary to take if a finding of vulnerability is made and confirmation that those steps were actually taken.

Once the suspect is charged with a criminal offence, and becomes a defendant facing trial, any potential vulnerability, such as the need for linguistic or medical assistance, should be noted in the court record of the proceedings and in the defendant’s custody record if he is kept in pre-trial detention. If it subsequently comes to light that a defendant’s vulnerability was either not recorded or that if a record was made, it was not acted upon, the Member State in question should provide for some recourse or remedy for the person concerned.

The assessment of the suspect’s potential vulnerability is difficult to make, but training in this field could be offered.

Question 21:

Are persons in the following categories especially vulnerable? If so, what can Member States be required to do to offer them an adequate level of protection in criminal proceedings:

- A. foreign nationals;
- B. children;
- C. persons suffering from a mental or emotional handicap, in the broadest sense;
- D. the physically handicapped or ill,
- E. mothers/ fathers of young children;
- F. persons who cannot read or write,
- G. refugees and asylum seekers;
- H. alcoholics and drug addicts?

Should any further categories be added to this list?

Question 22:

Should police officers, lawyers and/or prison officers be required to make an assessment, and a written note of that assessment, of a suspect/defendant's potential vulnerability at certain stages of criminal proceedings, together with a note of the steps they have taken if a finding of vulnerability is made?

Question 23:

If police officers, lawyers and/or prison officers are to be required to make an assessment of a suspect/defendant's potential vulnerability at certain stages of criminal proceedings, should there be an obligation to follow up the assessment with appropriate action?

Question 24:

If the police and/or law enforcement authorities fail to assess and report a suspect's vulnerability, or fail to take the necessary steps after making a finding of vulnerability, are sanctions appropriate? If so, what should those sanctions be?

7. CONSULAR ASSISTANCE

7.1 Introduction

As already seen above in relation to interpreters and translators, one readily identifiable vulnerable group is that of non-nationals, both nationals of other EU Member States and of third countries. Numerous NGOs identify this group as one that does not always receive equitable treatment. Some considerable protection would be offered by full implementation of the provisions of the 1963 Vienna Convention on Consular Relations (VCCR), which provides, in its Article 36(1), that:

- “(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
- (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other

manner. Any communication addressed to the consular post by the person arrested, in prison; custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(...)”

This provision also lays down a right to visit detained nationals.

Foreign nationals may refuse to see the representative of their government (this can be imagined, for example, in the case of asylum seekers and refugees fleeing persecution in their State of origin and who therefore might not expect or want help from their Consulate). Those falling into this category may contact representatives from another state that has agreed to look after their interests⁶² or a national or international organisation of their choice for this type of assistance⁶³. Implementation of the VCCR could entail appointing a dedicated official in each Consulate to cover cases where their nationals were accused of crimes while abroad (this consular official could also assist with victims of crime, since they would be required to know the local law and criminal procedure). The consular official could assist in liaising with the fam-

ily of the accused, with lawyers, with any potential witnesses, with NGOs that offer assistance to prisoners abroad and if necessary in organising special procedures such as appeals in the newspapers etc. The attraction of this idea is that it would reduce the burden on the Host State and increase the suspect/defendant's chances of getting assistance, especially assistance in a language he understands.

7.2 Discussion and questions

The Commission understand that at present many defendants do not get the benefit of this right, sometimes because they are not aware of it (or made aware of it) and also because when consular assistance is offered, defendants often refuse it for fear of the authorities in their home State learning of their arrest abroad. The right should be better understood by all concerned and Member States should address the question of how their consular officials can offer useful assistance to their nationals arrested abroad, without fear of subsequent prejudice on their return home. There is very little information available on

how often consular assistance is offered and whether Member States are failing to comply with this right. Currently, failure to comply with the VCCR may give rise to a cause of action in the International Court of Justice⁶⁴. However, proceedings in that court are lengthy.

Actions are brought by States so the basis of the remedy is that the State has suffered prejudice as a result of the failure to treat its national in accordance with consular protocol. This does not represent a remedy for the actual individual who has been the victim of the breach. Even if his home State is prepared to bring an action against the offending State, it will not provide an effective and practical remedy for the individual concerned. It is therefore worth considering what remedies should or could be available to an individual in this situation.

Suspects and defendants could be made aware of the right by way of the Letter of Rights (Part 8). Police forces could be made aware of it during the course of training if Member States would cooperate to ensure that arresting officers are trained to contact the relevant consular authorities if and when they arrest a foreign national.

Question 25:

Should Member States be required to ensure that there is an official with responsibility for looking after the rights of suspects and defendants in criminal proceedings in the Host state, including acting as a liaison person with their families and lawyers?

Question 26:

Should Member States be required to ensure that their police authorities comply with the Vienna Convention on Consular Relations by ensuring that police officers receive appropriate training?

Question 27:

Should there be any sanction for failing to comply with the VCCR? If so, what should this be?

8. KNOWLEDGE OF THE EXISTENCE OF RIGHTS/ LETTER OF RIGHTS

8.1 Introduction

It is important for both the investigating authorities and the persons being investigated to be fully aware of what rights exist. The Commission suggests that a scheme be instituted requiring Member States to provide suspects and defendants with a written note of their basic rights – a “Letter of Rights”. This suggestion received a favourable response on the whole and variations on this theme were

also put forward. Many respondents thought that if a measure such as this were introduced, it would significantly improve the position of suspects and defendants. The European Parliament has reacted favourably to the suggestion of a Letter of Rights and has proposed that a budget be made available for funding it. Producing such a document should be inexpensive, especially once the initial costs of drawing it up had been met.

8.2 Discussion and questions

Various suggestions were put forward, such as a Letter of Rights in several parts,

with one common part for all the EU and a second part that Member States could draft according to their own national legislation. An important consideration is to ensure that the Letter of Rights can be understood, even by a suspect/defendant with poor reading ability or a low IQ. The Letter of Rights could have a common Part 1 and a Part 2 to be added by the Member States to take account of national provisions. It should contain enough information to be useful but be drafted in a simple form so as to be easily understood. The aim would be to keep it as short as possible. It could be produced in all EU languages in some centralised way or there could be some other mechanism to ensure that it is as uniform as possible.

The Letter of Rights should be given to the suspect at the point when the suspect's rights are first at risk and in need of protection. The difficulty is in pinpointing that moment. This could be on arrest, or before. The letter could be given once the suspect is in custody at the police station but no later since in order to be useful, the Letter of Rights must be given as soon as the person is "detained" and rights conferred by Articles 5 and 6 ECHR arise. If it is not given to the suspect until arrival at the police station, the question of ensuring that he is aware of his rights before receipt of

the letter arises. For practical reasons, it would seem logical that it be given at the police station since stocks of the letters themselves would presumably be kept there, together with the different language versions.

It is difficult to assess whether the defendant should be required to sign for the Letter of Rights. The Commission consulted representatives from the Member States on the point. Many were happy that it should not need to be signed for. Some experts wondered what the status of the Letter of Rights would be and what the consequences of failing to give it to the defendant would be.

The Commission is aware of some of the difficulties perceived by Member States. Some consider that the ECHR already exists as a statement of rights. Others argue that their legislation is too complicated to boil down to an easily digestible document or that the rights of the defendant evolve during the course of proceedings so that any "Letter of Rights" would have to be up to 50 pages long in order to cover all options and all stages. However this latter problem should not apply since once the suspect has a lawyer acting for them (a right the person will be made aware of in the Letter of Rights if not before), that lawyer will be in a position to explain the person's rights to them.

Question 28:

Is a common EU wide Letter of Rights feasible? If so, what should it contain?

Question 29:

When should the Letter of Rights be given to the suspect?

Question 30:

Should the defendant be required to sign a receipt as evidence that he has been given the Letter of Rights?

Question 31:

What would be the legal consequences, if any, of failing to give the suspect the Letter of Rights?

9. COMPLIANCE AND MONITORING

9.1 Introduction

It is worth repeating that the intention behind the initiative on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union is not in any way to replace or even to complement the ECtHR. The hope is that as a result of this initiative, Member States will achieve better standards of compliance with the ECHR in the areas covered by this Green Paper. The ECtHR cannot be relied upon as a safety net to remedy all breaches of the ECHR. This is unrealistic in view of

a number of factors. The ECtHR is a court of *last resort* and additionally it has expressed concern over its ability to handle its ever-increasing caseload⁶⁵. If there are repeated allegations of violations of the ECHR, the Member States should have the means to remedy them of their own motion. Since the principle of mutual recognition may only be implemented efficiently where there is mutual trust, it is, as discussed above⁶⁶, important that these common minimum standards be complied with for this reason also. The level of compliance should be demonstrably high. In order for each Member State to be certain of the level of compliance in the other Member States, there should be some form of evaluation.

Mutual trust must go beyond the perceptions of the governments of the Member States—it must also be established in the minds of practitioners, law enforcement officers and all those that will administer decisions based on mutual recognition on a daily basis. This cannot be achieved overnight, and cannot be achieved at all unless there is some reliable means of assessing compliance with common minimum standards across the European Union. This will be all the more so after accession of the candidate countries. Furthermore, once a mechanism for evaluation has been decided upon, assessment should be carried out on a regular, continuous basis.

At present there is a growing demand for evaluation of Justice and Home Affairs measures.

Several contributions to Working Group X (“Freedom, Security and Justice”) of the Convention on the Future of Europe⁶⁷ have called for evaluation and monitoring of the implementation of the Area of Freedom, Security and Justice. Working Group X has been set up to consider “Freedom, Security and Justice” issues more closely. Justice and Home Affairs Commissioner Antonio Vitorino favours “enhancing[...], evaluation and monitoring mechanisms to check the real application of Union legislation at operational level”⁶⁸. Other suggestions are an

early warning mechanism for breaches of fundamental rights⁶⁹ and evaluation together with a greater involvement on the part of the ECJ⁷⁰.

9.2 Carrying out the evaluation

The Commission considers it appropriate that it should play the major role in the evaluation and monitoring process. It needs to be informed about how measures are being implemented in practice. Once a Framework Decision has been adopted, one of its final provisions lays down an obligation for Member States to inform the Commission of the arrangements they have made in order to transpose the obligations stemming from the Framework Decision into their national legislation. An example of such a provision is:

“Member States shall transmit to [...]the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision.[...]”⁷¹

The Commission is then also under a duty to ensure that the Framework Decision is properly implemented, that is to say that the national legislation adequately achieves the aim of the EU measure. It would therefore seem appropriate for the Commission to extend its task of collecting information on the transposition

into national legislation of the EU obligations to a regular monitoring exercise on compliance. This could be on the basis of the Member States themselves submitting reports or statistics compiled by their national authorities and submitted to be collated and analysed by the Commission. The Commission could also use the services of a team of experts. There is a newly appointed independent network of experts on fundamental rights commissioned by DG-Justice and Home Affairs “to assess how each of the rights listed in the CFREU is applied at both national and Community levels...[taking] account of developments in national legislation, the case law of constitutional courts [...] as well as the case law of the Court of Justice of the European Communities and the European Court of Human Rights”. The tasks of this team will be the production of a written report summarising the situation of fundamental rights in the context of both European Union law and national legal orders⁷². That network will report to the Commission. It is currently operating on the basis of a contract for a first evaluation to be carried out over a one-year period and which may be renewed for up to five years. If the outcome is satisfactory, the role of this team of experts could be expanded to encompass all the provisions of any Framework Decision

on procedural safeguards. Since Article 47 of the Charter of Fundamental Rights of the EU provides for the right to a fair trial, this network is already mandated to consider many of the provisions included in this Green Paper. In any event, evaluation of common minimum standards for procedural safeguards should be carried out on a continuous basis at regular intervals rather than as a once-off or on an *ad hoc* basis. In this way, any persistent breaches will come to light, together with any patterns of standards falling below the agreed minimum.

9.3 Tools for evaluation

The evaluation should cover compliance at all levels and stages of proceedings. There are many possible tools for evaluation. The more obvious are the statistics to be provided by Member States regarding numbers of proceedings and trials, the percentage of defendants with legal representation, percentages of cases where legal translators and interpreters were used and other similar indicators. However, there should be a mechanism for reporting and investigating complaints of non-compliance. Allegations of non-compliance, especially where they persistently refer to the same entity (court, police station or even geographi-

cal area) are good indicators of an underlying problem. Some Member States make recordings (audio and video) of police interviews. Not only does this protect police officers from subsequent allegations of unfair treatment but it also provides excellent evidence of what actually occurred. If Member States accepted the introduction of recording, this would be a good tool for evaluating compliance with the agreed common minimum safeguards.

For evaluation to serve its desired purpose, the scope of the evaluation and the expected results must be precisely indicated. Thus clarity in setting the terms of the monitoring body will be an absolutely necessary prerequisite.

9.4 Sanctions

The question of evaluation and monitoring also begs the question of what action to take in the event of non-compliance or

of a persistent falling below agreed common standards. There are remedies for individual violations of the ECHR, decided on a case by case basis by the ECtHR. Article 7 TEU provides very grave sanctions for “serious and persistent breaches” on the part of Member States⁷³. It is necessary to consider whether there could be any other type of sanction, for example for persistent breaches not serious enough to fall within the ambit of Article 7 TEU.

9.5 Conclusions

Setting common minimum standards for procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union will help clarify what is expected of police and judicial authorities. Efficient and continuous monitoring will ensure that those standards are adhered to in reality.

Question 32:

Is evaluation of compliance with common minimum standards an essential component of mutual trust and consequently of mutual recognition?

Question 33:

What information does the Commission need in order to make an effective assessment of compliance with any agreed common minimum standards of procedural safeguard?

Question 34:

Is recording of police interviews a desirable tool for efficient monitoring? What other tools would be effective?

Question 35:

Are sanctions for a level of provision found to fall below commonly agreed minimum standards appropriate? If so, what could those sanctions be?

QUESTIONS :

General

1. Is it appropriate to have an initiative in the area of procedural safeguards at European Union level?

Legal Representation

2. In order to ensure common minimum standards of compliance with Article 6(3)(c) ECHR, should Member States be required to establish a national scheme for providing legal representation in criminal proceedings?

3. If Member States are required to establish a national scheme for providing legal representation in criminal proceedings, should the requirement extend to verifying that remuneration

is enough to make participation in the scheme attractive for defence lawyers?

4. If Member States are required to establish a national scheme for providing legal representation in criminal proceedings, should the requirement extend verifying the competence, level of experience and/or qualifications of the lawyers participating in the scheme?

5. Article 6(3) of the ECHR provides that a person charged with a criminal offence be given free legal representation "if he has not sufficient means to pay for legal assistance". How should Member States make the assessment of whether the defendant is able to pay for legal representation or not?

6. Article 6(3) of the ECHR provides that a person charged with a criminal offence be given free legal representation “when the interests of justice so require”. Should this right be limited to offences which carry a risk of a custodial sentence or extended to cover, for example, a risk of loss of employment or loss of reputation?

7. If free legal representation is to be provided for all offences except “minor” ones, what definition of “minor offences” would be acceptable in all Member States?

8. Should there be sanctions, other than any findings of the ECtHR, if a Member State fails to provide legal assistance and representation where a person is entitled to it?

Provision of legal translators and interpreters

9. Should there be a formal mechanism for ascertaining whether the suspect/defendant understands the language of the proceedings sufficiently to defend himself?

10. Should Member States adopt criteria to determine how much of the proceedings, including those prior to the trial

should be interpreted for the suspect/defendant?

11. What criteria can be used to determine when it is necessary for the defendant to have separate translators and interpreters from the prosecution/court (depending on the legal system)?

12. Should Member States be required to provide translations of certain clearly defined procedural documents in criminal proceedings? If so, which documents represent the minimum necessary for a fair trial?

13. Should Member States be required to draw up national registers of legal translators and interpreters?

14. If Member States set up national registers of legal translators and interpreters, would it be preferable to use those registers as a basis for drawing up a single European register of translators and interpreters or to have system of access to the registers of other Member States?

15. Should Member States be required to establish a national scheme for training legal translators and interpreters? If so, should a system of accreditation, renewable registration and continuous profes-

sional development be established?

16. Should Member States be required to appoint an accrediting body to govern a system of accreditation renewable registration and continuous professional development? If so, is it desirable that the Ministry of Justice or Interior work with the accrediting body so as to ensure that the views and needs of the legal and linguistic professions are both taken into account?

17. If Member States are required to establish a national scheme for providing legal translators and interpreters in criminal proceedings, should the requirement extend to verifying that remuneration is enough to make participation in the scheme attractive for translators and interpreters?

18. How may and by whom should a Code of Conduct be drawn up and regulated?

19. The Commission understands that there is a dearth of appropriately qualified legal translators and interpreters. What can the Member States do to make this a more attractive profession?

20. Should there be sanctions, other than any findings of the ECtHR, if a Member State fails to provide interpretation

and translation where a person is entitled to it?

Protecting vulnerable groups

21. Are persons in the following categories especially vulnerable? If so, what can Member States be required to do to offer them an adequate level of protection in criminal proceedings:

- (1) foreign nationals,
- (2) children,
- (3) persons suffering from a mental or emotional handicap, in the broadest sense,
- (4) the physically handicapped or ill,
- (5) mothers/ fathers of young children,
- (6) persons who cannot read or write,
- (7) refugees and asylum seekers,
- (8) alcoholics and drug addicts,

Should any further categories be added to this list?

22. Should police officers, lawyers and/or prison officers be required to make an assessment, and a written note of that assessment, of a suspect/defendant's potential vulnerability at certain stages of criminal proceedings?

23. If police officers, lawyers and/or prison officers are to be required to make an assessment of a suspect/defendant's potential vulnerability at cer-

tain stages of criminal proceedings, should there be a mechanism for following up the assessment with appropriate action?

24. If the police and/or law enforcement authorities fail to assess and report a suspect's vulnerability, are sanctions appropriate? If so, what should those sanctions be?

Consular assistance

25. Should Member States be required to ensure that there is an official with responsibility for looking after the rights of suspects and defendants in criminal proceedings in the Host state, including acting as a liaison person with their families and lawyers?
26. Should Member States be required to ensure that their police authorities comply with the Vienna Convention on Consular Relations by ensuring that police officers receive appropriate training?
27. Should there be any sanction for failing to comply with the VCCR? If so, what should this be?

The Letter of Rights

28. Is a common EU wide Letter of Rights

feasible? If so, what should it contain?

29. When should the Letter of Rights be given to the suspect?
30. Should the defendant be required to sign a receipt as evidence that he has been given the Letter of Rights?
31. What would be the legal consequences, if any, of failing to give the suspect the Letter of Rights?

Evaluation and monitoring

32. Is evaluation of compliance with common minimum standards an essential component of mutual trust and consequently of mutual recognition?
33. What information does the Commission need in order to make an effective assessment of compliance with any agreed common minimum standards of procedural safeguard?
34. Is recording of police interviews a desirable tool for efficient monitoring?
35. Are sanctions for a level of provision found to fall below commonly agreed minimum standards appropriate? If so, what could those sanctions be?

ANNEX

Relevant provisions of existing treaties

The International Covenant on Civil and Political Rights

Article 9

- “1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”

Article 10

- “1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2.
 - (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
 - (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accord-

ed treatment appropriate to their age and legal status.”

The Rome Statute establishing the International Criminal Court

Article 55

“Rights of persons during an investigation

1. In respect of an investigation under this Statute, a person:
 - (a) Shall not be compelled to incriminate himself or herself or to confess guilt;
 - (b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;
 - (c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and
 - (d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.
2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities [...], that person shall also have the following rights of which he or she shall be informed prior to being questioned:
 - (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;
 - (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;
 - (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and
 - (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.”

Article 67

“Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
- (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused’s choosing in confidence;
- (c) To be tried without undue delay;
- (d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused’s choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;
- (e) To examine, or have examined, the

witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

- (f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks;
- (g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;
- (h) To make an unsworn oral or written statement in his or her defence; and
- (i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor’s possession or control which he or she believes shows or

tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.”

The United Nations Convention on the Rights of the Child

Article 40:

- “1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.
2. To this end, and having regard to the relevant provisions of international instruments,

States Parties shall, in particular, ensure that:

- (a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
- (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
 - (i) To be presumed innocent until proven guilty according to law;
 - (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
 - (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appro-

- appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
- (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
 - (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
 - (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
 - (vii) To have his or her privacy fully respected at all stages of the proceedings.
3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
- (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
 - (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.
4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.”

NOTES

- 1 E.g. Case 29/69, *Stauder v. City of Ulm*[1969] ECR 419 in which the ECJ accepted that Community law should not override nationally protected human rights, and *Nold v. Commission* [1974] ECR 491, in which the ECJ held that “fundamental rights form an integral part of the general principles of law, the observance of which it ensures” (para.13).
- 2 E.g. in Case C-49/88 *Al-Jubail Fertilizer Co. and Saudi Arabian Fertilizer Co. v. Council* [1991] ECR I-3187, the ECJ stressed the importance of the right to a fair hearing and in Cases 46/87 & 227/88 *Hoechst AG v. Commission* [1989] ECR 2859, it held “...regard must be had in particular to the rights of the defence, a principle whose fundamental nature has been stressed on numerous occasions...”
- 3 *Opinion 2/94 on Accession of the Community to the ECHR* [1996] ECR I-1759.
- 4 The Treaty on European Union, signed at Maastricht on 7 February 1992.
- 5 Article K.2 of Title VI - Provisions on Co-operation in the fields of Justice and Home Affairs.
- 6 COM(1998) 459 final, 14 July 1998, “Towards an Area of Freedom, Security and Justice”.
- 7 Presidency Conclusions, Tampere European Council 15 /16 October 1999.
- 8 Point 33 - Presidency Conclusions – Tampere European Council 15/16 October 1999.
- 9 Point 33, Tampere Conclusions.
- 10 COM(2000) 495 final.
- 11 2001/C 12/02.
- 12 (Council and Commission) Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C12, 15.1.2001, p. 10.
- 13 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) OJ L190/1 of 18.7.2002.
- 14 “Membership requires that the candidate country has achieved *stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and, protection of minorities*, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate’s ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.”
- 15 COM(2002)700 final of 9 October 2002. The 10 countries are Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia.
- 16 Such as the European Arrest Warrant

- (see footnote 13).
- 17 COM(2001)715 final.
- 18 Article 5 of the Treaty establishing the European Community (which applies here by virtue of Article 2 of the TEU) provides: “*The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.* Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.”
- 19 OJ C 19/1 of 23. 1. 1999
- 20 http://europa.eu.int/comm/justice_home/index_en.htm
- 21 COM(1999)349 final.
- 22 OJ L 82/1 of 22. 3. 2001.
- 23 COM(2002)562 final.
- 24 *Deweert v. Belgium* Judgment of 27 February 1980, Series A no. 35, para. 56
- 25 *Artico v. Italy*, 13 May 1980, Series A, N°37, paras. 32 and 33.
- 26 See for example Case T-112/98 *Mannesmannröhren-Werke v. Commission* [2001] ECR II-729, Case T- 54/99 *Max.mobil v. Commission* (judgment of 30 January 2002), paragraphs 48 and 57, Case T-177/01 *Jégo-Quéré v. Commission* (judgment of 3 May 2002), paragraphs 42 and 47 that ruling is currently under appeal (Case C-263/02P).
- 27 See for example: AG Alber in Case C-340/99 *TNT v. Poste Italiane* [2001] ECR I-4109, para. 94; AG Geelhoed in Case C-313/99 *Mulligan v. AG*, para. 28, C-413/99 *Baumbast v. Secretary of State for the Home Department*, para. 59 and Case C-491/01 *The Queen v. Secretary of State for Health ex parte BAT*, paras. 47 and 259; AG Jacobs in Cases C-377/98 *Netherlands v. Parliament and Council* (biotechnology Directive) (judgment of 9 October 2001), paras. 97 and 210, C-270/99P *Z v. Parliament* (judgment of 21 November 2001), para. 40, and C-50/00P *Unión de Pequeños Agricultores v. Council* (judgment of 25 July 2002), para. 39; AG Léger in Cases C-353/99P *Council v. Hautala* (judgment of 6 December 2001), paras. 51, 73 and 78-80, and C-309/99 *Wouters v. Nederlandse Orde van Advocaten* (judgment of 19 February 2002), paras. 173 and 175; AG Mischo in Cases C-122 and 125/99 *D v. Council* [2001] ECR I-4319, para. 97, and C-20/00 and 64/00 *Booker Aquaculture v. The Scottish Ministers*, para. 126 AG Stix-Hackl in Case C-49/00 *Commission v. Italy*, para. 57, and C-459/99 *MRAX v. Belgium* (judgment of 25 July 2002), para. 64; and AG Tizzano in Case C-173/99 *The Queen v. Secretary of State for Trade and*

- Industry ex parte* BECTU [2001] ECR I-4881, para. 27. Paragraph references are to the Opinions of the Advocates General, not the judgments.
- 28 Baumbast para. 59, BECTU para. 27, *Council v. Hautala* para. 80, Mulligan para 28, Unión de Pequeños Agricultores para. 39, Z, para 40.
- 29 BECTU, para. 27
- 30 Unión de Pequeños Agricultores, para. 39;
- 31 CONV 528/03
- 32 The candidate countries, including Bulgaria and Romania, are also parties to these treaties, with the exception of the Rome Statute which all candidate countries have ratified except the Czech Republic, Lithuania and Malta. As of November 2002, these three countries have signed but not ratified the Rome Statute.
- 33 G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976.
- 34 The UN Charter provides that the General Assembly may “make recommendations” (Article 11 and 12). However, the International Court of Justice stated in its 1996 Advisory Opinion on the *Legality of the threat or use of nuclear weapons*: “General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule”.
- 35 International Covenant on Civil and Political Rights (“ICCPR”) and rule 93 of the Standard Minimum Rules for the Treatment of Prisoners (Council of Europe Res. CM(73)5).
- 36 In the *Artico v. Italy* case (cited in footnote 27 above) the ECtHR held: “Article 6(3) contains an enumeration of specific applications of the general principle stated in paragraph 1 of the Article (art. 6-1)[...] When compliance with paragraph 3 is being reviewed, its basic purpose must not be forgotten nor must it be severed from its roots”.
- 37 Cases 46/87 & 227/88 *Hoechst AG v. Commission* [1989] ECR 2859, Paras 15 and 16.
- 38 Proposal for a Council Directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid and other financial aspects of civil proceedings,

- COM(2002)13 final of 18. 01. 2002
39 OJ L26/41 of 31. 1. 2003.
- 40 In *John Murray v. UK* (Judgment of 8 February 1996, Series A 1996-I) a violation of the ECHR was found as the accused was arrested for terrorist offences and refused access to a lawyer for 48 hours. Also Rule 93 of the Standard Minimum Rules for the Treatment of Prisoners (Council of Europe Res. CM(73)5 provides that “Untried prisoners shall be entitled, *as soon as imprisoned*, to choose a legal representative...”).
- 41 *Imbrioscia v. Switzerland* (Judgment of 24 November 1993, Series A, N°275, para. 36).
- 43 *Quaranta v. Switzerland*, judgment of 24 May 1991, Series A n° 205, para. 35 describes Mr Quaranta as “a young adult of foreign origin from an underprivileged background...[having] no real occupational training and a long criminal record. He has taken drugs since 1975, almost daily since 1983, and, at the material time, was living with his family on social security benefit”.
- 44 *Artico v. Italy* 1980 cited above.
- 45 E.g. Sweden, but N.B. shoplifting is not considered a “minor” offence in all Member States.
- 46 In *Goddi v. Italy* (Judgment of 9 April 1984), failure on the part of the State to notify Mr Goddi’s lawyer of the hearing date meant that he did not have the benefit of a “practical and effective” defence.
- 47 ISBN 90 804438 8 3; Contact Professor Erik Hertog at erik.hertog@lessius-ho.be or website <http://www.legalinttrans.info/Grotius>
- 48 Our questionnaire shows that all the Member States are conscious of their ECHR obligations and make provision for translators and interpreters during at least part of the proceedings if circumstances seem to dictate that there is a need for them.
- 49 *Kamasinski v. Austria* (judgment of 19 December 1989 A Series N° 168) para 74.
- 50 In *Brozicek v. Italy*, Judgment of 19 December 1989, A Series N°167, the ECtHR held that it was for the judicial authorities to prove that the defendant did speak the language of the court adequately and not for the defendant to prove he did not. (Para.41).
- 51 In *Cusani v. United Kingdom*, judgment of 24 September 2002, application n° 32771/96, the EctHR held: “ However, the ultimate guardian of the fairness of the proceedings was the trial judge who had been clearly apprised of the real difficulties which the absence of interpretation might create for the applicant. It further observes that the domestic courts have already taken the view that in circumstances such as those in the instant case, judges are required to treat an

- accused's interest with "scrupulous care".
- 52 *Luedicke, Belkacem and Koç v. Germany* – judgment of 28 November 1978, Series A N°29 paragraph 46
- 53 *Kamasinski v. Austria* (cited above).
- 54 *Kamasinski v. Austria*, cited above, para 74.
- 55 *Kamasinski v. Austria*, cited above, para 74.
- 56 Which every State in the world has signed except the United States and Somalia.
- 57 Gudjonsson, Clare, Rutter and Pearse Persons at Risk During Interviews in Police custody: the Identification of Vulnerabilities. Research Study n° 12. The Royal Commission on Criminal Justice. HMSO. London (1993).
- 58 For these categories of persons, the European Union is developing measures and standards in accordance with Article 63 of the Treaty establishing the European Community.
- 59 Article 12 of the 1951 Convention relating to the Status of Refugees provides that the status of refugee is governed by the law of the country of domicile or residence.
- 60 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. OJ L212/12 of 7.8. 2001.
- 61 *Quaranta v. Switzerland*, judgment of 24 May 1991, Series A n° 25, cited in footnote 43 above.
- 62 Rule 38 of the Standard Minimum Rules for the Treatment of Prisoners adopted in 1955 by the UN Congress on the Prevention of crime and the Treatment of Offenders: 1. [...] 2. Prisoners who are nationals of States without diplomatic or consular representation in the country and refugees or stateless persons shall be allowed similar facilities to communicate with the diplomatic representative of the State which takes charge of their interests or any national or international authority whose task it is to protect such persons.
- 63 Principle 16 of the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment adopted by the UN General assembly in 1988: 1.[...] 2. If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with [...] the representative of the competent international organisation, if he is a refugee or is otherwise under the protection of an intergovernmental organisation.
- 64 See ICJ cases: *Paraguay v. USA* (Breard case) Order of 9 April 1998 (case discontinued) and *Germany v USA* (Lagrand case) Judgment of 27 June 2001. Also the recent case of *Avena and other Mexican Nationals (Mexico v. United States of America)* in which an Order on Provisional Measures

is expected on 5 February 2003.

65 Report of the Evaluation Group on the means to guarantee the continued effectiveness of the European Court of Human Rights, Strasbourg, September 2002.

66 See Part 1–“Enhancing mutual trust”.

67 Convention on the Future of Europe—for information and documents, refer to the website:<http://european.convention.eu.int/bienvenue.asp?lang=EN> Working Group X has been set up to consider “Freedom, Security and Justice” issues more closely.

68 Working Group X “Freedom, Security and Justice”, WD 17, 15 November 2002.

69 Working Group X “Freedom, Security and Justice”, WD 13, 15 November 2002

70 Working Group X, as above, Comments of Ana Palacio, Member of the Convention, Representative of the Spanish Government, on WD05, 18 November 2002.

Mrs Palacio states: “As far as operational action is concerned, the main responsibility to monitor Member States would lay on the Council, which should ensure proper control through a system of “peer evaluation”. Finally, the Court of Justice would have full powers under the new Treaty, corresponding to those it enjoys today for “first pillar” issues, to exercise judicial control in JHA matters .

71 Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. OJL190 of 18. 7. 2002

72 Network of experts on the Charter appointed in July 2002, Unit A5, DG-JHA; its terms of reference are set out in Contract notice 2002/S60 – 046435, OJ S60 of 26. 3. 2002.

73 See Part 1(2) above.

COUNCIL DIRECTIVE 2002/8/EC

of 27 January 2003

TO IMPROVE ACCESS TO JUSTICE IN CROSS-BORDER DISPUTES BY ESTABLISHING MINIMUM COMMON RULES RELATING TO LEGAL AID FOR SUCH DISPUTES

THE COUNCIL OF THE EUROPEAN
UNION

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) and 67 thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

Whereas:

(1) The European Union has set itself the objective of maintaining and developing an area of freedom, security and justice in which the free movement of persons is ensured. For the gradual

establishment of such an area, the Community is to adopt, among others, the measures relating to judicial cooperation in civil matters having cross-border implications and needed for the proper functioning of the internal market.

(2) According to Article 65(c) of the Treaty, these measures are to include measures eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

(3) The Tampere European Council on 15 and 16 October 1999 called on the Council to establish minimum standards ensuring an adequate level of legal aid in crossborder cases throughout the Union.

(4) All Member States are contracting

parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. The matters referred to in this Directive shall be dealt with in compliance with that Convention and in particular the respect of the principle of equality of both parties in a dispute.

- (5) This Directive seeks to promote the application of legal aid in cross-border disputes for persons who lack sufficient resources where aid is necessary to secure effective access to justice. The generally recognised right to access to justice is also reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union.
- (6) Neither the lack of resources of a litigant, whether acting as claimant or as defendant, nor the difficulties flowing from a dispute's cross-border dimension should be allowed to hamper effective access to justice.
- (7) Since the objectives of this Directive cannot be sufficiently achieved by the Member States acting alone and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (8) The main purpose of this Directive is to guarantee an adequate level of legal aid in cross-border disputes by laying down certain minimum common standards relating to legal aid in such disputes. A Council directive is the most suitable legislative instrument for this purpose.
- (9) This Directive applies in cross-border disputes, to civil and commercial matters.
- (10) All persons involved in a civil or commercial dispute within the scope of this Directive must be able to assert their rights in the courts¹ even if their personal financial situation makes it impossible for them to bear the costs of the proceedings. Legal aid is regarded as appropriate when it allows the recipient effective access to justice under the conditions laid down in this Directive.
- (11) Legal aid should cover pre-litigation advice with a view to reaching a set-

tlement prior to bringing legal proceedings, legal assistance in bringing a case before a court and representation in court and assistance with or exemption from the cost of proceedings.

(12) It shall be left to the law of the Member State in which the court is sitting or where enforcement is sought whether the costs of proceedings may include the costs of the opponent imposed on the recipient of legal aid.

(13) All Union citizens, wherever they are domiciled or habitually resident in the territory of a Member State, must be eligible for legal aid in cross-border disputes if they meet the conditions provided for by this Directive. The same applies to third-country nationals who habitually and lawfully reside in a Member State.

(14) Member States should be left free to define the threshold above which a person would be presumed able to bear the costs of proceedings, in the conditions defined in this Directive. Such thresholds are to be defined in the light of various objective factors such as income, capital or family situation.

(15) The objective of this Directive could not, however, be attained if legal aid applicants did not have the possibility of proving that they cannot bear the costs of proceedings even if their resources exceed the threshold defined by the Member State where the court is sitting. When making the assessment of whether legal aid is to be granted on this basis, the authorities in the Member State where the court is sitting may take into account information as to the fact that the applicant satisfies criteria in respect of financial eligibility in the Member State of domicile or habitual residence.

(16) The possibility in the instant case of resorting to other mechanisms to ensure effective access to justice is not a form of legal aid. But it can warrant a presumption that the person concerned can bear the costs of the procedure despite his/her unfavorable financial situation.

(17) Member States should be allowed to reject applications for legal aid in respect of manifestly unfounded actions or on grounds related to the merits of the case in so far as pre-litigation advice is offered and access to justice is guaranteed. When taking a

decision on the merits of an application, Member States may reject legal aid applications when the applicant is claiming damage to his or her reputation, but has suffered no material or financial loss or the application concerns a claim arising directly out of the applicant's trade or self-employed profession.

(18) The complexity of and differences between the legal systems of the Member States and the costs inherent in the cross-border dimension of a dispute should not preclude access to justice. Legal aid should accordingly cover costs directly connected with the cross-border dimension of a dispute.

(19) When considering if the physical presence of a person in court is required, the courts of a Member State should take into consideration the full advantage of the possibilities offered by Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (1).

(20) If legal aid is granted, it must cover the entire proceeding, including expenses incurred in having a judgment enforced; the recipient should

continue receiving this aid if an appeal is brought either against or by the recipient in so far as the conditions relating to the financial resources and the substance of the dispute remain fulfilled.

(21) Legal aid is to be granted on the same terms both for conventional legal proceedings and for out-of-court procedures such as mediation, where recourse to them is required by the law, or ordered by the court.

(22) Legal aid should also be granted for the enforcement of authentic instruments in another Member State under the conditions defined in this Directive.

(23) Since legal aid is given by the Member State in which the court is sitting or where enforcement is sought, except pre-litigation assistance if the legal aid applicant is not domiciled or habitually resident in the Member State where the court is sitting, that Member State must apply its own legislation, in compliance with the principles of this Directive.

(24) It is appropriate that legal aid is granted or refused by the competent authority of the Member State in which

the court is sitting or where a judgment is to be enforced. This is the case both when that court is trying the case in substance and when it first has to decide whether it has jurisdiction.

(25) Judicial cooperation in civil matters should be organized between Member States to encourage information for the public and professional circles and to simplify and accelerate the transmission of legal aid applications between Member States.

(26) The notification and transmission mechanisms provided for by this Directive are inspired directly by those of the European Agreement on the transmission of applications for legal aid, signed in Strasbourg on 27 January 1977, hereinafter referred to as '1977 Agreement'. A time limit, not provided for by the 1977 Agreement, is set for the transmission of legal aid applications. A relatively short time limit contributes to the smooth operation of justice.

(27) The information transmitted pursuant to this Directive should enjoy protection. Since Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the

free movement of such data (2), and Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (3), are applicable, there is no need for specific provisions on data protection in this Directive.

(28) The establishment of a standard form for legal aid applications and for the transmission of legal aid applications in the event of cross-border litigation will make the procedures easier and faster.

(29) Moreover, these application forms, as well as national application forms, should be made available on a European level through the information system of the European Judicial Network, established in accordance with Decision 2001/470/EC (1).

(30) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (2).

(31) It should be specified that the establishment of minimum standards in

cross-border disputes does not prevent Member States from making provision for more favourable arrangements for legal aid applicants and recipients.

(32) The 1977 Agreement and the additional Protocol to the European Agreement on the transmission of applications for legal aid, signed in Moscow in 2001, remain applicable to relations between Member States and third countries that are parties to the 1977 Agreement or the Protocol. But this Directive takes precedence over provisions contained in the 1977 Agreement and the Protocol in relations between Member States.

(33) The United Kingdom and Ireland have given notice of their wish to participate in the adoption of this Directive in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community.

(34) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Directive and is not bound by it

or subject to its application,

Has adopted this directive:

CHAPTER I

SCOPE AND DEFINITIONS

Article 1

Aims and scope

1. The purpose of this Directive is to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid in such disputes.
2. It shall apply, in cross-border disputes, to civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.
3. In this Directive, 'Member State' shall mean Member States with the exception of Denmark.

Article 2

Cross-border disputes

1. For the purposes of this Directive, a cross-border dispute is one where the

party applying for legal aid in the context of this Directive is domiciled or habitually resident in a Member State other than the Member State where the court is sitting or where the decision is to be enforced.

2. The Member State in which a party is domiciled shall be determined in accordance with Article 59 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (3).
3. The relevant moment to determine if there is a crossborder dispute is the time when the application is submitted, in accordance with this Directive.

CHAPTER II

RIGHT TO LEGAL AID

Article 3

Right to legal aid

1. Natural persons involved in a dispute covered by this Directive shall be entitled to receive appropriate legal aid in order to ensure their effective access to justice in accordance with the conditions laid down in this Directive.

2. Legal aid is considered to be appropriate when it guarantees:

- (a) pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings;
- (b) legal assistance and representation in court, and exemption from, or assistance with, the cost of proceedings of the recipient, including the costs referred to in Article 7 and the fees to persons mandated by the court to perform acts during the proceedings.

In Member States in which a losing party is liable for the costs of the opposing party, if the recipient loses the case, the legal aid shall cover the costs incurred by the opposing party, if it would have covered such costs had the recipient been domiciled or habitually resident in the Member State in which the court is sitting.

3. Member States need not provide legal assistance or representation in the courts or tribunals in proceedings especially designed to enable litigants to make their case in person, except when the courts or any other competent authority otherwise decide in order to ensure equality of parties or in view of the complexity of the case.

4. Member States may request that legal aid recipients pay reasonable contributions towards the costs of proceedings taking into account the conditions referred to in Article 5.
5. Member States may provide that the competent authority may decide that recipients of legal aid must refund it in whole or in part if their financial situation has substantially improved or if the decision to grant legal aid had been taken on the basis of inaccurate information given by the recipient.

Article 4

Non-discrimination

Member States shall grant legal aid without discrimination to Union citizens and third-country nationals residing lawfully in a Member State.

CHAPTER III

CONDITIONS AND EXTENT OF LEGAL AID

Article 5

Conditions relating to financial resources

1. Member States shall grant legal aid to persons referred to in Article 3(1) who are partly or totally unable to meet the costs of proceedings referred to in Article 3(2) as a result of their economic situation, in order to ensure their effective access to justice.
2. The economic situation of a person shall be assessed by the competent authority of the Member State in which the court is sitting, in the light of various objective factors such as income, capital or family situation, including an assessment of the resources of persons who are financially dependant on the applicant.
3. Member States may define thresholds above which legal aid applicants are deemed partly or totally able to bear the costs of proceedings set out in Article 3(2). These thresholds shall be defined on the basis of the criteria defined in paragraph 2 of this Article.
4. Thresholds defined according to paragraph 3 of this Article may not prevent legal aid applicants who are above the thresholds from being granted legal aid if they prove that they are unable to pay the cost of the proceedings referred to in Article 3(2) as a

result of differences in the cost of living between the Member States of domicile or habitual residence and of the forum.

5. Legal aid does not need to be granted to applicants in so far as they enjoy, in the instant case, effective access to other mechanisms that cover the cost of proceedings referred to in Article 3(2).

Article 6

Conditions relating to the substance of disputes

1. Member States may provide that legal aid applications for actions which appear to be manifestly unfounded may be rejected by the competent authorities.
2. If pre-litigation advice is offered, the benefit of further legal aid may be refused or cancelled on grounds related to the merits of the case in so far as access to justice is guaranteed.
3. When taking a decision on the merits of an application and without prejudice to Article 5, Member States shall consider the importance of the individual case to the applicant but may also take into

account the nature of the case when the applicant is claiming damage to his or her reputation but has suffered no material or financial loss or when the application concerns a claimarising directly out of the applicant's trade or self-employed profession.

Article 7

Costs related to the cross-border nature of the dispute

Legal aid granted in the Member State in which the court is sitting shall cover the following costs directly related to the cross-border nature of the dispute:

- (a) interpretation;
- (b) translation of the documents required by the court or by the competent authority and presented by the recipient which are necessary for the resolution of the case; and
- (c) travel costs to be borne by the applicant where the physical presence of the persons concerned with the presentation of the applicant's case is required in court by the law or by the court of that Member State and the court decides that the persons concerned cannot be heard to the satisfaction of the court by any other means.

Article 8

Costs covered by the Member State of the domicile or habitual residence

The Member State in which the legal aid applicant is domiciled or habitually resident shall provide legal aid, as referred to in Article 3(2), necessary to cover:

- (a) costs relating to the assistance of a local lawyer or any other person entitled by the law to give legal advice, incurred in that Member State until the application for legal aid has been received, in accordance with this Directive, in the Member State where the court is sitting;
- (b) the translation of the application and of the necessary supporting documents when the application is submitted to the authorities in that Member State.

Article 9

Continuity of legal aid

1. Legal aid shall continue to be granted totally or partially to recipients to cover expenses incurred in having a judgment enforced in the Member State where the court is sitting.
2. A recipient who in the Member State where the court is sitting has received

legal aid shall receive legal aid provided for by the law of the Member State where recognition or enforcement is sought.

3. Legal aid shall continue to be available if an appeal is brought either against or by the recipient, subject to Articles 5 and 6.
4. Member States may make provision for the re-examination of the application at any stage in the proceedings on the grounds set out in Articles 3(3) and (5), 5 and 6, including proceedings referred to in paragraphs 1 to 3 of this Article.

Article 10

Extrajudicial procedures

Legal aid shall also be extended to extrajudicial procedures, under the conditions defined in this Directive, if the law requires the parties to use them, or if the parties to the dispute are ordered by the court to have recourse to them.

Article 11

Authentic instruments

Legal aid shall be granted for the enforcement of authentic instruments in another

er Member State under the conditions defined in this Directive.

CHAPTER IV

PROCEDURE

Article 12

Authority granting legal aid

Legal aid shall be granted or refused by the competent authority of the Member State in which the court is sitting, without prejudice to Article 8.

Article 13

Introduction and transmission of legal aid applications

1. Legal aid applications may be submitted to either:

- (a) the competent authority of the Member State in which the applicant is domiciled or habitually resident (transmitting authority); or
- (b) the competent authority of the Member State in which the court is sitting or where the decision is to be enforced (receiving authority).

2. Legal aid applications shall be com-

pleted in, and supporting documents translated into:

- (a) the official language or one of the languages of the Member State of the competent receiving authority which corresponds to one of the languages of the Community institutions; or
- (b) another language which that Member State has indicated it can accept in accordance with Article 14(3).

3. The competent transmitting authorities may decide to refuse to transmit an application if it is manifestly:

- (a) unfounded; or
- (b) outside the scope of this Directive. The conditions referred to in Article 15(2) and (3) apply to such decisions.

4. The competent transmitting authority shall assist the applicant in ensuring that the application is accompanied by all the supporting documents known by it to be required to enable the application to be determined. It shall also assist the applicant in providing any necessary translation of the supporting documents, in accordance with Article 8(b).

The competent transmitting authority shall transmit the application to the competent receiving authority in the other Member State within 15 days of the receipt of the application duly completed in one of the languages referred to in paragraph 2, and the supporting documents, translated, where necessary, into one of those languages.

5. Documents transmitted under this Directive shall be exempt from legalisation or any equivalent formality.

6. The Member States may not charge for services rendered in accordance with paragraph 4. Member States in which the legal aid applicant is domiciled or habitually resident may lay down that the applicant must repay the costs of translation borne by the competent transmitting authority if the application for legal aid is rejected by the competent authority.

Article 14

Competent authorities and language

1. Member States shall designate the authority or authorities competent to send (transmitting authorities) and receive (receiving authorities) the application.

2. Each Member State shall provide the Commission with the following information:

- the names and addresses of the competent receiving or transmitting authorities referred to in paragraph 1;
- the geographical areas in which they have jurisdiction;
- the means by which they are available to receive applications; and
- the languages that may be used for the completion of the application.

3. Member States shall notify the Commission of the official language or languages of the Community institutions other than their own which is or are acceptable to the competent receiving authority for completion of the legal aid applications to be received, in accordance with this Directive.

4. Member States shall communicate to the Commission the information referred to in paragraphs 2 and 3 before 30 November 2004. Any subsequent modification of such information shall be notified to the Commission no later than two months before the modification enters into force in that Member State.

5. The information referred to in paragraphs 2 and 3 shall be published in the *Official Journal of the European Communities*.

Article 15

Processing of applications

1. The national authorities empowered to rule on legal aid applications shall ensure that the applicant is fully informed of the processing of the application.
2. Where applications are totally or partially rejected, the reasons for rejection shall be given.
3. Member States shall make provision for review of or appeals against decisions rejecting legal aid applications.

Member States may exempt cases where the request for legal aid is rejected by a court or tribunal against whose decision on the subject of the case there is no judicial remedy under national law or by a court of appeal.

4. When the appeals against a decision refusing or canceling legal aid by virtue of Article 6 are of an administrative nature, they shall always be ultimately subject to judicial review.

Article 16

Standard form

1. To facilitate transmission, a standard form for legal aid applications and for the transmission of such applications shall be established in accordance with the procedure set out in Article 17(2).
2. The standard form for the transmission of legal aid applications shall be established at the latest by 30 May 2003.
The standard form for legal aid applications shall be established at the latest by 30 November 2004.

CHAPTER V

FINAL PROVISIONS

Article 17

Committee

1. The Commission shall be assisted by a Committee.
2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply.
3. The Committee shall adopt its Rules of Procedure.

Article 18

Information

The competent national authorities shall cooperate to provide the general public and professional circles with information on the various systems of legal aid, in particular via the European Judicial Network, established in accordance with Decision 2001/470/EC.

Article 19

More favourable provisions

This Directive shall not prevent the Member States from making provision for more favourable arrangements for legal aid applicants and recipients.

Article 20

Relation with other instruments

This Directive shall, as between the Member States, and in relation to matters to which it applies, take precedence over provisions contained in bilateral and multilateral agreements concluded by Member States including:

- (a) the European Agreement on the transmission of applications for legal

aid, signed in Strasbourg on 27 January 1977, as amended by the additional Protocol to the European Agreement on the transmission of applications for legal aid, signed in Moscow in 2001;

- (b) the Hague Convention of 25 October 1980 on International Access to Justice.

Article 21

Transposition into national law

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 30 November 2004 with the exception of Article 3(2)(a) where the transposition of this Directive into national law shall take place no later than 30 May 2006. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 22

Entry into force

This Directive shall enter into force on the date of its publication in the *Official Journal of the European Communities*.

Article 23

Addressees

This Directive is addressed to the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 27 January 2003.

For the Council

The President

G. PAPANDREOU

Four

PROMOTING ACCESS
TO JUSTICE IN
CENTRAL AND
EASTERN EUROPE:
BULGARIA AND POLAND

This chapter includes:

- Bulgaria:
 - Political Commitments by the Bulgarian Government to Ensure Equal Access to Justice
 - Free Legal Aid Litigation Before the ECtHR, Selecting Cases
 - Introduction to Bulgarian Methodology
 - Questionnaire on Criminal Cases of a General Character
 - Interview Questionnaire for Studying Access to Defense Counsel among People Deprived of Liberty
 - Civil Legal Assessment

- Poland:
 - Access to Legal Aid: Information about the Project
 - Questionnaires:
 - Questionnaire for a Person Not Represented by an Attorney/Legal Adviser
 - Questionnaire for a Person Represented by an Attorney/Legal Adviser
 - Questionnaire for Attorneys—Examination of Opinions of the Legal Professions' Representatives
 - Questionnaire for Organizations
 - Proposed Changes in the Legal Aid System

Political Commitments by the Bulgarian Government to Ensure Equal Access to Justice

Contents:

- Excerpt from European Commission's *2001 Regular Report on Bulgaria's Progress towards Accession*, concerning findings related to access to justice/legal aid
- Excerpt from the *Strategy Paper for the Reform of the Judiciary* in Bulgaria
- Excerpt from the *Program for the Implementation of the Strategy for Reforming the Bulgarian Judiciary*

2001 Regular Report on Bulgaria's Progress toward Accession

B. Criteria for membership

1. POLITICAL CRITERIA

1.1 Democracy and the rule of law

The judicial system

Steps are to be taken to promote equal access to justice (improving the provision of free legal aid), as well as to improve the execution of judgments to ensure more effective protection of citizens' rights.

1.2 Human rights and the protection of minorities

Civil and political rights

There have been concerns that more than a third of defendants in criminal cases do not have access to a lawyer during trials before a court of first instance. Bulgaria needs to take steps to ensure that fundamental human rights are fully respected, particularly to ensure that all detained individuals who cannot afford a lawyer are given access to legal aid.

Strategy Paper for the Reform of the Judiciary in Bulgaria

IX. Ensure equal opportunities for access to justice

Short-term priorities

- Preparation of legal amendments in order to improve free legal aid in civil and criminal procedures.

Medium-term priorities

- Creation of a national legal aid office.

Program for the Implementation of the Strategy for Reforming the Bulgarian Judiciary

IX. 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 Advocature, the civil and criminal procedure codes, and the Judicial Systems Act.

2) Develop a strategy for improving the operation of the system of providing free legal services.

3) Draft appropriate legislative amendments consistent with the strategy.

Time frame: Assessment and strategy—Third quarter, 2002; Draft amendments—second quarter, 2003.

Responsible state entity: [The Ministry of Justice (MOJ),] 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 previously mentioned.

2) Create a national legal aid office to coordinate and implement legal aid assistance throughout the country.

Time frame: Third quarter, 2003.

Responsible state entity: Dependent upon strategy and legislative amendments.

Critical assumptions: Adopting of amended law(s) by the legislature.

X. Budget of the Judiciary

Short-term priorities

- Judiciary budget that corresponds to its realistic and defensible needs.

Action: 1) Consistent with the updated Rules referred to in the short-term priorities within Section III, reorganize and expand the SJC staff to include additional personnel in its budget office to analyze the current financial needs of the judiciary and to strategically plan for its future needs.

2) Consistent with the updated Rules referred to in the short-term priorities within Section III, reorganize and expand the SJC staff to include a legislative liaison officer responsible for communicating the needs of the judiciary to the legislature, to other government agencies, to the public, and to the media.

Time frame: Ongoing beginning Third quarter, 2002

Responsible state entity: SJC

Critical assumptions: Availability of financial resources to hire additional staff; appropriation of necessary funds for the judiciary by the legislature.

- Creation of a specialized unit between the MOJ and the SJC responsible for the preparation and submission of the annual judiciary budget.

Action: Creation of a unit or standing committee composed of representatives of the MOJ and SJC to coordinate and implement those activities of either institution affecting the other, including preparation and submission of the annual judiciary budget.

Time frame: First quarter, 2002.

Responsible state entity: MOJ and SJC.

Critical assumptions: None.

Free Legal Aid Litigation before the ECtHR

Bulgarian Helsinki Committee

SELECTING CASES

Activities cover the following areas:

- Elaboration of criteria for selecting the types of cases to be litigated on behalf of the project before the European

Court of Human Rights [(ECtHR)].

- Interviews in detention facilities for the identification of prospective applicants before the Court.
- Trial monitoring with the Sofia District Court for the identification of one type of case.

BHC LITIGATION PROJECT WORKING GROUP

[The Bulgarian Helsinki Committee (BHC)] has set up a working group consisting of lawyers employed by the committee and headed by the BHC deputy chairperson and head of the Legal Program, Mr. Yonko Grozev.

The group has met regularly—twice a month or, when necessary, more often.

The coordination of activities was divided between Mr. Yonko Grozev and Mr. Georgi Mitrev, who also coordinates the EU-funded Access to Justice Project.

1. ELABORATION OF CRITERIA FOR SELECTING THE CASES TO BE LITIGATED

1.1 In the summer of 2001, within the EU-funded Access to Justice Project, the BHC conducted a nationwide survey of 1,891 criminal cases. The main goal of the survey was to collect reliable information on access to legal aid by criminal defendants, on the quality of legal aid offered, and on the establishment of certain links between access to legal aid and ethnic origin, income, sex, social background, type of crime, etc.

The survey focused on legal aid in the various stages of criminal proceedings, as well as the participation of counsel in the

stages of those proceedings. The primary shortcomings of access to legal aid were identified by a combination of open-ended and multi-optional questions.

Only those criminal cases in which court hearings had already been concluded and in which the court's final decision had been delivered were included in the survey. Practicing Bulgarian attorneys, who had been selected via open competition, read the case files and completed a questionnaire carefully prepared by a team of eminent Bulgarian lawyers.

1.2 Based on the findings of the survey, along with thorough research into the most recent European Court of Human Rights jurisprudence, the BHC Litigation Project Working Group established the criteria for the types of cases to be brought before the court in Strasbourg.

To achieve better results, the working group combined the following principles:

- a) Research of the recent Strasbourg jurisprudence confirmed the trends that could be found in the previous cases examined by the Court. Thus, a deprivation of liberty lasting for more than three months sets a positive obligation for the state to provide *ex officio* defense counsel where

the defendant does not have sufficient means to hire his or her own lawyer.¹ Cases involving an appeal are considered sufficiently complicated by the ECtHR to require the appointment of an *ex officio* defense counsel.² To determine whether a case is complicated, the Court collects evidence with regard to characteristics of the defendant's personality, taking into consideration his or her ability to submit arguments on his or her own behalf.³

b) These standards are in blatant contradiction to the present Bulgarian practice of appointing *ex officio* defense counsel. Bulgarian courts still appoint defense counsel only in cases where the individual faces imprisonment of at least ten years.

Therefore, the criteria elaborated focused mainly on litigating modalities of access to defense counsel, rather than on the quality of the legal aid offered. The results from the survey of case files indicated that 77.5 percent of cases in Bulgarian courts end at the first instance, without appeal. Of those cases, 38 percent did not have any lawyer at all, while only 10 percent had an *ex officio* defense counsel.

2. CRITERIA FOR CASES BEING BROUGHT BEFORE THE ECHR

2.1 Cases that have ended at the first instance without appeal. Among these, three types of cases were identified:

2.1.1 Cases in which:

- the individual has not had a lawyer during either the pre-trial proceedings or before the court;
- the individual has been sentenced to a deprivation of liberty of up to one year;
- the individual explicitly requested and was denied the appointment of an *ex officio* counsel, either at the pre-trial or trial stages;
- at least one month (judgment becomes final), but no more than five months (to allow time for preparation of the application), have elapsed since the delivery of the judgment.

2.1.2 Cases in which:

- the individual has not had a lawyer during either the pre-trial proceedings or before the court;
- the individual has been sentenced to a deprivation of liberty of up to five years;

- the individual has not requested the appointment of an *ex officio* counsel, either at the pre-trial or trial stages;
- at least one month (judgment becomes final), but no more than five months (to allow time for preparation of the application), have elapsed since the delivery of the judgment.
- the individual has expressly formulated a request for the appointment of a lawyer before one of the previous judicial instances or at the pre-trial stage;
- the individual has been sentenced to between one and three years of effective deprivation of liberty.

2.1.3. Cases in which:

- the individual has been sentenced to a conditional deprivation of liberty;
- the individual has not had a lawyer during either the pre-trial proceedings or before the court;
- the individual has not appealed the judgment;
- these cases are relevant regardless as to whether or not the individual requested the appointment of a lawyer.

2.2 IRRESPECTIVE OF THE INSTANCE DURING WHICH THE CASE ENDED, TWO TYPES WERE IDENTIFIED:

2.2.1 Cases in which:

- the individual intends to appeal the judgment on points of law before the Court of Cassation;
- the individual has had no lawyer as yet;

2.2.2 Cases in which:

- the individual intends to appeal on points of law before the Court of Cassation;
- the individual has had no lawyer as yet;
- the individual has never formulated a request for the appointment of a lawyer;
- the individual has been sentenced to more than five years of effective deprivation of liberty.

3. INTERVIEWS IN DEPRIVATION-OF-LIBERTY FACILITIES

Following the elaboration of the criteria, the working group began the selection process *strictu sensu*. Bearing in mind that four out of the five cases would involve prospective applicants who, at the time of bringing their cases to Strasbourg, would be serving effective sentences, the work-

ing group decided to meet convicted individuals from the Region of Sofia first, and then in other locations throughout the country.

Talks were held with the General Directorate attached to the Ministry of Justice in charge of all Places for Deprivation of Liberty within the country. Permission was sought to conduct interviews with individuals deprived of their liberty who met the case criteria outlined above.

The General Directorate granted access to all thirty-seven facilities for deprivation of liberty within the country.

Thus far⁴, twenty-one people from Sofia Central Prison, the Kazitchane, and the Kremikovtzi detention centers have been interviewed. Several potential applicants have been identified and their cases are currently being studied. Interviews

had been based on a questionnaire that had been prepared as part of the activities under the Access to Justice Project and which covered all aspects of access to a lawyer at the various stages of criminal proceedings.

4. TRIAL MONITORING AT THE SOFIA FIRST-INSTANCE COURTS

With regard to the types of cases involving conditional deprivation of liberty, the working group has decided that the best approach to determining prospective applicants would be to visit court hearings in the Sofia first-instance courts. Since court hearings are generally open to the public, no concerns relating to access have arisen.

NOTES

¹ Case of *Perks and others v. UK*, 12 October 1999.

² Case of *Biba v. Greece*, 9 June 1998.

³ Case of *Averill v. UK*, 6 September 2000.

⁴ As of January 2002.

Introduction to Bulgarian Methodology

Census data from March 2001 indicate that the current population of Bulgaria is 7,928,901.¹ According to the census data, the share of ethnic minorities (mostly Turks and Roma) was 16 percent. In fact, however, it is higher, as many Roma declare a 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.² The number of attorneys at law in the country is 5,880, distributed among twenty-eight local Bar Associations.³ The number of courts in Bulgaria is now 148, as per 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.⁴ 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 the 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 on a basis of a standardized questionnaire. Data was collected on access to legal protection, its effect and relationship to a number of factors inherent to the criminal justice system, and 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.

In February 2002, a second study was carried out in the prisons of Bulgaria. A total of 1,001 prisoners were approached with standardized face-to-face interviews. They were both detained persons awaiting trials and convicted persons 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.

In 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 gave a description of the nature of the needs and the social profile of those in need of legal aid in such cases, as well as 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 remand 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 the tendencies in the provision of legal assistance in the Bulgarian criminal procedure.

Results of the above research indicate 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, of non-governmental organizations, and of 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.

NOTES

¹ Data from the National Institute of Statistics, available at www.nsi.bg, accessed 20 February 2002.

² Cf.: Bulgarian Helsinki Committee, *Report on the Implementation of the Framework Convention for the Protection of National Minorities*, Sofia, 1999, available at www.bghelsinki.org, accessed 22

February 2002.

³ See *State Gazette* no. 5 of 2002, where a list of all registered attorneys-at-law is published.

⁴ The chapter on Bulgaria in Peter Soar (ed.), *The New International Directory of Legal Aid*, The Hague etc., Kluwer, 2002, is far from satisfactory.

Questionnaire on Criminal Cases of a General Character

Bulgarian Helsinki Committee
Access to Justice Project

Official number (no.) assigned to interviewer:
Court:
Court case number (including inventory year):
Number of this case within the total number of cases to be examined in this court (according to the formula X/Y, where X is the ordinal number and Y is the total number of cases under examination within this court):
Date(s) work on questionnaire began and ended: (dd/mm/yyyy-dd/mm/yyyy)

Whenever the case was examined by a particular court of a given judicial instance for the second time, relevant part(s) of a new questionnaire are to be filled in. This is applicable in proceedings for cases that were reopened, whereupon a judicial decision that had entered into binding force was subsequently rescinded, and the case was sent back to the relevant judicial instance.

Whenever the prosecutor returned the case for additional investigation at the pre-trial stage, a new questionnaire is not to be filled in, and what was accomplished as a result of the prosecutor's instructions

is to be considered an integral part of the pre-trial stage.

Whenever the judge-rapporteur returned the case at the pre-trial proceedings, only the relevant questions are to be filled in. What was accomplished up to the point of the case being returned is to be considered an integral part of the pre-trial stage.

In case files with more than one accused, a separate questionnaire is to be filled in for each of the accused.

Underlined questions are for clarification, and build upon a specific subject introduced by the question which is not

underlined and is placed directly above them.

In certain questions, the "No data available" option has purposefully been omitted, in order to better organize the format of the questionnaire. In such

cases, the option is implied if none of the other available options is applicable.

Interviewers will need access to the Criminal Code, the Criminal Procedure Code, and the Ordinance of the Supreme Attorney Council on Remunerations.

1. General information regarding the accused and the case

1.	Opening date of criminal proceedings	
2.	Type of procedural and investigative activities opening summary police proceedings, if such were carried out in the present case.	
3.	Which regular judicial instances did the case go through: 01 1st 02 2nd (appeal) 03 3rd (cassation)	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>
4.	Was the case reopened ? (It is only appropriate to give an answer to this question after reading the whole case file.)	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>

Answers to question 5 through 18 should be provided from data on statistical card attached at the back cover of case.

5.	Place of birth (town or village) of the accused:	
6.	Place of residence (town or village) of the accused:	

7.	Date of birth of the accused (according to Personal Identity Number):	dd/mm/yyyy
8.	Sex: 01 Male 02 Female	<input type="checkbox"/> <input type="checkbox"/>
9.	Nationality: 01 Bulgarian 02 Of another state 03 Bulgarian and of another state (dual)	<input type="checkbox"/> <input type="checkbox"/>
10.	Legal family status of the accused: 01 Single 02 Married 03 Widow/Widower 04 Divorced	<input type="checkbox"/> <input type="checkbox"/>
11.	Educational level of the accused: 01 University education 02 Specialized professional school 03 Specialized high school 04 High school 05 Elementary 06 Basic 07 Elementary, not completed 08 Illiterate	<input type="checkbox"/> <input type="checkbox"/>
12.	Occupation of the accused (according to the statistical card attached at the end of the case file):	<input type="checkbox"/> <input type="checkbox"/>
13.	Reasons for residing in the populated area where the crime was committed: 01 Permanent residence 02 Temporary residence 03 Does not live in area but works there 04 Temporary visit (business trip, holiday, etc.) 05 Passing through 06 Passing through area with idea of committing a crime 07 Mandatory residence assigned there 08 Foreigner—working here/ on business trip or holiday/ passing through this country 09 Other	<input type="checkbox"/> <input type="checkbox"/>

14.	Labor status: 01 Permanent professional occupation 02 Temporary professional occupation 03 Student 04 Retired 05 Housewife 06 Unemployed—dismissed 07 Unemployed—left job of own will 08 Unemployed—did not find employment following military service 09 Does not work due to illness	<input type="checkbox"/> <input type="checkbox"/>
15.	Ethnicity: 01 Bulgarian 02 Turkish 03 Roma 04 Other (please specify)	<input type="checkbox"/> <input type="checkbox"/>
16.	How many children does the accused have? (Specify the quantity numerically.) 01 No children 00 No data available	<input type="checkbox"/> <input type="checkbox"/>
17.	Social status of the accused: 01 Unqualified worker in industrial/services sector 02 Qualified worker in industrial/services sector 03 Agricultural worker 04 Director/manager 05 Specialist with a university degree 06 Owner/associate in a company without hired staff 07 Owner/associate in a company with up to 10 employees 08 Owner/associate in a company with up to 50 employees 09 Owner/associate in a company with over 50 employees 10 Craftsman 11 Liberal arts profession 12 No permanent workplace or occupation 13 Other (please specify)	<input type="checkbox"/> <input type="checkbox"/>
18.	Data on monthly income: 01 Up to leva 02 No data available	<input type="checkbox"/> <input type="checkbox"/>

36.	<p>Who initiated the additional investigative activities that were carried out?</p> <ul style="list-style-type: none"> • No additional investigative activities were carried out • The investigative authority • The prosecutor • The accused/SPP • Defense counsel • Civil plaintiff, if such took part in proceedings • Civil defendant, if such took part in proceedings 	<p>01-Yes 02-No</p> <p><input type="checkbox"/> <input type="checkbox"/></p>
37.	<p>Did defense counsel take part in the second presentation of the investigation to the accused?</p> <p>01 Yes 02 No 03 No second presentation of the investigation was carried out</p>	<p><input type="checkbox"/> <input type="checkbox"/></p>
38.	<p>Date the final report by the investigator was drafted, if such is available in the case file</p> <p>00 No concluding report by the investigator is available for this case</p>	<p>(dd/mm/yyyy)</p>
39.	<p>Conclusion of the final report by the investigator:</p> <p>01 For termination of proceedings 02 For indictment 03 No concluding report</p>	<p><input type="checkbox"/> <input type="checkbox"/></p>
40.	<p>Did the prosecutor return the case for additional investigation?</p>	<p>01-Yes 02-No</p> <p><input type="checkbox"/> <input type="checkbox"/></p>
41.	<p>Did the prosecutor return the case a second time for additional investigation?</p>	<p>01-Yes 02-No</p> <p><input type="checkbox"/> <input type="checkbox"/></p>
42.	<p>If criminal proceedings had been suspended by the prosecutor, at whose initiative were they reopened?</p> <ul style="list-style-type: none"> • The relevant prosecutor • The superior prosecutor • The police officers in charge • An investigator • The victim • The accused/SPP • Defense counsel • Proceedings were never suspended • Proceedings were not reopened 	<p>01-Yes 02-No</p> <p><input type="checkbox"/> <input type="checkbox"/></p>

43.	Did defense counsel file a general request for participation in all investigative activities	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
44.	If he or she filed such a request, what was the reaction of the authority administering the proceedings: 01 Authority admitted defense counsel to activities upon a general request 02 Authority refused to grant request, with a reply stating reasons 03 Authority dismissed request, did not reply to the demand, and did not notify defense counsel of investigative activities that it carried out 04 Defense counsel never filed such a request	<input type="checkbox"/> <input type="checkbox"/>	
45.	The compulsory measure(s) at the pre trial stage was imposed by: 01 Investigator 02 Police officer 03 Prosecutor 04 The court 05 No such measures were imposed	<input type="checkbox"/> <input type="checkbox"/>	
46.	Type of compulsory measure: 01 Detention 02 Released on bail 03 House arrest 04 Other (please specify)	<input type="checkbox"/> <input type="checkbox"/>	
47.	If above compulsory measure was detention, did the court confirm it?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
48.	Was an order not to leave the territory or the country imposed?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
49.	If such a measure was imposed, was it legally possible to request its termination?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
50.	If it was possible, was a request made?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
51.	How many times?		
52.	If such request was made, was it granted?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No

53.	How many times was the request granted ? 01 Once 02 Twice 03 Three times 04 More than three times 05 Never 06 It was never made	<input type="checkbox"/> <input type="checkbox"/>
54.	Were requests for permission to leave the country filed?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
55.	If such were made, how many times ?	
56.	Were they granted —how many times ?	
57.	Were they refused —how many times ?	
58.	Were there grounds to appeal the compulsory measure(s)? 01 Yes 02 No 03 No data is available	<input type="checkbox"/> <input type="checkbox"/>
59.	If yes, was it appealed ? 01 Personally, by the accused 02 By the defense counsel 03 No appeal made	<input type="checkbox"/> <input type="checkbox"/>
60.	Result of the appeal: 01 Confirmation of original measure 02 Assignment of a lighter measure 03 There was no appeal	<input type="checkbox"/> <input type="checkbox"/>
61.	If the appeal was not allowed, was the compulsory measure contested before a court of higher instance ?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
62.	If so, what was the result : 01 Original decision reconfirmed 02 Assignment of a lighter measure 03 There was no hearing before a court of higher instance	<input type="checkbox"/> <input type="checkbox"/>
63.	Was the person detained as a suspect ?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>

64.	<p>Did defense counsel have an access to the accused, when such a demand was made or defense was mandatory?</p> <p>01 Yes—in the case of defense being mandatory 02 Yes—in the event of an express demand 03 No—in the case of defense being mandatory 04 No—in the event of an express demand 05 The person was never detained as a suspect</p>	<input type="checkbox"/> <input type="checkbox"/>
65.	<p>If no charges had been pressed against him or her within the period specified by law, was the person immediately released?</p> <p>01 Yes 02 No 03 The person was not detained 04 Charges had been pressed within the period specified by law</p>	<input type="checkbox"/> <input type="checkbox"/>
66.	<p>If the person was not released—did defense counsel file a request for release?</p>	<p>01-Yes 02-No</p> <input type="checkbox"/> <input type="checkbox"/> Date (if yes):
67.	<p>Was the person detained under the Ministry of the Interior Act (as an alternative to being detained as a suspect)?</p>	<p>01-Yes 02-No</p> <input type="checkbox"/> <input type="checkbox"/>
68.	<p>Was defense counsel permitted to visit the accused, when such demand was made?</p> <p>01 Yes 02 No 03 No data available 04 No demand made</p>	<input type="checkbox"/> <input type="checkbox"/> Date (if yes):.....
69.	<p>Had the person been detained prior to being brought before the court?</p>	<p>01-Yes 02-No</p> <input type="checkbox"/> <input type="checkbox"/>
70.	<p>If person was detained—how long did this last? (Indicate date of detention, date of release.)</p>	

71.	At whose decision was the person detained?	
72.	What day of the week was the person detained on? 00 He or she was not detained 01 Monday 02 Tuesday 03 Wednesday 04 Thursday 05 Friday 06 Saturday 07 Sunday	<input type="checkbox"/> <input type="checkbox"/>
73.	Were there any obstacles to the accused being brought before the court immediately? If yes, please specify:	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
74.	Was defense counsel permitted to visit the accused, if an express demand was made or participation by the defense council was mandatory? 01 Yes—in cases of express demand 02 No—in cases of express demand 03 Yes—in cases of mandatory defense 04 No—in cases of mandatory defense	Fill in a combination, if appropriate: <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>
75.	How many investigative activities were carried out while the person was being detained: 01 One 02 Two 03 Three 04 Four 05 Five 06 Six 07 Seven 08 Eight 09 Nine 10 Ten 11 More than ten	<input type="checkbox"/> <input type="checkbox"/>

76.	<p>What was the total number of investigative activities carried out against the accused, regardless of whether detained:</p> <p>01 One 02 Two 03 Three 04 Four 05 Five 06 Six 07 Seven 08 Eight 09 Nine 10 Ten 11 More than ten</p>	<input type="checkbox"/> <input type="checkbox"/>
77.	<p>What was the total number of times that the accused was interrogated? (Specify number of interrogations according to official records.)</p> <p>00 The accused was not interrogated.</p>	<input type="checkbox"/> <input type="checkbox"/>
78.	<p>At how many of the interrogations was the defense counsel present? (Specify number of interrogations according to official records.)</p> <p>00 The defense counsel was not present at any of the interrogations/the accused was not interrogated.</p>	<input type="checkbox"/> <input type="checkbox"/>
79.	<p>Was the accused notified of his or her right to defense counsel?</p>	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
80.	<p>Was the defense counsel present during interrogations of witnesses? (If counsel was present during at least one such interrogation, the answer is yes.)</p>	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
81.	<p>What requests for gathering of evidence did the defense counsel make?</p> <ul style="list-style-type: none"> •For interrogations •For cross examination of witnesses •For expert opinions •For on-site experiments •Other (please specify) •No requests were made 	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>
82.	<p>Is there any data in the case file that specifies that the accused was given a thorough medical examination at the moment of his or her detention?</p>	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>

<u>83.</u>	Was there any request for a medical examination from the defense counsel or the accused on the grounds that violence was used?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
84.	Was any withholding or seizure of correspondence performed at the pre-trial stage?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
85.	Did the defense counsel take part in investigative activities that were performed by the prosecutor in person , if such took place at all? 01 Yes 02 No 03 The prosecutor did not perform any investigative activities personally.	<input type="checkbox"/> <input type="checkbox"/>	
86.	Were there any other compulsory procedural measures , aside from the previously mentioned ones imposed on the accused, and if yes, what were they: 01 Suspension from current position 02 Placement into a psychiatric facility for examination 03 Seizure of accounts to secure the civil action 04 Seizure of accounts to secure the penalty, and/or confiscation 05 No such measures were imposed	<input type="checkbox"/> <input type="checkbox"/>	
<u>87.</u>	If such measures were imposed, were they appealed before a court of higher instance ?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
<u>88.</u>	Were the appeals approved ?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
89.	Did the defense counsel take part in the presentation of the prosecutor's investigation to the accused?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
<u>90.</u>	If yes, did he or she file any objections ?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
<u>91.</u>	Were the objections of the defense counsel sustained ? 01 Yes, entirely 02 Yes, in part 03 No 04 They were not responded to	<input type="checkbox"/> <input type="checkbox"/>	

92.	Date of the concluding report (please specify dd/mm/yyyy)	
93.	Authority that drafted the concluding report:	
94.	Type of the concluding report , in view of its consequences for the accused/SPP: 01 Indictment 02 Acquittal	<input type="checkbox"/> <input type="checkbox"/>
95.	Date of submission of formal charges to the court by the prosecutor	
96.	Please specify what were, in your opinion, the mistakes of the defense counsel at the pre-trial stage:	

3. Regarding judicial proceedings before the court of first instance

97.	Did the judge-rapporteur return the case for additional examination?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
98.	Which date did the judge-rapporteur assign for the hearing of the case (dd/mm/yyyy)	
99.	What period did the first-instance proceedings cover? (dd/mm/yyyy–dd/mm/yyyy) (It is only appropriate to answer this question after reading the first instance case file.)	Start: _____ (date) End: _____ (date)
100.	Was there a modification of the charges into more serious ones during judicial review at the first instance?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>

<u>101.</u>	Did the defense counsel have grounds for objection?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
<u>102.</u>	If the defense counsel had grounds, did he or she object ?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
103.	Were there sufficient grounds to ask for termination of judicial proceedings and sending the case back for additional investigation?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
<u>104.</u>	If such grounds existed, did the defense counsel file an appropriate request/motion ?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
105.	Was the judicial proceeding terminated and the case sent back to the prosecutor ?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
106.	Did defense counsel submit any evidence regarding the act for which the accused was being tried?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
107.	Did the defense counsel submit any evidence regarding the personal, family, health, and/or financial status of the accused?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
108.	Were there any grounds to ask for acquittal?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
<u>109.</u>	If such grounds existed, did the defense counsel file an appropriate request/motion?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
110.	Were there grounds to ask for the application of a more favorable qualification of the incriminating act?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
<u>111.</u>	If such grounds existed, did the defense counsel file an appropriate request/motion?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
112.	Were there grounds to ask for a lighter, or alternative, sentence?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
<u>113.</u>	If such grounds existed, did the defense counsel file an appropriate request/motion?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
114.	Were there sufficient grounds to ask for the application of Article 55 of the Criminal Code?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No

115.	If such grounds existed, did defense counsel file an appropriate request/motion?	1-Yes <input type="checkbox"/> <input type="checkbox"/>	2-No
116.	Were there sufficient grounds to ask for termination of judicial proceedings, on account of expiration of the statute of limitations regarding the act for which the accused was being tried?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
117.	If such grounds existed, did defense counsel file an appropriate request/motion?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
118.	Were there grounds to ask for exemption from criminal liability and imposition of administrative measures concerning cases in which minors are being tried?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
119.	If such grounds existed, did defense counsel file an appropriate request/motion?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
120.	Did defense counsel file any requests/ motions that were clearly to the detriment of the accused?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
121.	If yes, please specify:		
122.	Date the judgment was pronounced (dd/mm/yyyy):		
123.	Did the court share the position of the defense counsel in its decision? 01 Yes, in its most important points 02 Yes, but not in accordance with the defense strategy adopted 03 No	<input type="checkbox"/> <input type="checkbox"/>	
124.	Did the prosecutor file a protest against the sentence? 01 Within the time limit set by law 02 Beyond the time limit set by law 03 No protest was filed	<input type="checkbox"/> <input type="checkbox"/>	

125.	Did the accused/defense counsel file an appeal: 01 Within the time limit set by law 02 Beyond the time limit set by law 03 No appeal was filed	<input type="checkbox"/> <input type="checkbox"/>
126.	Was the appeal to the court of the second instance returned due to procedural irregularities?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
127.	Were any complaints filed before the court regarding physical violence during (all applicable options should be entered): <ul style="list-style-type: none"> • Arrest • Detention at the Interior Ministry facilities • Preliminary detention • Detention 	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>
128.	Did the first-instance court impose any compulsory measure(s) ?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
129.	If yes, was an appeal filed?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
130.	Did defense counsel submit any evidence related to the compulsory measure(s)?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
131.	Was the appeal approved ?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
132.	Was a more favorable compulsory measure assigned as a result of the appellate proceedings? Please specify:	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
133.	If bail was assigned, could the accused afford to pay it? 01 Yes 02 No 03 No evidence was submitted regarding the financial status of the accused/SPP	<input type="checkbox"/> <input type="checkbox"/>
134.	If he or she could not afford bail, how long did detention last henceforth? (Specify beginning and end of period in question [dd/mm/yyyy –dd/mm/yyyy].)	

135.	Meanwhile, were there any requests for reduction of the bail?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
136.	Were these granted , and if so, when? (If the answer is yes, please specify the period.):	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
137.	Please specify what were, in your opinion , the mistakes of the defense counsel at the pre-trial stage:		

4. Information regarding appellate proceedings:

138.	Did the defendant/defense counsel file an appeal against the judgment of the court of first instance?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
139.	Did the defendant/defense counsel file an appeal against the acquittal based on an unfavorable reasoning of the court?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
140.	Was the appeal filed within the time limits ?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
141.	Was there a declaration by the court concerning irregularities of the appeal that was filed ?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
142.	Did the prosecutor file a protest against the judgment of the first-instance court?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
143.	If the first-instance judgment was protested, did defense counsel/defendant file objections against the protest within the time limit?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No

144.	Did the court return the submitted appeal on the basis of Article 322 of the Criminal Procedure Code—due to irregularities in its form and content?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
145.	Was the complaint withdrawn ?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
146.	Was the complaint withdrawn within the prescribed time limits ?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
147.	Were there any requests for admission of new evidence made in the appeal, or in objections filed by defense counsel/defendant before the court of first instance?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
148.	What period did the appellate proceedings cover? (dd/mm/yyyy–dd/mm/yyyy) (It is only appropriate to answer this question after reading the appellate case file.)	Start: _____ (date) End: _____ (date)	
149.	What was the total number of hearings before the second instance court? (Specify number according to official records.) 01 One 02 Two 03 Three 04 Four 05 Five 06 Six 07 Seven 08 Eight 09 Nine 10 Ten or more	<input type="checkbox"/> <input type="checkbox"/>	
150.	Were there occasions when defense counsel had been regularly summoned but did not appear ?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
151.	Is there any information in the case file regarding the reasons for the regularly summoned defense counsel's failure to appear ? 01 For good reasons (health, busy with other cases) 02 Unjustified reasons—please specify 03 No data available	<input type="checkbox"/> <input type="checkbox"/>	

152.	If the defense counsel failed to appear for unjustified reasons, did the court take any steps to sanction his or her conduct?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
153.	Did the defense counsel adequately present his or her position in the appeal?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
154.	Were the efforts of the defense counsel adequate during judicial hearings?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
155.	The appellate court rescinded the previous ruling and sent the case back to the prosecutor for review.	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
156.	The appellate court rescinded the previous ruling and sent the case back to the first-instance court for review.	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
157.	The appellate court rescinded the previous judgment and delivered a new ruling in its stead.	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
158.	The appellate court modified the first-instance ruling.	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
159.	The appellate court rescinded the previous ruling and terminated criminal proceedings .	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
160.	The appellate court suspended criminal proceedings.	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
161.	The appellate court confirmed the first-instance court's ruling.	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
162.	Did the second-instance court impose any compulsory measure(s) ?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
163.	If yes, was an appeal filed?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
164.	Did defense counsel submit any opposing evidence related to the compulsory measure?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
165.	Was the appeal allowed ?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
166.	Was a more favorable compulsory measure assigned as a result of the appellate proceedings? Please specify:	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No

167.	If bail was assigned, could the accused/SPP afford to pay it? 01 Yes 02 No 03 No evidence was submitted regarding the financial status of the accused/SPP	<input type="checkbox"/> <input type="checkbox"/>
168.	If he or she could not afford bail, how long did detention last on this basis? (Specify beginning and end of period [dd/mm/yyyy–dd/mm/yyyy].)	
169.	Were there any intermediary requests for reduction of bail?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
170.	Were these approved , and how much time did this take? (If the answer is yes, please specify the period.)	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
171.	Did the appellate court hear any private complaints by the defense counsel under chapter 16 ?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
172.	How many such proceedings were there? (Specify the number.)	
173.	What were the proceedings concerned with ?	
174.	Were the private complaints sustained ? (If yes, specify number.)	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
175.	Was argumentation by the defense counsel good ? 01 Yes 02 Yes, pretty much 03 No, pretty much 04 No	<input type="checkbox"/> <input type="checkbox"/>
176.	Please specify what were, according to you, the errors of the defense counsel at the second -instance proceedings:	

5. Information regarding cassation (court of third instance) proceedings:

177.	What was the objective of cassation examination in this case: 01 A judgment or judgments by the appellate court on a criminal case of general character for which the law stipulates deprivation of liberty or a harsher punishment 02 Rulings by the appellate court under Article 304, Section 1, items 1-4 03 Rulings by the appellate court that terminate or hinder any further development of criminal proceedings	<input type="checkbox"/> <input type="checkbox"/>
178.	Did the defense counsel/defendant initiate cassation proceedings?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
179.	Did the prosecutor file a protest against an appellate court decision in favor of the defendant?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
<u>180.</u>	If yes, did the defendant have defense counsel at the appellate proceedings?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
<u>181.</u>	Was the defense counsel appointed ex officio ?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
182.	Were the grounds for third -instance review well supported with arguments in the cassation request?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
183.	Were all possible cassation grounds regarding the case made relevant in the cassation request?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
184.	Did the cassation request list grounds falling outside the scope of cassation examination?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
185.	Was an additional cassation request filed?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
186.	Was the cassation request accepted ? 01 Yes, entirely 02 Yes, partly 03 No	<input type="checkbox"/> <input type="checkbox"/>
187.	Was the cassation request filed within the prescribed time limits ?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>

188.	Did the cassation request meet the requirements of Article 354?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
189.	Did the court return the cassation request?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
190.	Did the court make a note on the cassation request concerning any irregularities in its form or content?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
<u>191.</u>	Were these made good with an additional submission by the author of the request?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
192.	Was the cassation request withdrawn ?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
<u>193.</u>	What period did the cassation proceedings cover? (dd/mm/yyyy–dd/mm/yyyy) (It is only appropriate to answer this question after reading the cassation case file.)	Start: _____ (date) End: _____ (date)	
194.	What is the total number of hearings before the cassation court (according to official records)? 01 One 02 Two 03 Three 04 Four 05 Five 06 Six 07 Seven 08 Eight 09 Nine 10 Ten or more	<input type="checkbox"/> <input type="checkbox"/>	
195.	Was there a time when the defense counsel had been regularly summoned but did not appear ?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
196.	Is there any information in the case file regarding the reasons for the regularly summoned defense counsel's failure to appear ? 01 For good reasons (health, busy with other cases) 02 Unjustified reasons —please specify 03 No data available	<input type="checkbox"/> <input type="checkbox"/>	

197.	If the defense counsel failed to appear for unjustified reasons, did the court take any steps to sanction his or her conduct?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
198.	Did the defense counsel adequately present his or her position in the appeal?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
199.	Were the efforts of the defense counsel adequate during judicial hearings?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
200.	The cassation court: 01 Left in force the previous sentence/judgment 02 Rescinded the sentence/judgment, terminated or suspended criminal proceedings, acquitted the accused 03 Modified the sentence 04 Partly or entirely rescinded the previous ruling and sent the case back for new examination	<input type="checkbox"/> <input type="checkbox"/>	
201.	Did the cassation court impose any compulsory measure(s) ?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
<u>202.</u>	If yes, was an appeal filed?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
<u>203.</u>	Did the defense counsel submit any evidence related to the compulsory measure?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
<u>204.</u>	Was the appeal allowed ?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
205.	Was a more favorable compulsory measure assigned as a result of the appeal proceedings? Please specify:	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
206.	If bail had been assigned, could the accused/SPP afford to pay it? 01 Yes 02 No 03 No evidence was submitted regarding the financial status of the accused/SPP	<input type="checkbox"/> <input type="checkbox"/>	
<u>207.</u>	If he or she could not afford bail, how long did detention last on this basis? (Specify beginning and end of period in the format: dd/mm/yyyy – dd/mm/yyyy.)		

<u>208.</u>	Were there any intermediary requests for reduction of bail?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
<u>209.</u>	Were these granted , and how much time did it take? If the answer is yes, please specify the period:	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No

6. Information regarding reopening of cases:

210.	When was the proposal for reopening the case made? 01 Date (dd/mm/yyyy) 02 No reopening was made	<input type="checkbox"/> <input type="checkbox"/>	
211.	Date of entry into force of the judgment imposed before reopening		
212.	Reopening, based on a proposal from the prosecutor, of a criminal case that ended with: 01 Acquittal 02 Ruling for termination of proceedings 03 Increase in the punishment requested 04 Application of the law for the more serious crime requested	<input type="checkbox"/> <input type="checkbox"/>	
213.	Judicial review of the following was requested: 01 A sentence that had entered into force 02 A judgment that had entered into force 03 A ruling that had entered into force	<input type="checkbox"/> <input type="checkbox"/>	
214.	Was there a reopening of the case based on sentencing an absentee accused who subsequently appeared?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
215.	As a result of reopening the case, the initial sentence/judgment/ruling was rescinded, and the case was sent back for judicial review to: 01 The pre-trial stage 02 The first instance 03 The second instance 04 The cassation instance 05 None of the above	<input type="checkbox"/> <input type="checkbox"/>	

216.	As a result of reopening the case, the initial sentence/judgment/ruling was rescinded, and the criminal proceedings were: 01 Terminated 02 Suspended 03 Neither of the above	<input type="checkbox"/> <input type="checkbox"/>
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7. Information regarding participation of the defense counsel in general

217.	The defense counsel appeared for the first time at the pre-trial stage : 01 From the moment of preliminary detention 02 From the moment of pressing charges/institution of SPP status 03 From the moment of presentation of the investigation documents to the accused 04 No defense counsel was present at the pretrial stage	<input type="checkbox"/> <input type="checkbox"/>
218.	Was there defense counsel before the court of first instance ?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
219.	Was there defense counsel before the court of second instance ?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
220.	Was there a defense counsel before the court of third instance ?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
221.	Was there a change of the defense counsel from an ex officio to a contractual one at any point during the various proceedings?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
222.	Was there a change of the defense counsel from a contractual one at the pre-trial stage, into an ex officio one at the first-instance proceedings?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
223.	How many defense counsels did the accused use during the entire span of proceedings? (Indicate number.)	

224.	Was there a change of defense counsel within the duration of proceedings for any one level of judicial proceedings (one judicial instance)?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
225.	What can the change of defense counsel be attributed to? 01 Objective reasons—hindrance to fulfilling counsel's duties 02 Reasons of the counsel 03 Reasons of the accused 04 No data available	<input type="checkbox"/> <input type="checkbox"/>
226.	How do you estimate the activities of the new counsel? 01 More appropriate 02 Less appropriate 03 No discernible difference	<input type="checkbox"/> <input type="checkbox"/>
227.	Defense counsel changed during: 01 First-instance proceedings 02 Second-instance proceedings 03 Third-instance proceedings 04 Once 05 Twice 06 More 07 No data available	All applicable options should be included: <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>
228.	Is there any data showing that the accused/SPP made an express demand for the appointment of defense counsel? If so, to which authority did he or she make the demand? 01 Authority of the Interior Ministry 02 Police officer 03 Investigator 04 Prosecutor 05 First-instance court 06 Appellate court 07 Cassation court 00 No data available	<input type="checkbox"/> <input type="checkbox"/>

229.	<p>If such demand was presented, at which moment was it made:</p> <p>01 At the moment of detention 02 At the moment of charges being pressed/institution of SPP status 03 During the pre-trial proceedings 04 At the presentation of the investigation documents to the accused 05 During interrogation 06 At the point of another procedural or investigative activity 07 In a written motion 08 In a written motion addressed to the judge - rapporteur 09 At a court hearing of the 1st instance 10 At a court hearing of the 2nd instance 11 At a court hearing of the 3rd instance 12 No such demand was made</p>	<input type="checkbox"/> <input type="checkbox"/>
230.	Was the demand granted ?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
231.	<p>Were there any grounds for the defense counsel to file for non-joinder (withdrawal from the case) of:</p> <p>A. Police officer B. Investigator C. Prosecutor D. Judge E. No data available</p>	01-Yes 02-No A. <input type="checkbox"/> <input type="checkbox"/> B. <input type="checkbox"/> <input type="checkbox"/> C. <input type="checkbox"/> <input type="checkbox"/> D. <input type="checkbox"/> <input type="checkbox"/> E. <input type="checkbox"/> <input type="checkbox"/>
232.	<p>Did defense counsel make a request for non-joinder (withdrawal from the case) of:</p> <p>A. Police officer B. Investigator C. Prosecutor D. Judge E. No data available</p>	01-Yes 02-No A. <input type="checkbox"/> <input type="checkbox"/> B. <input type="checkbox"/> <input type="checkbox"/> C. <input type="checkbox"/> <input type="checkbox"/> D. <input type="checkbox"/> <input type="checkbox"/> E. <input type="checkbox"/> <input type="checkbox"/>
233.	Was the request approved ?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>

234.	Type of defense counsel at : Pre-trial proceedings The first-instance proceedings The second-instance proceedings The third-instance proceedings The reopening proceedings 01 <i>Ex officio</i> 02 Contractual 03 Relative	Use all applicable options <table border="0"> <tr><td><input type="checkbox"/></td><td><input type="checkbox"/></td><td><input type="checkbox"/></td><td><input type="checkbox"/></td></tr> </table>	<input type="checkbox"/>																			
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<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>																			
235.	Amount of remuneration for <i>ex officio</i> defense counsel (in the case of more than one counsel, the total sum for the relevant stage/phase should be indicated): Pre-trial 1st instance 2nd instance 3rd instance Reopening proceedings	_____leva _____leva _____leva _____leva _____leva																				
236.	Did counsel's remuneration correspond to the Supreme Attorney Council Report No. 1?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>																				

237.	<p>If there was an <i>ex officio</i> defense counsel, under which stipulation of the Criminal Code was he or she appointed?</p> <p>01 Because of the accused/SPP having mental or physical disabilities 02 Because of the accused/SPP being a minor 03 Because the punishment for the criminal act in question is stipulated by the law as being life imprisonment, or deprivation of liberty for not less than ten years 04 Because the accused/SPP does not know the Bulgarian language 05 Because the case was heard in the absence of the accused 06 Because of the contradicting interests of more than one accused/SPP, when one of them does not have a defense counsel 07 Because the interests of justice so required; at the request of the accused/SPP 00 There was no <i>ex officio</i> defense counsel</p>	<input type="checkbox"/> <input type="checkbox"/>
238.	<p>Did the authority in the pretrial proceedings explain to the accused/SPP that he or she has the right to an <i>ex officio</i> defense counsel if he or she does not have the means to afford a private attorney?</p>	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
239.	<p>Did the court explain to the accused/SPP that he or she has the right to an <i>ex officio</i> defense counsel if he or she does not have the means to afford a private attorney?</p>	01-Yes 02 - No <input type="checkbox"/> <input type="checkbox"/>
240.	<p>Did the defense counsel raise any objections against unfounded assertions by the prosecutor during the first-instance proceedings?</p>	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
241.	<p>Did the defense counsel serve more than one SPP/accused at the same time?</p>	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>

<p><u>242.</u></p>	<p>The defense counsel served more than one accused/SPP:</p> <p>At the pretrial proceedings</p> <p>At the 1st-instance proceedings</p> <p>At the 2nd-instance proceedings</p> <p>At the 3rd-instance proceedings</p> <p>Following reopening of the case, at the pretrial proceedings</p> <p>Following reopening at the 1st -instance proceedings</p> <p>Following reopening at the 2nd -instance proceedings</p> <p>Following reopening at the 3rd -instance proceedings</p>	<p>All applicable options should be included</p> <p><input type="checkbox"/> <input type="checkbox"/></p>
<p><u>243.</u></p>	<p>Did the accused/SPP have interests that were contradictory to those of another accused/SPP?</p>	<p>01-Yes 02-No</p> <p><input type="checkbox"/> <input type="checkbox"/></p>
<p>244.</p>	<p>Was there a contradiction between the positions of the accused/SPP and defense counsel?</p>	<p>01-Yes 02-No</p> <p><input type="checkbox"/> <input type="checkbox"/></p>
<p><u>245.</u></p>	<p>If there was such, did the defense counsel maintain a position in favor of the accused?</p>	<p>01-Yes 02-No</p> <p><input type="checkbox"/> <input type="checkbox"/></p>
<p>246.</p>	<p>Please list briefly what were the activities of the defense counsel that were not in the interest of the accused/SPP?</p> <p>at the 1st instance</p> <p>at the 2nd instance</p> <p>at the 3rd instance</p> <p>following reopening of the case</p>	

247.	Did the court deliver a judgment/judgment that was more favorable to the accused/SPP than the one for which the defense counsel pleade d?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
248.	Were there any written requests, appeals, objections or complaints filed by the defense counsel during: The pre-trial stage The first-instance proceedings The appellate proceedings The cassation proceedings	01-Yes <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	02-No
249.	Were there any complaints by the accused/SPP that he or she was not visited by defense counsel during detention?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
250.	If the accused was acquitted , did defense counsel ask for termination of the criminal proceedings at the pre-trial stage?	01-Yes <input type="checkbox"/> <input type="checkbox"/>	02-No
251.	For mandatory defense cases: was the accused/SPP informed that defense was mandatory? At the pre-trial stage At the 1st-instance proceedings At the 2nd-instance proceedings At the 3rd-instance proceedings Following reopening of the case	01-Yes <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	02-No
252.	Was a request by the accused/SPP for a private conference with their defense counsel filed? At the pre-trial stage proceedings At the 1st-instance proceedings At the 2nd-instance proceedings At the 3rd-instance proceedings Following reopening of the case	01-Yes <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	02-No
253.	If such was not allowed, was a complaint filed ? At the pre-trial stage At the 1st-instance proceedings At the 2nd-instance proceedings At the 3rd-instance proceedings Following reopening of the case	01-Yes <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	02-No

<u>254.</u>	The complaint was At the pre-trial stage At the 1st-instance proceedings At the 2nd-instance proceedings At the 3rd-instance proceedings Following reopening of the case	01-Allowed 02-Dismissed <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>
255.	Did defense counsel make a request to study the material concerning the case from the moment he or she took part in the pre-trial proceedings?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
<u>256.</u>	If the request was denied, did counsel file a complaint ?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>

8. Information on proceedings termination types

257.	Agreement	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
<u>258.</u>	Who initiated agreement proceedings? 01 The prosecution 02 The defense	<input type="checkbox"/> <input type="checkbox"/>
259.	The outcome of the criminal proceedings was: 01 Sentencing to deprivation of liberty 02 Probation period with pending deprivation of liberty 03 Sentencing to punishment less severe than deprivation of liberty 04 Acquittal 05 Exemption from criminal liability, with imposition of an administrative sanction 06 Exemption from criminal liability, with imposition of administrative measures regarding public interest 07 Termination of the criminal proceedings	<input type="checkbox"/> <input type="checkbox"/>
260.	When did the judgment enter into force (specify date) ?	<input type="checkbox"/> <input type="checkbox"/>
<u>261.</u>	The case terminated: 01 Following sentencing in the 1st instance 02 Following an agreement 03 Following sentencing/judgment in the 2nd instance 04 Following judgment in cassation proceedings	<input type="checkbox"/> <input type="checkbox"/>

262.	Case was reopened at the request of: 01 The chief prosecutor 02 The defense counsel 03 The case was not reopened	<input type="checkbox"/> <input type="checkbox"/>
263.	The case was reopened on the basis of: 01 False evidence 02 A breach of the law in relation to the case, by a judge, assessor, prosecutor, or investigator 03 Circumstances or evidence that was previously not known to the court 04 A judgment of the European Court of Human Rights 05 Procedural irregularities allowed in sentencing, judgments, or rulings that were not examined by the cassation court 06 Judgment imposed in the absence of the accused	<input type="checkbox"/> <input type="checkbox"/>
264.	Qualification of the acts the person was accused of (Specify relevant texts according to acts that defendant was initially accused of, and subsequent modifications.)	
265.	The accused was found guilty of (specify relevant texts of Criminal Code according to final sentence/judgment):	
266.	Type and limits of punishment(s) imposed	
267.	Was overall punishment imposed in accordance with Articles 23–25 and 27 of the Criminal Code?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
268.	Was a re-education measure imposed under Article 64, Section 1, of the Criminal Code?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
269.	Was an administrative sanction imposed?	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>
270.	Other types of termination of the case (please specify if applicable)	01-Yes 02-No <input type="checkbox"/> <input type="checkbox"/>

Interview Questionnaire for Studying Access to Defense Counsel among People Deprived of Liberty

Bulgarian Helsinki Committee*

Name of interviewer:
Facility for deprivation of liberty where this questionnaire is being used (full name should be written without any abbreviations):
Number of participants in survey at this facility:
Ordinal number of the person out of the total number of persons forming the sample at this facility:
Date of interview:

Instructions:

1. Each question shall be read out by the interviewer without the answer options.
2. Time shall be given for the respondent to formulate his or her answer.
3. If respondent has difficulties or his or her answer does not coincide with the options, they shall be read out loud. The person shall then be asked to identify the alternative that, according to him or her, most fully describes his or her situation.
4. **ATTENTION!** Questions asking for information that has already been provided by the respondent while answering another question shall be rapidly filled in by the interviewer without omissions and for the purpose of avoiding repetition.
5. Certain answers to some of the questions may exclude a group of questions coming next to these. In such cases, please strictly follow the indications for the next question the person

needs to answer, which are given by an arrow followed by the number of the next question or instructions formatted inside a frame.

6. Most cases where information might have already been provided by the respondent in another question shall be marked with an asterisk (*) next to the relevant option. However, if other such options are identified during the interview, interviewer shall mark the appropriate option himself or herself.
7. Answers shall be marked by circling the correct option below each of the questions.
8. In some cases it is possible that more

than one answer could be applicable to the respondent's situation. In such questions there is an explicit instruction reading *ALL APPLICABLE OPTIONS*. However, if in other questions, logic in the respondent's answer indicates that more than one option is applicable, the interviewer shall mark all applicable options.

9. If not expressly indicated that certain questions should be skipped, the interviewer needs to fill in the appropriate answer. If no appropriate answer is indicated as a possible option, the interviewer shall mark in a free form the answer of the respondent.

Start of interview:.....
1. General information about the respondent:
<p>1. Gender:</p> <p style="margin-left: 20px;">01. Male</p> <p style="margin-left: 20px;">02. Female</p>
<p>2. Place of birth (village, town, city, populated area)</p> <p><i>Interviewer: please write down the place of birth inside the square to the right, then provide the appropriate coding below.</i></p> <p><i>Name of populated area:</i></p> <p style="margin-left: 20px;">01. Sofia</p> <div style="border: 1px solid black; width: 200px; height: 40px; margin-left: 300px; margin-top: 10px;"></div>

- 02. Administrative regional center
- 03. Other city/town
- 04. Village

3. Place of residence (village, town, city, populated area)

Interviewer: please write down the place of residence inside the square to the right, then provide the appropriate coding below.

Name of populated area:

Name of populated area:

- 01. Sofia
- 02. Administrative regional center
- 03. Other city/town
- 04. Village

4. Nationality (*ALL APPLICABLE OPTIONS*):

- 01. Bulgarian
- 02. Of another state
- 03. None

5. Age (completed):

- 01. 14–18 years
- 02. 19–30 years
- 03. 31–40 years
- 04. 41–50 years
- 05. Over 50 years

6. Family status

- 01. Single
- 02. Married
- 03. Widower/widow
- 04. Divorced

7. Occupation as of time of the criminal act:

- 01 Permanent
- 02 Temporary
- 03 Student
- 04 Retired
- 05 Unemployed
- 06 Had no occupation because of illness

8. Education

- 01. Higher
- 02. College
- 03. Specialized/technical
- 04. High school
- 05. Primary
- 06. Less than primary

9. Did you have an occupation at the time of the criminal act you were convicted of committing?

- 01. Yes
- 02. No

10. Ethnicity:

- 01. Bulgarian
- 02. Turkish
- 03. Romani
- 04. Other:

please specify

11. Children:

- 01. None
- 02. One
- 03. Two
- 04. Three
- 05. More than three

12. Social status as of the time of the criminal act:

- 01. General-qualifications worker in the industries or services
- 02. Special-qualifications worker in the industries or services
- 03. Agricultural worker
- 04. Director/manager
- 05. Specialist with higher education
- 07. Owner/associate in a company without hires
- 07. Owner/associate in a company with up to 10 hires
- 08. Owner/associate in a company with up to 50 hires
- 09. Owner/associate in a company with more than 50 hires
- 10. Arts and crafts
- 11. Free-lance
- 12. Without permanent work or occupation
- 13. Other:
please specify

13. Monthly income at time of commission of the criminal act:

- 01.leva
- 02. Can't remember
- 03. No income

14. Have you been previously convicted?

- 01. Yes, but rehabilitated
- 02. Yes and have still not been subsequently rehabilitated
- 03. No
- 04. Don't know/no answer

2. General information regarding criminal proceedings

15. Year the criminal act was committed:

01. prior to 1980
02. 1980–1989
03. 1990–1995
04. 1996
05. 1997
06. 1998
07. 1999
08. 2000
09. 2001
10. 2002

16. Pre-trial proceedings opened:

01. Prior to 1 January 2000
02. After 1 January 2000

17. Age completed at time of commission of the criminal act?

01. 14–18 years
02. 19–30 years
03. 31–40 years
04. 41–50 years
05. Over 50 years

18. What act(s) have you been accused of committing on account of which you are now deprived of your liberty?

01. Theft—the general type under Article 194
02. Theft—aggravated, under Article 195
03. Robbery
04. Murder
05. Grievous bodily injury

06. Medium bodily injury
07. Setting a fire
08. Abuse of rights of others
09. Hooliganism
10. Rape
11. Sexual harassment
12. Extortion
13. Abuse of power to obtain material advantage belonging to another
14. Forgery
15. Drug-related offenses
16. Other (please specify):

.....
Please pay SPECIAL ATTENTION to this option, if relevant!

19. You presently are:

01. At pre-trial → **Go to 31**
02. Awaiting trial/involved in a pending trial before the first-instance court or following appeal, and your conviction has not yet entered in force
→ **Go to 31**
03. Convicted and your judgment/decision of the court has been delivered but has not entered yet in force; however, you will not appeal it

20. Year of **conviction**:

01. Prior to 1980
02. 1980–1989
03. 1990–1995
04. 1996
05. 1997
06. 1998
07. 1999
08. 2000
09. 2001
10. 2002

21. How many years of deprivation of liberty have you been sentenced to?
Please specify the number ofyears and months
(if the conviction has been up to one year, please specify the period in
months in the space provided for the duration in months above).

22. At which instance has your case ended (*for the convicts*)?

- 01. First —————→ **Go to 23**
- 02. Appellate —————→ **Go to 27**
- 03. Cassation —————→ **Go to 31**
- 04. Following reopening —————→ **Go to 31**
- 05. I don't know —————→ **Go to 31**

23. Do you still have a possibility to file an appeal against the act of the first instance?

- 01. Yes —————→ **Go to 25**
- 02. No

24. For what reasons have you not filed an appeal?

- 01. Proceedings terminated with agreement —————→ **Go to 31**
- 02. I had no wish to file an appeal —————→ **Go to 31**
- 03. I had no money to hire a lawyer —————→ **Go to 31**
- 04. I missed the deadline and had no lawyer —————→ **Go to 31**
- 05. My *ex officio* lawyer missed the deadline and didn't file an appeal
—————→ **Go to 31**
- 06. The lawyer whom I paid did not file an appeal/missed the deadline
—————→ **Go to 31**
- 07. I did not know whether I had a procedural possibility for filing an appeal
and I had no lawyer before the court that sentenced me —————→ **Go to 31**
- 08. Other, please specify: —————→ **Go to 31**

25. —————→ **From 23**

Do you have the intention to appeal the act of the first instance?

- 01. Yes, personally —————→ **Go to 31**

02. Yes, through my lawyer —————> **Go to 31**

03. No

26. For what reason will you not appeal?

01. Proceedings terminated with an agreement —————> **Go to 31**

02. I have no money to hire a lawyer —————> **Go to 31**

03. I have no lawyer, I cannot afford one, and I cannot defend
myself in person —————> **Go to 31**

04. Other, please specify: —————> **Go to 31**

27. —————> **From 22**

Do you still have a possibility to file an appeal against the act of the appellate instance?

01. Yes —————> **Go to 29**

02. No

28. For what reasons have you not submitted a further appeal?

Proceedings terminated with an agreement —————> **Go to 30**

I did not wish to appeal —————> **Go to 30**

I had no money to hire a lawyer —————> **Go to 30**

I missed the deadline and had no lawyer —————> **Go to 30**

My *ex officio* attorney did not file an appeal/missed the deadline
—————> **Go to 30**

The lawyer whom I paid did not file an appeal/missed the deadline
—————> **Go to 30**

I did not know whether I had a procedural possibility for filing an appeal and
I had no lawyer before the court that sentenced me —————> **Go to 30**

Other, please specify: —————> **Go to 30**

29. —————> **From 27**

Do you intend to file an appeal against the act of the appellate instance?

01. Yes, personally **Go to 31**

02. Yes, through my lawyer —————→ **Go to 31**
03. No

30. For what reason will you not file an appeal?
01. I have no money to hire a lawyer
02. Other, please specify:

3. Information about pre-trial proceedings and rights of people during pre-trial detention

31. Did you have a lawyer during pre-trial proceedings?
01. Yes
02. No

32. How long have pre-trial proceedings lasted/How long do they last?
01. Up to 2 months
02. Up to 6 months
03. Up to 1 year
04. Up to 2 years
05. More than 2 years

33. Have you been detained?
01. Yes, *at work*
02. Yes, *they came and arrested me when I was at home*
03. Yes, *at the scene of the crime*
04. Yes, *at another place*
05. Yes, they *called me on the phone*, invited me to go to the police/investigation, and then arrested me
06. Yes, I *turned myself in to the police/investigation*
07. No —————→ **Go to 47**

34. Have you ever received a summons to appear for a “routine check” at the Regional Police Directorate/at the investigator’s?

01. Yes

02. No, I was detained without *ever receiving a summons*

03. No, *they called me on the phone* and detained me when I appeared

35. Did you receive an order for your arrest only when you appeared for a “routine check”?

01. Yes

02. I was detained without being previously invited to appear for a “routine check”*

03. They made me sign something and then arrested me

04. I have never received an order for my arrest

05. Other, please specify:

06. Don’t know/no answer

36. Were you immediately informed of the reasons for your arrest?

01. Yes

02. No

37. Were you promptly brought before a judge following your arrest?

01. Yes

02. No —————→ **Go to 39**

38. Did you have a lawyer when you appeared before the judge?

01. Yes, I had hired a lawyer

02. Yes, I had an *ex officio* lawyer

03. No

39. How long had your arrest lasted before an indictment order was given to you?
(*Interviewer: please first try getting information about the time the indictment order was delivered and how long after the detention this happened and then circle the correct answer under the appropriate time period.*)

04. Yes, other—please specify:

05. No

06. I do not wish to answer

43. At the moment of arrest, was it explained that you were entitled to inform a person of your choice that you were arrested?

01. Yes

02. No

44. Has a person of your choice been informed of the arrest/detention?

01. Yes

02. No —————→ **Go to 46**

45. In what way precisely was the person of your choice informed of the arrest/detention (*ALL APPLICABLE OPTIONS*)?

01. A policeman called a person I had indicated

02. The investigator called a person I had indicated

03. They allowed me to call a person of my choice

04. They allowed me to write to a person of my choice

05. A person of my choice was notified in writing by the police

06. People I would wish to be notified had already been informed of my arrest

07. In another way—please specify:

08. I do not remember exactly in what way; however, people were notified of my arrest/detention

46. When you were arrested, was it explained that you had the right to contact a lawyer if you so wished?

01. Yes

02. No

47. When did you learn criminal proceedings had been opened against you?

01. The same day these had been opened

- 02. Within 24 hours of their opening
- 03. Within 48 hours of their opening
- 04. Within 72 hours of their opening
- 05. Within a week of their opening
- 06. Within a month of their opening
- 07. I learned later

48- In what way did learn that proceedings had been opened?

- 01. During interrogation in the capacity of an accused
- 02. During interrogation in the capacity of a witness
- 03. At the moment of arrest/detention
- 04. Other, please specify:

49. When you were served the indictment order, what was the non-deviation measure imposed?

- 01. A Promise to report regularly at the police
- 02. Bail
- 03. Home arrest
- 04. Detention on remand
- 05. I was on bail; however, they arrested me, because I had no means to pay the sum required
- 06. I don't know

50. Have you been imposed another non-deviation measure, beside the above-mentioned one? (*ALL APPLICABLE OPTIONS*)?

- 01. Yes, a promise to report regularly at the police
- 02. Yes, they put me on bail
- 03. Yes, house arrest
- 04. Yes, detention on remand
- 05. Yes, but don't remember what exactly
- 06. No
- 07. Don't know

51. Did the investigating authority use any physical force against you?

01. Yes

02. No ————— **Go to 53**

03. The investigating authority did not use physical force, but behaved rudely*
—————→ **Go to 53**

04. I do not wish to answer —————→ **Go to 53**

52. Did you file a complaint based on the use of physical force by the investigating authority against you (*ALL APPLICABLE OPTIONS*)?

01. Yes, personally

02. Yes, through my lawyer

03. No

04. I do not wish to answer

Questions 53 through 64 shall be asked when option 04 (detention on remand) has been used to answer questions 49 and/or 50. For all others, go to question 65.

53. If the non-deviation measure in your pre-trial proceedings has been detention on remand, how long has detention lasted?

01. Up to 1 month

02. Up to 6 months

03. Up to 1 year

04. More than 1 year

05. Can't remember

54. Have you been placed for part or the entire duration of detention in a pre-trial detention facility?

01. Yes, for the entire duration

02. Yes, part of the detention

03. No —————→ **Go to 63**

55. How many people have you been in the same room/cell in the pre-trial deten-

tion facility?

Please specify the number:

56. What were the dimensions of the room/cell in the pre-trial detention facility?

01. Up to 2 sq. m.
02. Up to 3 sq. m.
03. Up to 4 sq. m.
04. Up to 5 sq. m.
05. Up to 6 sq. m.
06. Up to 7 sq. m.
07. Up to 8 sq. m.
08. Up to 9 sq. m.
09. More than 9 sq. m.
10. Other/don't know

57. Were sanitation facilities in the pre-trial detention facility good?

01. Poor
02. Good
03. Sometimes good, sometimes poor

58. During your stay in the pre-trial detention facility, did you have to use buckets instead of going to the toilet?

01. Yes, day and night
02. Yes, but only at night
03. Yes, but only during the day
03. No

59. Was there sunshine in your room/cell in the pre-trial detention facility during the day?

01. Yes
02. No

60. Did you have the chance to go for a walk outside of the room/cell in the pre-trial detention facility?

01. Yes, outside

02. Yes, in covered premises

03. No —————→ **Go to 62**

61. How often did you go out?

01. I had the chance, but did not want to go out

02. Every day for about an hour

03. Every day for more than an hour

04. Twice a week for about an hour

05. Twice a week for more than an hour

06. Once a week for about an hour

07. Once a week for more than an hour

08. Less often than once a week

09. No answer

62. In what way have you been spending your time when in the pre-trial detention facility (*ALL APPLICABLE OPTIONS*)?

01. Working

02. Reading

03. Lying down and sleeping

04. Other organized ways of spending time; please specify:

.....

05. Other, please specify:

63. Has your non-deviation measure been modified?

01. Yes

02. No

64. How did the authorities treat you during detention?

01. Good treatment

- 03. Within 3 days of the detention
- 04. Within a week of the detention
- 05. Within a month of the detention
- 06. Don't know/can't remember

69. How were meetings with defense counsel held during your detention?

- 01. Face-to-face
- 02. Sometimes they were held face-to-face
- 03. In the presence of the prison/investigation administration
- 04. Sometimes in the presence of the prison/investigation administration
- 05. No answer

70. While you were being detained, were there cases where correspondence with defense counsel has been read or has not reached addressee?

- 01. Yes
- 02. No → **Go to 73**
- 03. Don't know → **Go to 73**
- 04. I have never written to counsel because I had been forbidden to do so
→ **Go to 73**
- 05. I have never written to counsel, because I did not need to do so
→ **Go to 73**

71. Whom did you complain to (*ALL APPLICABLE OPTIONS*)?

- 01. The prison director
- 02. The investigator
- 03. The prosecutor
- 04. An attorney
- 05. Someone else
- 06. I did nothing to complain

72. If you have not been detained, when did you meet your lawyer for the first time?

- 01. Before the interrogation

- 02. During interrogation
- 03. Before I was given the indictment order
- 04. During indictment
- 05. Before I was summoned to examine the investigation file
- 06. At the moment I was examining the investigation file
- 07. On the occasion of other procedural activities (please specify):
.....
- 08. On another occasion (please specify):
.....

73. How often have you had the chance to use defense counsel services?
- 01. In all procedural activities I was involved in
 - 02. In only some of the procedural activities
 - 03. I never saw him or her

74. How was your counsel appointed (*ALL APPLICABLE OPTIONS*)?
- 01. I hired him or her myself
 - 02. My relatives or acquaintances hired him or her for me
 - 03. He or she was appointed *ex officio*

75. Was your counsel present during interrogations?
- 01. Yes, at all of them
 - 02. Yes, at some of them
 - 03. No

76. Was your counsel present during interrogations of witnesses?
- 01. Yes, at all of them
 - 02. Yes, at some of them
 - 03. No
 - 04. I don't know

77. How would you mark your counsel's activities at pre-trial—ranging from 2 (poor) to 6 (excellent)?

- 01. Poor 2
- 02. Average 3
- 03. Good 4
- 04. Very good 5
- 05. Excellent 6
- 06. I can't tell

78. What were the weaknesses your counsel demonstrated (*ALL APPLICABLE OPTIONS*)?

- 01. Uninterested attitude
- 02. Cooperation with the investigator to the detriment of my interests
- 03. Insufficient activity
- 04. Inadequate conduct
- 05. Insufficient contact with the accused
- 06. Other; please specify:
- 07. No weaknesses

Question 79 will be asked if option 02 of question 36 (absence of counsel at pre-trial) was the applicable one. For all others, go directly to question 80.

79. What was the reason you had no counsel?

- 01. I had no money, so I could not afford one, and no *ex officio* counsel was appointed for me, since I was not entitled to one
- 02. I was not aware I had been charged with an offense
- 03. I was not allowed to contact a lawyer
- 04. I did not need one
- 05. I did not find a suitable one
- 06. I decided not to use his or her services anymore
- 07. Don't know/no answer

The following questions will be asked of everyone.

80. Did you ask the investigator to appoint counsel to you?

- 01. No —————→ **Go to 83**
- 02. No, however he or she appointed one —→ **Go to 83**
- 03. Yes, and did so insistently
- 04. Yes; however, I was not insistent

81. Did you ask the investigator to record your request for the appointment of a defense counsel in the protocol of proceedings?

- 01. No
- 02. Yes, and did so insistently
- 03. Yes; however, I was not insistent

82. Was your request for the appointment of counsel for the defense recorded in the protocol of the proceedings?

- 01. Yes
- 02. No

83. Were you given a physical *upon arrest at the police precinct?*

- 01. I have not been arrested*
- 02. Yes
- 03. No
- 04. Can't remember

84. Were you given a physical *upon admittance at the detention center?*

- 01. I have not been detained in such a center* —————→ **Go to 90**
- 02. Yes
- 03. No —————→ **Go to 90**

85. Was the physical conducted in presence of a prison administration official?

- 01. Yes

- 02. No
- 03. Can't remember

86. Who conducted the physical *(ALL APPLICABLE OPTIONS)?*

- 01. A doctor
- 02. A paramedic
- 03. A nurse
- 04. Don't know

87. Did you have any complaint related to the physical?

- 01. Yes
- 02. No —————→ **Go to 89**

88. Whom did you complain to *(ALL APPLICABLE OPTIONS)?*

- 01. Investigator, assistant-investigator
- 02. Prosecutor, junior prosecutor
- 03. Police investigator, assistant-police investigator
- 04. Police officer
- 05. Security at police detention facilities
- 06. Other authorities
- 07. Did nothing

89. Were you given the results of the physical *(ALL APPLICABLE OPTIONS)?*

- 01. Yes, they were given to me
- 02. Yes, they were given to my counsel
- 03. No
- 04. Don't know/no answer

90. Did the interrogator introduce himself or herself during the interrogations at pre-trial, announcing name and position?

- 01. Yes
- 02. Some introduced themselves, others did not (where more than one inves-

tigator dealt with the case)

03. No

04. I have not been interrogated so far —————→ *With regard to the accused, go to 116, after having explained to him or her that each appointment with the investigative authority qualifies as interrogation and it has been found that none had so far been made.*

91. Were you subjected to brutal or humiliating treatment during interrogation, and if yes, what did this consist of (*ALL APPLICABLE OPTIONS*)?

01. Abusive language

02. Slaps

03. Insults

04. Threats

05. Prolonged interrogation

06. Dismissive attitude

07. Spitting

08. Other; please specify:

09. No —————→ **Go to 93**

10. Don't wish to answer —————→ **Go to 93**

92. Did you file a complaint (*ALL APPLICABLE OPTIONS*)?

01. In person

02. Counsel did that

03. No

93. How were you usually interrogated (*ALL APPLICABLE OPTIONS*)?

01. I was offered to sit

02. I had to stand

03. Other; please specify:

94. How long did the interrogations usually last (*ALL APPLICABLE OPTIONS*)?

01. Up to 1 hour

- 02. Up to 2 hours
- 03. More than 2 hours
- 04. The whole day
- 05. The whole night

95. Were other people present during the interrogations (beside your lawyer, if he or she was present)?

- 01. Yes
- 02. No —————→ **Go to 97**

96. Did they introduce themselves?

- 01. Yes
- 02. Some yes, others not
- 03. No

4. On the trial phase

97. Did you have a lawyer before the first judicial instance (*ALL APPLICABLE OPTIONS*)?

The first instance is forthcoming/currently in progress and:

- 01. I have *ex officio* counsel —————→ **Go to 116**
- 02. I have contracted counsel —————→ **Go to 116**
- 03. I have no counsel —————→ **Go to 106**

The first instance terminated and:

- 04. I had a lawyer
- 05. I did not have a lawyer —————→ **Go to 106**

98. How did you get a lawyer (*ALL APPLICABLE OPTIONS*)?

- 01. I hired him or her myself
- 02. My relatives hired him or her
- 03. He or she was appointed *ex officio*

Questions 99 through 105 shall be asked only of individuals who had/have a lawyer in proceedings before the first judicial instance. Where options 03 and 05 in question 97 (the person did not have a lawyer before the first judicial instance) were applicable, go immediately to question 106.

99. How often were you able to use your lawyer's services?

- 01. At all hearings
- 02. Only at some hearings

100. Were pleadings of your lawyer good?

- 01. Yes
- 02. No
- 03. Don't know/can't say

101. Did your last word coincide with what your counsel requested?

- 01. Yes
- 02. No
- 03. Can't tell
- 04. No last word (e.g., in the case of plea bargaining followed by settlement*)

102. Did you see your lawyer before the hearing to discuss your conduct?

- 01. Yes
- 02. No

103. Did you have enough time meeting your lawyer to get ready for the courtroom?

- 01. Yes
- 02. No
- 03. Can't tell

104. How would you rate your counsel's activities at hearings, if you had one—from 2 (poor) to 6 (excellent)?

- 01. Poor 2
- 02. Average 3

- 03. Good 4
- 04. Very good 5
- 05. Excellent 6
- 06. I can't tell

105. What weaknesses did your counsel make proof of (*ALL APPLICABLE OPTIONS*)?

- 01. Disinterested attitude →
- 02. Collaboration with the authorities to the detriment of my interests →
- 03. Insufficient activity →
- 04. Inadequate conduct →
- 05. Insufficient contact with the accused →
- 06. Other; please specify: →
- 07. No weaknesses →

Go to
110

Questions 106 through 110 will be asked only of individuals who did/do not have a lawyer in proceedings before the first judicial instance. In the case of others, go directly to question 110.

106. What was the reason you had no lawyer in the proceedings before the first instance?

- 01. I did not have money to hire one, and no *ex officio* counsel was appointed, since I was not entitled to one
- 02. I did not find a suitable one
- 03. Other; please specify:
- 04. I did not need one

107. Did you ask the judge to appoint counsel for you?

- 01. No hearing has been conducted so far* → ***Go to 116***
- 02. No → ***Go to 110***
- 03. No; however, he appointed one → ***Go to 109***
- 04. Yes, and I did so insistently

05. Yes, but I was not insistent

108. Did you ask the judge to record your request for the appointment of counsel?

01. No

02. Yes, and did so insistently

03. Yes, but was not insistent

109. Was your request/objection to appointment of counsel recorded in the protocol of proceedings?

01. Yes

02. No

03. Don't know

5. On defense before other judicial instances (where applicable for the individual interviewed)

110. Did you have a lawyer before the appellate instance?

01. No proceedings before the appellate instance so far* —————→ **Go to 116**

Appellate proceedings terminated and there:

02. I had *ex officio* counsel —————→ **Go to 112**

03. I hired counsel —————→ **Go to 112**

04. Had no counsel —————→ **Go to 111**

Proceedings before the appellate instance are forthcoming/currently in progress, and:

05. I have *ex officio* counsel —————→ **Go to 112**

06. I hired counsel —————→ **Go to 112**

07. Have no counsel —————→ **Go to 111**

111. I had no counsel before the appellate instance, because:

- 01. I have no money, and *ex officio* counsel was not appointed despite my request →
- 02. I have no money, no *ex officio* counsel was appointed, and I never asked for one, either →
- 03. I did not find a suitable one →
- 04. I don't need one →
- 05. Other; please specify: →

Go to
113

112. Were you satisfied with your lawyer's performance?

- 01. He or she did a great job
- 02. Pretty much yes
- 03. Nothing to complain about
- 04. Pretty much no
- 05. He or she did not do a good job at all

113. Did you have a lawyer in the proceedings before the cassation instance?

- 01. No proceedings before the cassation instance so far* → **Go to 116**

The proceedings before the cassation instance have terminated and there:

- 02. I had an *ex officio* counsel → **Go to 115**
- 03. I hired counsel → **Go to 115**
- 04. I had no counsel → **Go to 114**

Proceedings before the cassation instance are forthcoming/currently in progress and there:

- 05. I have an *ex officio* counsel → **Go to 115**
- 06. I have hired counsel → **Go to 115**
- 07. I have no counsel → **Go to 114**

114. The reason you had no lawyer in the proceedings before the appellate instance was:

- 01. I have no money, and *ex officio* counsel was not appointed despite my request → **Go to 116**

- 02. I have no money, no *ex officio* counsel was appointed,
and I never asked for one, either → **Go to 116**
- 03. I did not find a suitable one → **Go to 116**
- 04. I don't need one → **Go to 116**
- 05. Other; please specify: → **Go to 116**

115. Were you satisfied with your lawyer's performance?

- 01. He or she did a great job
- 02. Pretty much yes
- 03. Nothing to complain about
- 04. Rather no
- 05. He/she did not at all do a good job

6. On the rights of those sentenced to imprisonment

Questions in this section will be asked of all interviewees.

116. Is medical service available to you?

- 01. Yes
- 02. No
- 03. Not informed

117. In what way were you acquainted with your right to use medical services—a doctor and a dentist (*ALL APPLICABLE OPTIONS*)?

- 01. A brochure
- 02. Posted on walls
- 03. By the administration
- 04. From other inmates
- 05. I have not been informed

118. Do you have access to a psychiatrist?

- 01. Yes; however, I do not need one
- 02. Yes, and I go to see him or her
- 03. No
- 04. I never tried to inquire

119. Do you have access to hospital, if you need treatment?

- 01. Yes, and services are good
- 02. Yes, but services are not good
- 03. No
- 04. I have not needed treatment/have not been informed

120. Is hygiene at a good level?

- 01. Yes
- 02. Sometimes yes, other times not
- 03. No

121. In what way were internal regulations presented to you (*ALL APPLICABLE OPTIONS*)?

- 01. I was given a brochure
- 02. These are posted on walls
- 03. I learn them from experience
- 04. From the administration
- 05. I read the law and relevant enactments
- 06. Other, please specify:
- 07. I have not been informed of the internal regulations

122. If you have problems with your health, do you know whom you need to contact?

- 01. Yes
- 02. No

123. Do you know how you can complain about the administration?

- 01. Yes
- 02. No

124. How many people do you share the same cell with?

Write down a numeral:

125. Have you got a toilet in the cell?

- 01. Yes
- 02. No

126. Do you have running water in the cell?

- 01. Yes, all the time
- 02. Yes, sometimes
- 03. No

127. Is there violence among prisoners?

- 01. Yes
- 02. No → **Go to 132**
- 03. Don't know/don't wish to answer → **Go to 132**

128. How did you come to know there was violence among prisoners (*ALL APPLICABLE OPTIONS*)?

- 01. As a witness
- 02. I was told by witnesses
- 03. I was told by victims
- 04. I was told by those who had recourse at violence
- 05. I was a victim
- 06. I had recourse to violence in self-defense
- 07. I have had recourse to violence
- 08. Other; please specify:

129. How often do *you witness* violence among prisoners?

01. Almost on a daily basis
02. Several times a week
03. 1–2 times a week
04. Several times a month
05. 1–2 times a month
06. Several times in six months
07. 1–2 times in six months
08. Less often
09. I have never witnessed violence

130. How often have you yourself *kicked, pushed, hit, etc.*, other inmates?

01. Almost on a daily basis
02. Several times a week
03. 1–2 times a week
04. Several times a month
05. 1–2 times a month
06. Several times in six months
07. 1–2 times in six months
08. Less often
09. I have never used violence

131. How often have you been the *victim* of violence?

01. Almost on a daily basis
02. Several times a week
03. 1–2 times a week
04. Several times a month
05. 1–2 times a month
06. Several times in six months
07. 1–2 times in six months
08. Less often
09. I have never been the victim of violence

132. Do you think that if you complained about violent acts, your name would be disclosed to the one against whom you filed the complaint?

- 01. Yes
- 02. No
- 03. Can't tell

133. Have you ever complained about violence to the administration (*ALL APPLICABLE OPTIONS*)?

- 01. Yes, of violence among prisoners
- 02. Yes, of violence by the administration
- 03. I would never complain, because I am afraid to do so → **Go to 135**
- 04. I have not complained for other reasons → **Go to 135**
- 05. I have had no grounds to complain/there was no violence ► **Go to 135**

134. What was the outcome of your complaint?

- 01. Measures were taken, and the situation improved
- 02. Measures were taken, but the situation got worse
- 03. Nothing happened
- 04. Can't tell

135. Where do you sleep?

- 01. In a bed with sheets and blankets
- 02. In a bed with blankets, but no sheets
- 03. In a bed with no sheets or blankets
- 04. On the floor

136. Are blankets enough?

- 01. Yes
- 02. No
- 03. No blankets

137. Do you have a chance to exercise regularly while in prison?

01. Yes

02. No —————→ **Go to 139**

138. How often can you exercise outside?

01. Every day for about an hour

02. Every day for more than an hour

03. Several times a week for about an hour

04. Several times a week for more than an hour

05. Once a week for about an hour

06. Once a week for more than an hour

07. Less often than once a week

139. Do you have a program to spend your time in a meaningful way (*ALL APPLICABLE OPTIONS*)?

01. Work

02. Reading

03. Sports

04. TV

05. Other; please specify:

06. Other organized activities; specify:

07. No organized activities

140. Do you have an opportunity for visits?

01. I am not allowed to have visits

02. I am provisionally not allowed

03. I have an opportunity; however, no one comes to see me

04. I have this opportunity and also have visitors

05. I often am let out on leave

141. Do you have an opportunity to call your friends or relatives, if they live far and can't visit you?

01. Yes

02. No

142. What do you think of the attitude of the administration?

01. Very bad

02. Pretty bad

03. Neither bad nor good

04. Pretty good

05. Very good

06. Can't tell

143. How often can you shower?

01. Every day

02. Several times a week

03. Once a week

04. Less often than once a week

05. No showers available

144. In prison, has any special equipment been used against you?

01. Yes

02. No —————→ **Go to 146**

03. Don't know/don't wish to answer —————→ **Go to 146**

145. Did you have a physical after such use?

01. Yes

02. No

03. Don't wish to answer

146. Have you had isolation imposed on you?

01. Yes

02. No → **Go to 149**

147. What has been the total for the last year?

01. Up to 24 hours

02. Up to 1 week

03. Up to 20 days

04. Up to 40 days

05. More than 40 days

148. What did you do (*ALL APPLICABLE OPTIONS*)?

01. Complained to the prison governor

02. Complained to the prosecutor

03. Complained to a lawyer

04. Complained somewhere else

05. Did nothing

149. Have you had any visits from officials/inspection authorities?

01. Yes

02. No → **Go to 151**

150. If you have had such visits, did you have the chance to talk to them in person?

01. Yes

02. No

151. Is food in prison OK?

01. Very good

02. Pretty much OK

03. Decent

04. Poor

05. Can't tell

152. Are your religious needs met?

- 01. Yes, completely
- 02. Yes, but not sufficiently
- 03. No
- 04. Have no religious needs

153. Do you believe there is corruption among the administration?

- 01. Yes, on a large scale
- 02. Yes, on a small scale
- 03. No
- 04. Don't know/can't answer

154. Please write down all other comments related to the questions asked, where any such comments have been reported by the interviewee

End of interview:

Note:

This questionnaire has been prepared by a team of lawyers and sociologists of the Bulgarian Helsinki Committee in order to collect data on the rights of individuals deprived of liberty, and in particular their access to counsel in criminal proceedings.

This study is carried out within the Access to Justice Project. Project partners are the Helsinki Foundation for Human Rights (Poland), the Public Interest Law Initiative (PILI), and INTERIGHTS (UK).

The immediate objective of this project is to improve access to the legal system of vulnerable and disadvantaged individuals, such as the poor and ethnic

and national minorities. Thus, the project will contribute to the practical implementation of rights provided for by law for large parts of the population in the countries where it is carried out, and eventually in the entire CEE region. This project has been funded by the European Commission.¹

For additional information concerning this project, as well as in the event of problems in using this questionnaire, please contact:

Krassimir Kaner
Bulgarian Helsinki Committee

NOTES

* Access to Justice Project

¹ This document has been prepared with the financial support of the European Commission. Views herein outlined are

solely those of the Bulgarian Helsinki Committee and may in no way be considered as the official opinion of the European Commission.

Civil Legal Needs Assessment

Bulgarian Helsinki Committee

Access to Justice Project

1. If you believe your rights have been infringed upon, does the alleged infringement concern one of the areas below (ALL APPLICABLE OPTIONS):
 - 1.1 Problems concerning your personal legal status (name, residence registration, personal identity, identity papers, papers for travel abroad, civil registrations)
 - 1.2 Problems concerning property
 - 1.3 Problems concerning contractual relations
 - 1.4 Employment relations
 - 1.5 Family relations
 - 1.6 Inheritance
 - 1.7 Taxation matters
 - 1.8 Social security
 - 1.9 Relations with the administration
 - 1.10 Insurance matters
 - 1.11 None of the above - go to 3

2. In relation to the above complaints, what you need is: (ALL APPLICABLE OPTIONS):
 - 2.1 Legal advice on the applicable law
 - 2.2 Assistance from a lawyer in dealing with documents of importance in determining your rights in any of the above areas
 - 2.3 Advice from a lawyer on possibilities to take action in relation to these rights
 - 2.4 Assistance from a lawyer to bring a case to court
 - 2.5 Legal representation by a lawyer before court

3. Do you think you could afford hiring a lawyer?
 - 3.1 Yes, and I have done this
 - 3.2 Yes, but still haven't done it
 - 3.3 No, because this is too expensive
 - 3.4 No, since I had hired one, but have no more money to pay him
 - 3.5 I have never needed one/I can't tell

4. If you had used the services of a lawyer, do you believe he did his job well?
 - 4.1 Yes
 - 4.2 No
 - 4.3 Can't tell

5. Do you believe the law should provide for a possibility for those who can't afford a lawyer to be entitled to free legal advice or representation before court?
 - 5.1 Yes
 - 5.2 No
 - 5.3 Can't tell

Access to Legal Aid: Information about the Project

by **Lukasz Bojarski***

The Helsinki Foundation for Human Rights in Poland (HFHR) is conducting the project Access to Legal Aid, within the larger project on Promoting Access to Justice in Central and Eastern Europe. As part of this project, HFHR planned in 1999, and has conducted since 2000, surveys and activities aimed at promoting access to legal aid in Poland. What follows is a general description of the project; a list of activities and surveys carried out; some quotations from the Polish Forum on Access to Legal Aid; and a description of some of the empirical tools used in the project. More detailed information can be found in the accompanying volume of country reports.

1. PROBLEM OF ACCESS TO LEGAL AID

One of the basic problems in Poland and in other countries of our region is the widely understood one of access to justice, and within its scope, in particular, access to court and access to legal aid. It is also one of the spheres of

interest of the Helsinki Foundation for Human Rights. Activities we have undertaken in this respect so far include, for example, the following:

- Monitoring of work conditions in district courts in Poland and publication of a report (1998–99).¹ The report was quoted during a budgetary debate as an argument for increasing government expenditures for the judiciary,² it was extensively discussed in public, and it was also presented by its authors to the Parliamentary Commission on Justice and Human Rights (Komisja Sprawiedliwosci i Praw Czeowieka). As stated by the vice-minister of justice during the Parliamentary Commission's meeting, it helped to allocate bigger funds in the budget for the administration of justice.
- Providing advice to individual clients of HFHR's Public Interest Law Actions section in the following matters: right to defense, right to legal aid, and misconduct of *ex officio* appointed attorneys. These matters were addressed with court,

Bar, and disciplinary authorities.

- Participation of HFHR's employees in a series of meetings with a group of experts from Western European countries, the United States, South Africa, and Central and Eastern European countries concerning access to legal aid (Oxford, 1998; Warsaw, 1999; London, 2001; Budapest, 2002).

For several years, up to and including the present, the problem of access to legal aid has not received a lot of attention in Poland. Neither government bodies nor research institutes conduct surveys concerning this problem. HFHR's work clearly indicates that there are many problems requiring changes in the access to legal aid.

2. PROJECT GOALS

Within the framework of the four organizations' joint project on Promoting Access to Justice in Central and Eastern Europe, HFHR decided to conduct a survey and undertake public activities concerning access to legal aid. Our goal was to provoke a public debate that would result in amendments to the law, as well as changes in practices within this scope. Our activities were aimed mostly at:

- subjecting the problems of access to legal aid to a serious public debate, involving government bodies, legal corporations, and representatives of the non-governmental sector;
- improving the quality and effectiveness of free legal aid;
- increasing access to legal aid for persons who cannot afford to hire a lawyer.

Our aim was to accomplish this through the following means, among others:

- more efficiently using means assigned by the state for legal aid;
- making better use of, improving, and modifying presently functioning procedures, within the existing means;
- introducing, within the existing means, alternative forms of granting free legal aid applied in the world;
- developing forms for granting legal aid to indigent persons that do not burden the state budget (e.g., *pro bono* work);
- conducting state surveys and collecting statistical data concerning legal aid.

How do we understand the notion

of legal aid? The main sphere under survey was the narrowly defined term “legal aid,” i.e., *ex officio* legal aid paid for by the state. This notion can also be understood widely as any free assistance of a legal nature granted to a person, such as:

- exemption from court costs;
- free legal advice and assistance with drafting procedural writs—provided by social organizations, as well as within the scope of social legal assistance supported by local governments pursuant to the Law on Social Assistance;
- activities of social organizations before courts in the name or on behalf of citizens;
- the institution of actions by a public prosecutor;
- the assistance of the ombudsperson in specific cases;
- the obligation of proceeding authorities to inform participants of their legal situation;
- the court’s obligation to rule more than demanded in certain cases.

Although our main sphere of interest was *ex officio* legal aid, we also dealt partly with the other above-listed phenomena.

3. ACTIVITIES UNDERTAKEN

3.1 *Review of law*

Poland does not have one single legislative act concerning legal aid; instead, these problems are regulated through many separate legal acts. For research purposes, more than one hundred legal acts of various kinds were selected. Provisions concerning widely understood legal aid were found in seventy-nine of them. We have prepared a compilation of these regulations. We have also compiled information on international standards for legal aid.

3.2 *Analysis of jurisprudence*

We have reviewed jurisprudence of Polish and international courts concerning the issue of access to legal aid and its quality.

3.3 *Analysis of statistical data*

Although direct data concerning various aspects of access to legal aid is almost nonexistent, analysis and comparison of indirect data allowed us to collect 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.

We have reviewed data, among others, from the Ministry of Justice, the National Council of the Bar, the National Council of Legal Advisers, the Public Prosecutor's Office, the police, and the Prisons Administration.

3.4 Empirical surveys

These included the following:

- interviews based on a questionnaire;
- survey in courts
 - of parties not represented by an attorney or a legal adviser, concerning, among others, reasons for such lack of representation and the possibility to obtain legal aid;
 - of parties having an attorney or a legal adviser (either private or *ex officio*), concerning, among others, the manner in which each obtained legal assistance, evaluation of the quality of the lawyer's work, costs, and other relations between the lawyer and the client;
- survey in penitentiaries
 - of imprisoned persons not represented by a defender, concerning, among others, the reasons for lack

of representation and the possibility to obtain legal aid;

- of imprisoned persons having a defendant (either private or *ex officio*), concerning, among others, the manner in which each obtained legal assistance, evaluation of the quality of the defender's work, costs, and other relations between the lawyer and the client;
- examination, carried out as a pilot survey, of the opinions of attorneys, legal advisers, and public prosecutors concerning the system of legal aid paid for by the state, including difficulties and proposed changes;
- pilot survey of non-governmental organizations providing advice and civil and legal assistance, concerning the type of assistance granted and ways in which it is granted, persons receiving such assistance, competence of persons providing it, institutional conditions, problems, and proposed changes;
- interviews with presidents of district and regional courts and with judges;
- examination of the opinions of judges concerning the present system of legal aid and proposed changes.

3.5 Case studies

Based on cases received by HFHR's Public Interest Law Actions section, we have developed the following case studies:

- negative examples of the functioning of *ex officio* legal aid, illustrating the main problems;
- examples of disciplinary proceedings in cases of misconduct by *ex officio* defenders and attorneys.

3.6 Problem description

For the project's needs, we have developed an analysis of problems, such as the following:

- interpretation and application of Article 78, Section 1, of the Code of Criminal Proceedings—the problem of “adequate demonstration” by a defendant requesting an appointment of an *ex officio* defender, “that he or she is not able to bear costs of defense without detriment to necessary support and maintenance for himself or herself and family”;
- restrictions in access to legal aid for persons who want to sue an attorney for damages caused by the attorney in performance of his or her work;
- third-party liability insurance for

attorneys and legal advisers for damages caused in performance of their work;

- serious restrictions in access to the profession of advocates and legal advisers as one of the reasons of the lack of legal aid and its poor quality, along with the need to broaden the number of practicing lawyers, and possible solutions.

3.7 Collection of materials

When conducting the project, HFHR collects numerous materials concerning problems with access to legal aid and international standards, as well as solutions adopted by other countries. We want to make these materials available to interested entities—the first step was the translation and publication of selected materials for participants of the Legal Aid Forum in Poland. These materials are also available at the foundation's Web site: www.hfhrpol.waw.pl.

3.8 Legal Aid Forum

On 7–8 June 2002, HFHR, in cooperation with the Parliamentary Commission on Justice and Human Rights, organized a Legal Aid Forum at the Parliament (Sejm) of the Republic of Poland. Information on surveys conducted by HFHR,

results of surveys, and proposed changes in practice and law with respect to access to legal aid were presented during the forum. More than 120 persons representing authorities (legislature, executive, and judiciary), legal corporations, non-governmental organizations, and the scientific world participated in the forum. Foreign experts shared their experiences in other countries.

3.9 Report

In April 2003, the Final Report on Access to Legal Aid was published. The book consists of project findings, HFHR recommendations as to the reform of the system of legal aid (both law and practice), summaries of voices from the Legal Aid Forum, and a presentation of international standards related to the subject.

3.10 Leaflets

HFHR published information materials for citizens concerning, among other things, the possibility to obtain lawyers' assistance and including practical instructions on how to proceed in cooperation with a lawyer, what to do when such cooperation is problematic, etc.

3.11 Activities planned

HFHR will continue to deal with problems concerning legal aid. Organization of the Legal Aid Forum at the Polish Parliament, as well as publication of the report, completes the first stage of the project. Other activities planned by us following the forum include:

- continuation of the research on law and practice in the *ex officio* legal aid field;
- publications on legal aid in law journals;
- participation in public debate and works undertaken to improve access to legal aid and the quality of this aid.

4. FIRST STEPS TOWARD REFORM

The above-mentioned surveys and activities undertaken allow HFHR to examine legal aid from various perspectives. However, the picture obtained thus far is still fragmentary and incomplete. We realize that the surveys, to a large extent, are more successful in terms of quality than of quantity, and do not provide an in-depth examination of opinions. Our goal, however, is to

draw attention to problems occurring in the application of legal aid and to provoke a public debate on necessary changes and reforms. We treat our surveys as the beginning, not the end, of the road to legal aid reform. We believe that we can encourage government authorities and legal corporations, the academic world, and the non-governmental sector to conduct systemic work on the shape of legal aid in Poland. We ourselves will participate in such work and public debate.

We are pleased to observe the interest that the discussed issues have already inspired.

On the eve of the Legal Aid Forum, in May 2002, a team was appointed at the Commission on Human Rights of the National Council of the Bar to develop a proposal of the Bar aimed at creating an efficient *ex officio* legal aid system. The team has been analyzing solutions applied in other countries. The next stage will include the formulation of changes proposed by the Bar.

The chairman of the Parliamentary Commission on Human Rights (which co-organized the forum) at that time, Member of Parliament Grzegorz Kurczuk—who became minister of justice a month later—emphasized several times, both as chairman of the commission and later as the minister of justice, the importance of access to legal aid and declared

that the Ministry would undertake work in this respect.

The director of the Legislative Department at the Ministry of Justice, Judge Marek Sadowski, promised participants in the Legal Aid Forum that its achievements would be taken into consideration as part of ongoing legislative work (for example, of the Civil Law Legislative Commission developing new principles concerning costs of civil proceedings). Works of the commission following the forum proved this to be a serious commitment. The draft law includes, for instance, establishing a “means test” of a kind that was proposed by HFHR.

In addition, the Polish ombudsman (human rights commissioner—Rzecznik Praw Obywatelskich) stressed its interest in reforming the system of granting legal aid. So far, for instance, the ombudsman’s office has signed cooperation agreements with some University Law Clinics.

Legal aid is also a matter of interest for a number of NGOs. Some of them, such as the Stefan Batory Foundation and Freedom Foundation, have a specific strategic approach. By granting funds to other NGOs, they try to standardize their work and establish cooperation or networks.

An interest in the issue of legal aid has also been expressed by representatives of the Bar and Legal Advisers.

All of this shows that the subject is right now a matter of interest for many bodies and institutions. Our goal, therefore, would be to establish a working group consisting of representatives of these different actors. There is a need for a collaborative, structured effort to reform the system of granting legal aid,

and all steps along this way should be discussed among institutions interested.

Below are some quotations from introductory remarks and comments showing the interest gained by the Legal Aid Forum that the Helsinki Foundation for Human Rights organized.

TRANSCRIPT FROM THE LEGAL AID FORUM, 7–8 JUNE 2002, PARLIAMENT OF THE REPUBLIC OF POLAND

Marek Nowicki, President of the Helsinki Foundation for Human Rights

Good morning, Ladies and Gentlemen. My name is Marek Nowicki, and I am president of the Helsinki Foundation for Human Rights. I would like to extend a warm welcome to all present at the conference to which we have invited you, together with the Commission on Justice and Human Rights. . . . We have with us Mr. Grzegorz Kurczuk, chairman of the Parliamentary Commission on Justice and Human Rights, whom I will ask to say a few words in a minute. . . .

MP Grzegorz Kurczuk, Chairman of the Parliamentary Commission on Justice and Human Rights

. . . As an introduction, I would like to say the following: some of the most important issues in Poland include problems connected with access to justice. . . . I do not want to refer today to an extremely interesting, I emphasize *extremely* interesting, publication in *Gazeta Wyborcza* entitled “Justice for Richer” (“Sprawiedliowo ce dla bogatszych”) [this publication presented the HFHR

report prepared for the forum], but in general what you are going to discuss, the subject of the meeting, that is, activities that should or are being undertaken in order to improve access to justice in Central and Eastern Europe, that is, also in Poland, are in my opinion some of the most important ones, and I do not say so only as a lawyer and chairman of the Parliamentary Commission but also as a practicing lawyer and a careful observer of what is going on in our country. I hope, Ladies and Gentlemen, that you examine the entire problem, and first of all the issue of access to legal aid in our countries, in this very competent group you have gathered here. I think that this is also important considering that our country, but also several others, is a candidate for the European Union, where certain standards are binding. We would like to have such standards as well, but we know how bad the situation is in this respect. I think that your discussions, Ladies and Gentlemen, which I consider a significant element of a public debate on legal aid, will result in certain definite proposals. I believe that it will be possible to transform the fruits of your discussion into something that I would call proposals of legislative changes that are also undertaken, for example, by my commission interested in such issues. Finally, I think that we will use the result of this conference, what you are going to discuss, first of all to propagate the knowledge of certain standards, and I think that this is also very important. This is as far as I am concerned; I would not like to prolong my speech. I am very happy to be able to participate in this meeting with you, and I welcome you on behalf of Marshal Marek Borowski, I wish you fruitful deliberations.

Sylweryusz Królak, Undersecretary of State, Ministry of Justice

The initial material for the debate that is to follow should be evaluated as prepared very professionally. Its contents will certainly constitute the basis for discussion that will allow us to formulate postulates and conclusions, which should then be very thoroughly analyzed by all public authorities. Only this circumstance allows us to state that the course and results of the conference will have

material significance for shaping a free legal aid model in Poland. . . . As a conclusion, I would like to say that the forum faces an extremely important task; this task is connected not so much with a completion of a certain work but with an efficient, wise, and farsighted beginning of a discussion on very important issues that have not only Polish but also European dimensions. Therefore, please allow me, on behalf of the minister of justice, Barbara Piwnik, and on my own behalf, to wish you, and thus the Justice Department, a successful discussion and fruitful conclusions that are very necessary for Poland and the Polish justice system. Thank you very much.

Judge Marek Sadowski, Director of the Legislative Department, Ministry of Justice

Thank you very much. I think that this first speech after the material's presentation [HFHR report] will be the most inconvenient, because the majority of critical comments are addressed to the minister of justice and her staff, since they are responsible for creating a good system of *ex officio* legal aid. . . . This conference and its results will be certainly extremely useful also for the Ministry of Justice. The collected material is already useful; its short and swift analysis may surely lead to some attempts at formulating conclusions or proposals. . . . The Ministry of Justice is working on a new law on court costs in civil cases, which is also to provide for a mechanism of granting an *ex officio* attorney. Since this task is performed by the Civil Law Codification Commission, acting with the minister of justice—I am obviously familiar with the status of this work and the scope of proposals, but the work has not been completed and I declare straightaway that a lot of thoughts that have been expressed here, included in the materials, will be reexamined. . . . The law on court costs in civil cases is to be prepared; the draft of this law is [supposed] to be ready in this semi-annual period, but it probably will not be; it is in the plans of the Council of Ministers but probably will not be completed. I think that you [organizers—the foundation] will be in a way responsible for the fact that the work on the draft

of the law will not be completed, as so many issues were submitted and indicated here that it is worthwhile to discuss the law once again at least in the part concerning appointment of *ex officio* attorneys.

Igor Dzialuk, Vice-Director of the Department of International Cooperation and European Law, Ministry of Justice

. . . A strong point of this report is, first of all, the fact that it is well based in the reality of the country that it is to serve and is not just an advertisement of systems removed by light-years from a situation in the country; secondly, it does not aspire to the function of reliable scientific research with all of the consequences—based on certain surveys, it draws certain conclusions but does not claim to be infallible, and this is also its great value. Also, the report rightly differentiates two parts of the discussion (I refer to conclusions here): a certain planned vision of the system the way it could be in the future, and a clear statement that there are no simple answers here—nor as a result of conducted surveys could the report formulate definitive conclusions. It clearly separates this mission from certain organizational and immediate changes that could help to better administer and manage the potential that is available.

Mecenas Andrzej Kalwas, President of the National Council of Legal Advisers

First of all, I would like to warmly thank Professor Rzepliński, President Nowicki, and the Helsinki Foundation for bringing up this subject. It is very good that such difficult issues as problems connected with justice administration, provision of legal aid, and the profession of a defender, attorney, or legal adviser as co-factors or co-participants of the justice administration should be discussed by professionals, people who are familiar with these issues—extremely difficult, sensitive, socially meaningful, but also evoking emotions. . . .

Attorney Bozenna Banasik, Commission for Human Rights at the National Council of the Bar; Dean of the Regional Bar in Łódź

I represent the Commission for Human Rights at the National Council of the Bar. Ladies and Gentlemen, first of all I would like to thank Mr. Łukasz Bojarski and congratulate him on presenting such a thorough, it seems to me, report and at the same time thank and congratulate him on excellent research and speed in collecting information—as on page 32, there is a note on the establishment as of the end of May of a team at the Commission for Human Rights of the National Council of the Bar, dealing with all of those issues we are discussing today. The subject scope of this conference [has been important] for many years, as I am honored to have been a member of the National Council for four years as a dean, presently in my second term, of the Council of the Bar in Łódź, and I can say with full conviction that the subject of this conference is very frequent during meetings of the National Council. Unfortunately, a unified solution has not been found so far, and it is good that this conference is taking place now when these subjects are alive again at the meetings of the Council, and found their expression in particular in our Commission for Human Rights. A special team has in fact been appointed to deal with this, a team consisting of many colleagues from all over Poland, so it is not only “warszawka” (the Warsaw clique) that is dealing with this but also colleagues from Bielsko-Biala or Żywiec, also from other chambers. Please allow me to pass the floor to Dr. Marcin Radwan, since as a boss I also have my people who prepare reports, and I think he will present better what we have done so far.

Attorney Dr. Marcin Radwan, Commission for Human Rights at the National Council of the Bar

I think that in general this is an opportunity to present the fact that our team has been established and that we are trying to think of these problems, and at the same time approach them in such a way that a certain solution is developed

that would resolve at least some of the current problems connected with *ex officio* legal aid in Poland. I do not hide the fact that since this team was established at the end of May, it would be naturally difficult to have conclusions that we could present, or ready legislative solutions at this point. Generally, I think that we are very grateful to the organizers for all of the knowledge they provided us with, since it will be undoubtedly one of the important elements that we have to master in order to further tackle these problems. . . . On our side, we have of course begun collection of various legal comparative materials, since we want to begin a search for certain technical solutions to certain issues. I think that certain assumptions arose, from this very preliminary discussion we had, that we would like to apply in our work. . . . I hope that we will be able to cooperate both with the foundation and with other institutions when building this model, and that we will be able to contribute certain concrete issues. That is all we can say at the moment. The team has been operating for a short time and we do not have major achievements, but we wanted to make our presence known.

Attorney Zofia Daniszewska, the Regional Council of the Bar in Bialystok

On behalf of the corporation, I would like to thank the foundation for preparing the report. I will admit to a weakness, that at our commission we have been signaling the problem for ten years, and we were not able to carry out the survey ourselves. So thank you very much for this report; for showing the problem and solutions, we extend double thanks. We now have material to think about how we are going to participate in this help, because I think the issue of whether such help is necessary we attorneys should not even discuss, as we understand it is clearly necessary. . . .

5. ANALYSIS OF EXISTING STATISTICAL DATA

There have been no comprehensive surveys on legal aid conducted in Poland so far. Neither the courts nor the Ministry of Justice collects any relevant data. The Institute of Justice at the Ministry of Justice has not conducted research either. Similarly, professional self-management of attorneys and legal advisers does not deal with problems of access to legal aid in a comprehensive manner. Although certain statistical data is collected and preserved in this way, such data is insufficient and, unfortunately, partly unreliable.

Court statistics in Poland are detailed. The fact that they do not include data on legal aid confirms a small interest in this issue. Research on access to legal aid and the quality of such aid, on efficiency of the present model of granting legal aid to the indigent, and the collection of appropriate statistical data constitute tasks for various entities.

One of the goals of the HFHR project is to encourage government authorities, research institutes, corporations of attorneys and legal advisers, and the academic world to undertake surveys and to systematically collect

data in this field. The more entities engage in the research (including non-governmental institutes and organizations), the bigger the chance that such research will be objective and comprehensive.

The problems of access to legal aid are so significant that they deserve appropriate research work to be undertaken urgently and decisions to be made on the necessity and directions of the reform. A situation in which the state spends increasing amounts of public funds on free legal aid and has no factual knowledge of how such funds are allocated seems to be incorrect. Collection of appropriate data and its analysis would enable the evaluation of many elements of the current system as far as their consistency with international standards and effectiveness.

Some of the data could be obtained with relatively small changes to the existing court statistics. The problems connected with legal aid should become one of the research tasks included in the government's statistical plans. Results of research and analysis of statistical data would enable a comprehensive evaluation of the legal aid system's *status quo*. Such evaluation could in turn produce conclusions concerning potential changes in practice and law. This would also enable a simulation of

changes to the current model.

Introduction of changes does not necessarily mean an increase in expenditures for legal aid, but rather a more rational use of such funds. It would be worthwhile to consider an introduction of pilot programs, which would allow comparing the efficiency of an *ex officio* legal aid system with, for example, a public defender office system.

For example, mass media regularly inform us of difficulties with finding attorneys who would undertake *ex officio* defense in big criminal cases requiring significant involvement.³ Costs of free legal aid in such cases are very high.⁴ A cost simulation could show that allocating appropriate funds to create a pilot public defender office, for example in one court district, is a better solution than maintaining only the *ex officio* defense model.

The experiences of other countries prove how research and collection of appropriate data or testing solutions through pilot programs help in making decisions on reforms.

5.1 Scope and costs of legal aid

All over the world, various criteria are applied to evaluate whether a state is complying with its obligation to ensure

an access to legal aid for its citizens who cannot afford to hire a lawyer. Data is collected, *inter alia*, on the absolute amount of funds for legal aid, and comparisons are made, for example, between government expenditures for this purpose per citizen and per capita domestic income. This enables a comparison of the scale of expenditures in particular countries, taking into consideration their wealth.⁵

Some countries, where the granting of legal aid depends on a specified minimum income and property (e.g., the Netherlands), calculate the number of citizens who are entitled to legal aid paid for fully or in part by the state as a result of their financial situation.

5.2 Efficiency of systems for granting free legal aid

One of the criteria used in evaluation of the efficiency of free legal aid is the calculation of an average cost incurred by the state per case. This allows a comparison of costs of different legal aid delivery models—for example, in the *ex officio* legal aid system adopted in Poland and in a system where staff lawyers provide free legal aid (e.g., a public defender office operating in Lithuania, Israel, or the United States).

To calculate an average cost per case, it is necessary to obtain data concerning expenditures of the state for *ex officio* legal aid, as well as information on the number of *ex officio* cases.⁶ Data that would allow reliable calculations in this respect is not collected in Poland.

We can only present the data that is available and mention what is missing in Poland. Despite its scantiness, the existing data allows certain conclusions to be reached. We shall attempt to consider, among others, the following questions:

- Do authorities know how much the Polish state spends on legal aid and what these funds are used for?
- What is the scope of *ex officio* legal aid in Poland—how many people, and in

what cases, are granted such aid, and is the data presented by the Main Statistical Office reliable?

- Are there enough attorneys and legal advisers in Poland, and are they able to satisfy the legal services market?

6. EXPENDITURES OF THE ADMINISTRATION OF JUSTICE FOR LEGAL AID

“Costs of free legal aid” mean costs of legal aid provided by *ex officio* attorneys and legal advisers paid for with state budget funds. This sum includes expenditures from the budget of the Ministry of Justice paid in a given financial year and due budgetary obligations to be paid.

Table 1. Expenditures of the administration of justice for free legal aid (in PLN – Poland Zlotych)⁷

Year	1997	1998	1999	2000	2001	2002 (to 30 Sept.)
Expenditures	7,051,128	10,350,485	23,508,803	31,939,162	22,366,695	57,164,656
Obligations	4,776	200,860	84,907	6,370,624	32,210,370	16,860,937
Total	7,055,904	10,551,345	23,593,710	38,309,786	54,577,065	74,025,593

We see that in 1999, compared to 1998, expenditures for free legal aid increased almost by 123.6% and that in

recent years this increase, although slightly smaller, has remained very clear. In addition, the number of

obligations of the State Treasury toward attorneys and legal advisers has been increasing.

The table below presents the increase of expenditures for free legal aid in relation to all state budgetary expenditures (the picture is not com-

pletely correct, however, as one has to take into consideration an error resulting from carrying over “obligations” in consecutive years). For comparative purposes, expenditures for the general budget line “ordinary courts” are presented.

Table 2. Legal aid expenditures in relation to all state budgetary expenditures (in PLN – Poland Zlotych)⁸

Year	Total budgetary expenditures	Expenses for: “ordinary courts”	Percent of expenditures in total budget	Expenditures for free legal aid	Percent of expenditures in total budget
1999	142,099,762,000	1,706,659,000	1.20%	23,594,000	0.016%
2000	156,309,815,000	2,112,097,000	1.35%	38,310,000	0.024%
2001	181,604,087,000	2,351,970,000	1.29%	54,577,065	0.030%
2002	185,101,632,000 138,826,224,000*	2,560,317,000	1.38%	74,025,593 (by 30 Sept.)	0.053%

* 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 table below shows an attempt to determine the amount of adjudicated fees in a given year; it seems to be rather accurate.⁹

Table 3. The amount of adjudicated fees for *ex officio* cases in a given year (in Poland Zlotych)¹⁰

Year	1999	2000	2001	2002 (to 30 Sept.)
Sum of adjudicated fee (in millions of PLN)	23.4	38.2	48.2	41.8
% of the total state expenditures	0.016%	0.024%	0.026%	0.030%

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—not as significant, however, as the previous table would indicate.

The increase of expenditures resulted mostly from a significant increase of attorneys and legal advisers' fees for *ex officio* cases,¹¹ although based on infor-

mation from the National Council of the Bar, we may assume that the number of *ex officio* cases has also increased (see below).

Since 1 September 1998, *ex officio* legal aid in criminal cases is also granted at pre-trial; thus, the Ministry of Justice has data on amounts spent on *ex officio* legal aid, separately for public prosecutor's offices and courts, as of 1999.

Table 4. Data concerning state expenditures on *ex officio* legal aid for public prosecutor's offices and courts, 1999–2002 (in Poland Zlotych):¹²

Year	1999	2000	2001	2002 (to 30 Sept.)
Public prosecutor's offices	216,879	677,386	589,743	608,747
Courts	23,376,831	37,632,400	53,987,322	73,416,846

This data reveals that the total of expenditures and obligations for *ex officio* legal aid at pre-trial in 1999 consti-

tuted 0.9 percent of the total amount of expenditures and obligations for legal aid granted by courts. By 2000 it was

already amounting to 1.8 percent; therefore, costs of legal aid at pre-trial had significantly increased—only to drop again immediately (they constituted 1.09 percent of total expenditures and obligations of courts in 2001, and only 0.8 percent in 2002). However, this data does not fully correspond to reality, because fees for legal aid at pre-trial are also sometimes paid for by the courts. The fees are paid, first of all, pursuant to an application submitted by an attorney or a legal adviser to the public prosecutor's office conducting the proceedings; such application is then approved by a public prosecutor in the case and directed for payment to the Budgetary Department of a given public prosecutor's office. Often, however, when a case is being examined later, an attorney or legal adviser submits the bill for pre-trial costs to the court, and remuneration is adjudicated together with the bill for court appearance.

Thus, there is no data that would allow us to determine unequivocally which portion of expenses for *ex officio* legal aid is spent at pre-trial and, consequently, what is the scope of such aid granted at this stage.

The above table presenting state expenditures for legal aid was created to provide a means of control for the Ministry of Justice, in order for it to regularly monitor the degree of increase in expens-

es 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 the so-called “cash paid out” system; therefore, it can be assumed that it is correct and should not contain errors.

The Ministry has been analyzing expenditures and obligations concerning free legal aid on regular basis—units prepare an attachment to the monthly expense reports.¹³ Information on “costs of free *ex officio* legal aid” is included in the paragraph entitled “costs of court and public prosecutor's proceedings.”

6.1 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 2002,¹⁴ is surprising. We are pleased to emphasize that—for the first time—the problems of legal aid appeared in the periodical report.¹⁵ However, the data provided is incorrect. It states that in 2001, 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. 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.¹⁶

6.2 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;¹⁷ however, it would be worthwhile to examine it, since if the state were more active in this respect, expenses would be lower.

6.3 Lack of a separate budget for free 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 the payment of fees to lawyers are a clear proof of this.

During preparation of a budget, particular units plan future expenses based on expenses incurred in a preceding year. However, costs of free legal aid are not placed in a separate category but are instead included in the paragraph “costs of proceedings before courts and public prosecutor’s offices,” which also includes, among other things, fees for opinions issued by medical schools, costs of securing by a court executive officer and execution by such officer, observation in a hospital, costs of transportation of a body, field sessions of a court, costs of delivery and 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 prepared during work on the reform of administrative procedure by a team of the National Administrative Court. The postulate to create a separate fund of legal aid has, however, been lost at the finish of parliamentary work.¹⁸

7. CONCLUSIONS

7.1 Need for research and planned state policy

Although we possess data concerning state expenditures for free legal aid, this data does not reveal, e.g., how much of the funds relates to legal aid in criminal and how much to civil and other cases; what part of the funds is paid to attorneys and what to legal advisers; the number of cases in which parties were granted legal aid; whether and how this number increased with the increase of expenses; in what cases aid was granted and for what reasons; whether, for example, in criminal cases such aid was due to the mandatory defense requirement or it was granted on application; as far as obligations are concerned, we do not know when they were incurred.

The state has no clear policy for creating funds for legal aid or incurring expenses. It seems that calculation and regulation of outstanding payments remain the only fields of interest.

The very inadequate knowledge of the phenomenon provided by the analysis of expenditures does not allow implementation of a thought-out policy. Thus, the first step should be obtaining knowledge based on which it will be possible to approach the issue of legal aid paid for by

the state in a systemic manner.

We propose drafting and changing appropriate forms of reports, which would allow the monitoring of expenditures by the state for paid-for *ex officio* legal aid on a regular basis and also the collection of information on, e.g., the number of cases in which such fees were paid, the type of cases, at what stage of the proceedings, and to whom (attorneys or legal advisers), etc.

7.2 Legal aid fund and Legal Aid Board

The lack of a separate legal aid fund, including expenditures for this purpose in a broader budgetary category covering many other types of expenses at the disposal of courts and public prosecutor's offices, causes or may cause different types of problems.

In the present financial situation of the administration of justice, when deciding about granting legal aid, courts when forced to make savings may be led by considerations not related to the merits but rather of a financial nature.¹⁹ It is obvious that at the present stage, the state cannot afford to guarantee legal aid to all who need it. However, the lack of standards in this respect, as well as lack of research and data, creates a situation in which we do not know who receives such

aid and why. The only standards arise out of the provision of law—but as we indicate further in this report, they are not precise enough and result in discretionary granting of legal aid.

We should consider the establishment of a separate legal aid fund. It would be possible to determine standards for granting aid within specified funds—so that even if not all who need such aid receive it, at least it is clear who may apply for such aid and on what principles, having fulfilled what criteria.

We should also consider establishment, as in other countries, of an independent institution administering such fund (e.g., a Legal Aid Board). Such a board could carry out a planned policy. It may search

for sources of funding of legal aid—for example, the possibility of a partial contribution of represented persons to such costs could be considered. Knowing the capacity of the legal aid fund, the board could decide on detailed criteria for granting aid. It should also conduct surveys on the system's efficiency.

Introduction of such reform does not automatically have to involve an increase in costs. It is important, however, that expenses are incurred in a rational manner. Comparative surveys carried out in different countries suggest that, depending on the manner of spending, the same money may be used to take care of more people with legal aid.

NOTES

* Access to Justice Program Director Polish Helsinki Foundation for Human Rights

¹ L. Bojarski and J. Swaton, *Warunki pracy sądów rejonowych: Raport z monitoringu* (Work Conditions of District Courts: Report on Monitoring), Helsinki Foundation for Human Rights, Warsaw, 1999. Seria: Raporty, ekspertyzy, opinie, nr 23. The first draft of the report, before its publication, was made available in November 1998.

² Shorthand notes from the plenary meeting of the Sejm of the Republic of Poland (RP) on 9 November 1998, first reading of a draft Budgetary Law for 1999 (3rd office term, 34th session), MP Tadeusz Syryjczyk; see the Internet site of the Sejm of RP.

³ These problems were best illustrated in a Katowice case concerning “pacification of the Wujek mine,” during which consecutive attorneys were refusing to undertake defense and thus making the opening of

and regular course of proceedings impossible; see, e.g., B. "Cieszewska: Adwokaci nie chcą bronią," *Rzeczpospolita*, 16 September 1999, p. C1; I. L., "Kolejni obrońcy proszą o zwolnienia," *Rzeczpospolita*, 18–19 September 1999; B. Jaworska and L. Ostalowska, "Obrona się broni," *Gazeta Wyborcza*, 16–17 October 1999.

⁴ See e.g., information on costs of the so-called "cocaine case" in Warsaw; *Rzeczpospolita*, of 17 October 2002.

⁵ See Earl Johnson Jr., "Comparative Commitment to Equal Justice: Some New Statistical Indicators," which provides extensive literature. The article was prepared for the International Legal Aid Group conference in Melbourne, Australia, on 13–16 July 2001. The article also provides a list of expenditures for legal aid in some countries. This and other articles from the conference (regarding legal aid systems in various countries) are available on the Internet. See also Earl Johnson Jr., "Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies," *Fordham International Law Journal* 24 (2000). This entire issue of the periodical is devoted to the issue of access to legal aid and comprises a collection of articles and the transcript of a discussion carried out during the Partnership across Borders Conference: A Global Forum on Access to Justice, in New York on 6–8 April 2000.

⁶ This also requires a definition of the term "case," so that it is clear whether it includes legal aid granted in one instance or through-

out the entire proceedings.

⁷ Data from Grazyna Urbaniak, chief accountant of the Budgetary Department of the Ministry of Justice; Department of the Budget and Assets of the State Treasury.

⁸ Data taken from Budgetary Laws for consecutive years.

⁹ 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.

¹⁰ Rounded up.

¹¹ Regulated at the time of discussed changes by the Ordinance of the Minister of Justice on Fees for Attorneys and Legal Advisers of 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.

¹² Calculations based on data from Grazyna Urbaniak, chief accountant of the Budgetary Department of the Ministry of Justice; Department of the Budget and Assets

- of the State Treasury.
- 13 “Attachment to the Rb-28 report on expenses.”
- 14 *2002 Regular Report on Poland’s Progress toward Accession*; the report is available on the Web site of the European Commission and on the Web site of Urząd Komitetu Integracji Europejskiej (UKIE).
- 15 This does not apply to Poland in any case. In reports for 2002, the European Commission included, in the majority of cases for the first time, legal aid issues for the following countries: Bulgaria, the Czech Republic, Hungary, Latvia, Romania, and Slovakia; see the Web site of the European Commission.
- 16 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.
- 17 Information confirmed by judges.
- 18 More about the proposal of the National Administrative Court’s team in the following part of the report.
- 19 According to information obtained from some judges, the problem of lack of funds and a motion from persons managing courts to limit any expenses, including for legal aid, has been constantly present.

QUESTIONNAIRES

Below are some of the tools that the Helsinki Foundation for Human Rights used in its research:

- questionnaire for a person not represented by an attorney/legal adviser;
- questionnaire for a person represented by an attorney/legal adviser;
- questionnaire for attorneys—examination of opinions of the legal professions' representatives;
- questionnaire for organizations.

The first two questionnaires were used both in a pilot survey and, after improvements, in the main survey. Attorneys and non-governmental organizations were surveyed only in the pilot project, and these tools appear in the original, not changed, version.

The range of tools (additional ones were used to survey opinions of legal advisers, prosecutors, and judges) shows our approach in the project: we wanted to gain information and opinions from a variety of people and to build upon that a more complete general picture. We also hoped that some research would be continued by us or by other institutions in the future. We proposed, for instance, that the Polish Bar and Legal Advisers conduct representative surveys within their professions, using professional journals to distribute improved questionnaires.

One more thing needs explanation: There are two separate independent legal professions in Poland—advocates (called in these tools “attorneys”) and legal advisers. The main differences between them are as follows: legal advisers may not represent clients in criminal cases (with the exception of misdemeanors) or family cases; legal advisors may be employed on labor contracts, but in such cases they may not represent private clients.

1. Questionnaire for a person not represented by an attorney/legal adviser

(Separate questionnaires were used for persons surveyed in courts and in penitentiaries. For the purposes of this publication, surveys have been unified, with differences between questionnaires used in courts and in penitentiaries marked.)

Good morning/afternoon. I would like to talk to you about certain issues connected with legal aid in your case.

This survey is being conducted by the Helsinki Foundation for Human Rights in Warsaw.

The purpose of this survey is to determine the extent to which persons appearing in courts are provided with legal aid. This survey is anonymous. Its results will be used only in a collective form.

1. Did you have one or several cases in court?

1. one case 2. several cases

If answer 1.2: Could we talk about the most recent case (or if several cases are/were pending simultaneously, please select the one most important for you)?

Time of the beginning of the interview:

Obtaining legal aid

2. Have you attempted to find an attorney/legal adviser in your current case?

1. yes *(omit questions 4.1 and 4.2)*
2. no *(go to question 4.1 and omit questions 7–12)*

3. If yes, then in what way?

1. I submitted an application (I asked the court)

- 2. at an attorney's/legal adviser's office
- 3. through family or acquaintances
- 4. in court
- 7. in a different manner (how?)

[in surveys for persons in penitentiaries, additional answers: 5. through others imprisoned, 6. through a tutor]

4. 1. If no, then why? (please select no more than 2 answers)

- 1. I did not know how to find one
- 2. I do not need one (I am managing on my own)
- 3. it is "said" to be too expensive
- 4. other reasons what?

4.2. If no, would you like to have assistance of an attorney/legal adviser during the case?

- 1. Yes why?
- 2. No why?

5. Are you aware that people who cannot afford to hire a lawyer may apply to court and obtain a so-called *ex officio* attorney, remunerated by the state?

- 1. yes 2. no

6. If yes, where did you learn about it?

(only one answer can be selected—where the respondent heard about it for the first time)

- 1. court
- 2. family, acquaintances
- 3. reading materials (book, leaflet, etc.)
- 4. social organization
- 5. public prosecutor
- 6. curator
- 9. other source What?

[in surveys for persons in penitentiaries, additional answers: 7. tutors, 8. other

imprisoned]

7. If you had attempted to hire an attorney/legal adviser privately, why were you unsuccessful?

1. he or she did not want to take the case why?
2. he or she was too expensive
3. other reasons?

8. On what basis did you apply for an *ex officio* attorney/legal adviser (what arguments have you used)?

.....

9. What information/documents did you have to attach to an application?

1. none, application was enough
2. additional verbal explanation before a court
3. certificate of the Fiscal Office
4. certificate on income
5. certificate from welfare
7. other what?

[in surveys for persons in penitentiaries, additional answer: 6. certificate from the penitentiary on lack of employment due to lack of work]

10. Did the court require additional documents or information?

1. yes
2. no
3. I don't know /I don't remember

11. If yes, then what type and in what manner?

.....

12. Why did the court refuse to grant an *ex officio* attorney/legal adviser—what arguments did it use?

.....

All respondents

Additional legal aid

13. Have you tried to obtain legal advice or assistance in a different manner?

- 1. Yes
- 2. No (*omit questions 14 and 15*) **Why?**

14. If yes, then where?

- 1. social organization which?
- 2. state institution which?.....
- 3. acquaintances or family
- 4. leaflets, books, codes
- 5. other ways What?

If answer 1. or 2. to question 14:

15. With what result? (*provide the name of an organization or institution*)

- 1) refused assistance what justification?
- 2) did not respond to a letter
- 3) provided advice
- 4) provided advice for drafting a letter
- 5) other What?

16. Do you know that attorneys and legal advisers have written principles for performing their professions (so-called professional ethics principles)?

- 1. yes
- 2. no (*go to question 19*)

If answer 16.1:

17. Could you give any examples of such principles?

- 1. yes
- 2. no

If answer 16.1:

18. Could you say where you heard of such principles?

.....

19. Do you know that attorneys and legal advisers have to be insured and that if, when conducting a case, they neglect their duties and harm a client, that client may receive compensation from such insurance?

1. Yes, I know of such insurance 2. No, I have not heard of such insurance

20. Do you know what to do if an attorney/legal adviser fails to perform his or her duties?

1. Yes what?
2. No

21. In what capacity are you appearing in the case? [asked only in the survey conducted in courts]

1. plaintiff
2. defendant
3. accused
4. auxiliary prosecutor
5. private prosecutor
6. intervener
7. applicant

***[question 21 in the survey for penitentiaries: What article(s) were you accused under (type of offense)—please specify whether of the old or new Criminal Code*]**

22. In what court was your case initiated?

1. District Court in
2. Board judging petty offenses in

[question 22 in a survey for penitentiaries: What sentence was awarded?

- 1. below 1 year 2. from 1 to 3 years 3. over 3 to 6 years**
4. over 6 to 10 years 5. over 10 years]

23. In which court's division was/is the case pending?

1. civil 2. criminal 3. criminal and civil 4. family and juvenile
 5. labor 6. economic 7. land and mortgage register 8. registry

[question 23 in the survey for penitentiaries: In what court was your case initiated?

- 1. District Court in 2. Regional Court in]***

24. Nature of the case (e.g., inheritance, alimony)..... *[asked only in surveys in courts]*

Specification

25. Sex

1. Female 2. Male

26. Age

1. up to 30 years of age 2. 31-40 3. 41-50 4. 51-60
 5. over 60 years of age

27. What is your family's income sufficient for? *[asked only in surveys in courts]*

1. not enough even for everyday expenses
 2. hardly enough for everyday expenses
 3. enough for everyday expenses, but we have to save for bigger ones
 4. we are well off, we can afford a lot

28. Education

1. incomplete elementary
2. elementary
3. professional
4. high school
5. incomplete higher
6. higher

29. Which case before a court in which you appear as a party is it? [in surveys for penitentiaries: Which case in which you were a defendant was it?]

1. first
2. second
3. third
4. fourth (or more)

30. Would you like to add anything else concerning issues discussed in this survey?

Thank you for the conversation and for your answers.

Time of the completion of the interview.

Annex for the inquirer

1. Date of the interview.

2. Duration of the interview (in minutes)

3. Attitude of the respondent toward the interview:

1. favorable
2. indifferent
3. reluctant
4. comments.....

4. Were questions understandable?

1. yes, all were understandable
2. no, all were not understandable
3. some were not understandable Which?

5. Comments of the inquirer (issues not included in questions that arose during a conversation, interesting issues, other)

.....

Full name of the inquirer

Signature of the inquirer

2. Questionnaire for a person represented by an attorney/legal adviser

(Separate questionnaires were used for persons surveyed in courts and in penitentiaries. For the purposes of this publication, surveys have been unified, with differences between questionnaires used in courts and in penitentiaries marked.)

Good morning/afternoon. I would like to talk to you about certain issues connected with legal aid in your case.

This survey is being conducted by the Helsinki Foundation for Human Rights in Warsaw.

The purpose of this survey is to determine the extent to which persons appearing in courts are provided with legal aid. This survey is anonymous. Its results will be used only in a collective form.

1. Did you have one or several cases in court?

1. one case 2. several cases

If answer 1.2: Could we talk about the most recent case? (Or, if several cases are/were pending simultaneously, please select the one most important for you.)

2. Did you have an attorney or a legal adviser in this case? *[only in surveys]*

conducted in courts]

1. an attorney 2. a legal adviser

If more than one lawyer appeared in the case, we would like to talk about the first one.

Time of the beginning of the interview.

Obtaining legal aid

3. How did you obtain an attorney/legal adviser?

1. by choice—hired privately ***(omit questions 7–10)***
2. by choice—because court denied my application for an *ex officio* attorney
3. *ex officio*—on my application (due to lack of funds for an attorney) ***(go to question 5)***
4. *ex officio*—mandatory defense (e.g., if treated by a psychiatrist or a case in first instance before a Regional Court in case of imprisonment) ***(go to question 5)***
5. *ex officio*—in a different manner (e.g., proposed by a court, curator applied to court) ***(go to question 5)***

What manner?.....

4. If an attorney/legal adviser is by choice—how have you selected him or her:

(please select one answer)

2. at an attorney's/legal adviser's office
3. through family or acquaintances
4. in court
7. in a different way (how?)

[in surveys for persons in penitentiaries, additional answers: 5. through other imprisoned, 6. through a tutor]

5. Did you have any problems with finding (obtaining) an attorney/legal

adviser?

1. yes **what?** 2. no

6. Are you aware that people who cannot afford to hire a lawyer may apply to court and obtain a so-called *ex officio* attorney, remunerated by the state?

1. yes 2. no

6.1. If yes, where did you learn about it?

(only one answer can be selected—where the respondent heard about it for the first time)

1. court
2. family, acquaintances
3. reading materials (book, leaflet, etc.)
4. social organization
5. public prosecutor
6. curator
9. other sources (What?)

[in surveys for persons in penitentiaries, additional answers: 7. tutors, 8. other imprisoned]

Questions 7–10 apply only to an *ex officio* attorney

7. On what basis did you apply for an *ex officio* attorney/legal adviser (what arguments did you use)?

8. What information/documents did you have to attach to an application? *(several answers may be selected)*

1. none, application was enough
2. additional verbal explanation before a court
3. certificate of the Fiscal Office
4. certificate on income
5. certificate from welfare
7. other (what?)

[in surveys for persons in penitentiaries, additional answer: 6. certificate from the penitentiary on lack of employment due to lack of work]

9. Did the court require additional documents or information?

1. yes 2. no 3. I don't know /I don't remember

10. If yes, then what type and in what manner?.....

All respondents

Quality of work of an attorney/legal adviser

11. Were/are you satisfied with cooperation with an attorney/legal adviser?

1. I am satisfied *(omit questions 14 through 18)*
2. I am quite satisfied *(omit questions 14 through 18)*
3. I am rather unsatisfied
4. I am unsatisfied

5. it's difficult to evaluate

12. What are you most satisfied with? (please select no more than 3 answers)

1. he or she is involved in the case, is doing his or her best
2. he or she is very familiar with the case and the files
3. he or she informs me of what is happening in the case
4. he or she has meetings with me regarding the case
5. he or she agrees the line of conduct with me
6. he or she is present during hearings
7. he or she actively participates in the proceedings
8. he or she is nice/polite
9. I won the case
10. other reasons what?

13. What are you most dissatisfied with? (please select no more than 3 answers)

1. he or she is not involved in the case, does not do his or her best
2. he or she is not familiar with the case or the files
3. he or she does not inform me of what is happening in the case
4. he or she does not hold any meetings with me regarding the case
5. he or she does not agree the line of conduct with me
6. he or she is not present during hearings
7. he or she does not actively participate in the proceedings
8. he or she is not nice/polite
9. I lost the case
10. other reasons what?

14. If you were/are rather dissatisfied with the cooperation, have you done anything in this respect?

1. yes 2. no (*go to question 18*) 3. difficult to say

15. Please specify what you did:

1. had a conversation with an attorney/legal adviser (*go to question 19*)
2. filed a complaint
3. other (*go to question 19*) (What?)

If answer 15.2:

16. Whom did you file a complaint with?

17. What was the result of your action?

18. If you have not taken any action, why?

19. Do you know that attorneys and legal advisers have written principles for performing their professions (so-called professional ethics principles)?

1. yes 2. no (*go to question 22*)

If answer 19.1:

20. Could you give any examples of such principles?

1. yes 2. no

If answer 19.1:

21. Could you say where you heard of such principles?

22. Do you know that attorneys and legal advisers have to be insured and that if, when conducting a case, they neglect their duties and harm a client, that client may receive compensation from such insurance?

1. Yes, I know of such insurance
2. No, I have not heard of such insurance

23. Do you know what to do if an attorney/legal adviser fails to perform his or her duties?

1. yes (What?) 2. no

24. How did your attorney/legal adviser conduct the case?

1. personally (*go to question 27*)
2. through substitutes—deputies
3. partly personally and partly through substitutes

25. How many substitutes (deputies) were there? (*how many people?*)

1. one 2. two 3. three 4. four or more

26. Were deputies prepared for the proceedings?

1. yes, all of them
2. some yes, some no
3. no, none of them
4. difficult for me to evaluate

27. How many hearings total were there in the case?

1. 1–3 2. 4–6 3. 7–10 4. more than 10

Costs

(if a private attorney/legal adviser, we ask questions 28 through 35; if an ex officio attorney/legal adviser, go to question 36)

28. If attorney/legal adviser by choice—do you think the fee for an attorney/legal adviser for the case was/is?

1. too high
2. appropriate for the type of case *(go to question 30)*
3. too low *(go to question 29.2)*
4. difficult to say *(go to question 30)*
5. refuse to answer *(go to question 30)*

If answer 28.1:

29. 1. Please explain why too high? (discuss costs)

.....

If answer 28.3:

29. 2. Please explain why too low? (discuss costs)

.....

30. Could you specify how much and for what you paid?

.....

(We do not insist on an answer.)

31. Did/does an attorney/legal adviser give you evidence of payment (bills, invoices) when he or she receives fees?

1. yes 2. no 3. yes, but only for some of the services
4. different solution (What?)

32. Did you ask for a bill?

1. yes *(omit question 34)* 2. no *(go to question 34)*

33. If you asked for a bill, what was the response of an attorney/legal adviser?

34. If you did not ask for a bill, then why? (you may select more than 1 answer)

1. it was not necessary to ask, the attorney/legal adviser provided the bill himself or herself
2. I did not know that a lawyer should give such bills
3. it is not proper
4. I do not need a bill
5. other (What?)

35. How are you paying to an attorney/legal adviser?

1. for particular actions
2. one time in advance
3. agreed sum at the end of the case
4. other (how?)

36. *Ex officio* defense/representation—did an attorney/legal adviser suggest that you should pay him or her, or did he or she demand money?

1. yes 2. no

36.1. If yes, then how much, for what and in what manner?

.....

All respondents

Inspection of the work of an attorney/legal adviser

37. Have you asked your attorney/legal adviser about his or her activities in the case, or checked what he or she did?

1. yes (why?)
2. no **why? (no more than 2 answers)**
 1. I have confidence in him or her
 2. it is not proper
 3. I don't know how
 4. other reasons (what?)

If answer 37.1:

38. If yes, does an attorney/legal adviser respond, explain?

1. yes, he or she explains everything
2. yes, but not precisely
3. he or she puts me off
4. he or she does not respond at all
5. other (Which?)

Additional legal aid

39. Have you tried to obtain legal advice or assistance in a different manner?

1. Yes
2. No **(omit questions 40 and 41) Why?**

40. If yes, then where?

1. social organization (which?)
2. state institution (which?)
3. acquaintances and family
4. leaflets, books, codes
5. in a different manner (What?)

If answer 1. or 2. to question 40:

41. With what result? (provide the name of an organization or institution)

- 1) refused assistance (what justification?)
- 2) did not respond to a letter
- 3) provided advice
- 4) provided assistance with drafting a letter

5) other (What?)

42. In what court was your case initiated?

1. District Court in

2. Board judging petty offenses in

[question 42 in the survey for persons in penitentiaries: Do you have access to books on law, codes, etc., in prison?

1. yes 2. no comments]

43. Court's division in which the case is pending

1. civil 2. criminal

3. criminal and civil

4. family and juvenile

5. labor

6. economic

7. land and mortgage register

8. registry

[question 43 in the survey for penitentiaries: What article(s) were you accused under (type of offense) – please specify whether of the old or new Criminal Code]

44. Nature of the case (e.g., for inheritance, alimony)

.....

[question 44 in the survey for penitentiaries: What sentence was awarded?

1. below 1 year

2. from 1 to 3 years

3. over 3 to 6 years

4. over 6 to 10 years

5. over 10 years]

45. In what capacity are you appearing in the case?

1. plaintiff
2. defendant
3. accused
4. auxiliary prosecutor
5. private prosecutor
6. applicant
7. intervener

[question 45 in the survey for persons in penitentiaries: In what court was your case initiated?

***1. District Court in2.
Regional Court in]***

Specification

47. sex

1. Female
2. Male

48. age

1. up to 30 years of age
2. 31–40
3. 41–50
4. 51–60
5. more than 60 years of age

Financial status *[only in surveys in courts]*

49. What is your family's income sufficient for?

1. not enough even for everyday expenses
2. hardly enough for everyday expenses
3. enough for everyday expenses, but we have to save for bigger ones
4. we are well off, we can afford a lot

50. Education

- 1. incomplete elementary
- 2. elementary
- 3. professional
- 4. high school
- 5. incomplete higher
- 6. higher

51. Which case before a court in which you appear as a party is it? [in surveys for penitentiaries: Which case in which you were a defendant was it?]

- 1. first
- 2. second
- 3. third
- 4. fourth (or more)

52. Would you like to add anything else concerning issues discussed in this survey?

Thank you for the conversation and your answers.

Time of the completion of the interview

Annex for the inquirer

1. Date of the interview.

2. Duration of the interview (in minutes)

3. Attitude of the respondent to the interview: 1. favorable 2. indifferent
3. reluctant 4. comments

4. Were questions understandable?

- 1. yes, all were understandable
- 2. no, all were not understandable
- 3. some were not understandable (Which?)

5. Comments of the inquirer (issues not included in questions that arose during a conversation, interesting issues, other)

Full name of the inquirer.....

Signature of the inquirer.....

3. Questionnaire for attorneys—examination of opinions of the legal professions’ representatives

1. Do you conduct cases as an *ex officio* defender or attorney?

1. yes – criminal 2. yes – civil 3. yes – administrative

4. I don’t conduct *ex officio* cases because:

- 1. I am released
- 2. substitutes do
- 3. other reasons

2. What percentage of all cases do *ex officio* cases currently constitute in your section? %

3. How many *ex officio* cases do you conduct on average every year?..... cases

4.1. Did you have any problems this year with obtaining fees for *ex officio* work?

1. Yes 2. No (*please omit questions 4.2, 4.3, and 4.4*)

4.2. If yes, what type of problems? (e.g., delays—how significant, other)

4.3. If yes, when did this happen?

4.4. If yes, in which court?

5.1. Is the manner for determining fees for *ex officio* criminal cases satisfactory?

1. Yes (please omit question 5.2) 2. No

5.2. If no, what way would be satisfactory for you? (please justify, provide comments and potential proposals)

6.1. Are rates for *ex officio* criminal cases satisfactory?

1. Yes (please omit question 6.2) 2. No

6.2. If no, what rates would you consider satisfactory? (please provide examples of amounts—for an entire case or for particular activities)

7.1. Is the manner for determining fees for *ex officio* civil cases satisfactory?

1. Yes (please omit question 7.2) 2. No

7.2. If no, what way would be satisfactory for you? (please justify, provide comments and potential proposals)

8.1. Are rates for *ex officio* civil cases satisfactory?

1. Yes (please omit question 8.2) 2. No

8.2. If no, what rates would you consider satisfactory? (please provide examples of amounts—for an entire case or for particular activities)

9. How, in your opinion, should appointment for *ex officio* criminal cases be carried out?

9.1. appointing body

1. appointment by a court's president
2. appointment by a Regional Council of Attorneys after granting of an *ex officio* representation by a court

3. other body

Which?

9.2. manner of appointment

1. appointment from a list of all attorneys in order on the list
2. appointment from a list of all attorneys according to specialization indicated by attorneys
3. appointment from a list of attorneys who volunteered to conduct *ex officio* cases
4. appointment from a list of attorneys who volunteered to conduct *ex officio* cases with consideration for specialization indicated by an attorney
5. other manner

What?

10. How, in your opinion, should appointment for *ex officio* civil cases be carried out?

10.1. appointing body

1. appointment by a court's president
2. appointment by a judge presiding over the case
3. appointment by a Regional Council of Attorneys after granting of an *ex officio* representation by a court
4. other body

Which?

.....

10.2. manner of appointment

1. appointment from a list of all attorneys in order on the list
2. appointment from a list of all attorneys according to specialization indicated by attorneys
3. appointment from a list of attorneys who volunteered to conduct *ex officio* cases
4. appointment from a list of attorneys who volunteered to conduct *ex officio* cases with consideration for specialization indicated by an attorney

5. other manner

What?

11. In your practice, the number of *ex officio* cases:

1. could be higher than currently (you would have enough time to conduct more *ex officio* cases than currently)

2. is just right

3. is too high

4. no opinion

12. How many *ex officio* cases could you conduct in total every year?

..... cases.

13. Please express your opinion on whether, according to you, work of attorneys from your chamber in *ex officio* cases (on average) is of the same high quality as in private cases with respect to:

13.1. number of meetings with a client

1. yes 2. no 3. no opinion

Comments and opinions

.....

13.2. frequency of substitution

1. yes 2. no 3. no opinion

Comments and opinions

.....

13.3. activity during proceedings

1. yes 2. no 3. no opinion

Comments and opinions

.....

13.4. reading of the files

1. yes 2. no 3. no opinion

Comments and opinions

.....

13.5. other professional activities

1. yes 2. no **Which?**

3. no opinion

Comments and opinions

14. What other comments (problems) do you have in connection with the current legal aid paid for by the State Treasury?

14.1. concerning law

14.2. concerning practice

14.3. any other comments connected with the system of legal aid paid for by the State Treasury **specification**

15. What chamber are you a member of?

.....

16. Form of performing profession:

1. private office

2. law partnership

3. law firm

17. How many years have you been an attorney (excluding time of training)?

1. up to 3

2. 4-6

3. 7-10

4. 11-20

5. over 20

18. Sex

1. female

2. male

19. Age

1. up to 30 years of age

2. 31-40

3. 41-50

4. 51-60

5. 61 and more

Thank you very much for spending some time filling in this survey.

4. Questionnaire for organizations

Please print (or fill in on a computer and send via e-mail).

Information about the organization

1. Name of the organization

.....

2. Legal status *(please mark or specify in case of answer 3)*

1. association 2. foundation 3. other What?

.....

3. Year of establishment

4. Address.....

5. Telephone no.

6. Facsimile no.

7. E-mail

8. WWW address.....

9. Does your organization have local branches? *(If yes, please provide information only from one branch in this survey.)*

1. yes 2. no

Please provide addresses of the branches.

.....

Information about activities of the organization

10. Does your organization provide legal aid (understood widely—as, for example, advice and/or opinions, agency services, representation, etc.) *(please mark an appropriate box with an X)*

1. Yes 2. No

11. For how long have you been providing legal aid? For years.

12. Type of cases in which you provide legal aid *(please mark an appropriate box with an X and in the case of “other” also specify; you may mark more than one answer)*

1. civil 2. family 3. criminal 4. administrative
5. other (what?)

13. Type of activities undertaken by you *(please mark an appropriate box with an X and indicate the number of particular activities in the last full month)*

1. verbal legal advice (meetings)
2. telephone legal advic
3. written legal advice
4. assistance in drafting official writs
5. assistance in drafting pleadings
6. hiring of an attorney or legal adviser
7. observation of court proceedings
8. participation in proceedings in the capacity of a social representative
9. other
(what?)

14. Do you cooperate with other entities when granting legal aid? *(please mark an appropriate field with an X)*

1. Yes 2. No

14.1. domestic organizations (please mark an appropriate field with an X, and if the answer is "yes," also specify)

1. yes **which?**
2. no

14.2. foreign organizations (please mark an appropriate field with an X, and if the answer is "yes," also specify)

1. yes **which?**
2. no

14.3. offices

(please mark an appropriate field with an X, and if the answer is "yes," also specify)

1. yes **which?**
2. no

14.4. Other

(please mark an appropriate field with an X, and if the answer is "yes," also specify)

1. yes **which?**
2. no

15.1 Is assistance provided paid for? (please mark an appropriate field with an X)

1. Yes 2. No (omit question 15.2.)

15.2. If yes, what activities are paid for and in what amount? (please specify)

15.3. Does a client reimburse costs incurred by your organization if a case is won (e.g., reimbursement of a registration fee)? (please mark an appropriate field with an X)

1. Yes 2.No

comments.....

Information about personnel (current situation)

16. Who provides legal aid? *(please mark an appropriate field with an X and indicate the number of persons in each category; you may select more than one answer)*

- 1. employees of the organization
- 2. members of the organization
- 3. persons from outside of the organization employed for this purpose
- 4. volunteers
- 5. other persons

17. Professional training of advisers *(please mark an appropriate field with an X and indicate the number of persons in each category; you may select more than one answer)*

17.1. lawyers:

1. practicing lawyers

What profession?

- 1. attorneys How many?
- 2. legal advisers How many?
- 3. judges How many?
- 4. prosecutors How many?
- 5. notaries public How many?

2. trainees How many?

Type of training:

- 1. attorneys How many?
- 2. legal advisers How many?
- 3. judges How many?
- 4. prosecutors How many?
- 5. notarial How many?

3. lawyers without a training

1. How many?
2. What professions?

4. retired practicing lawyers

1. What professions were they performing earlier?
 1. attorneys How many?
 2. legal advisers How many?
 3. judges How many?
 4. prosecutors How many?
 5. notaries public How many?

17.2. How many lawyers commenced, and how many terminated, work in your organization last year? *(please indicate the number next to an answer)*

1. number of people who began work
2. number of people who terminated work

17.3. Non-lawyers *(please mark an appropriate field with an X and provide the number of people in each category; more than one answer may be selected)*

1. law students
Which year?
 1. first How many?
 2. second How many?
 3. third How many?
 4. fourth How many?
 5. fifth How many?

2. other
 1. How many?
 2. What education do they have?
.....

17.4. Did advisers/ non-lawyers participate in any training?

(please mark an appropriate field with an X, and if the answer is "yes," please also provide the number of persons participating in training and describe their subjects)

1. yes

- 1. How many advisers?
- 2. In what training?

.....
2. no

17.5. Are advisers/ non-lawyers supervised by a lawyer?

(please mark an appropriate field with an X, and if the answer is "yes," please specify)

1. Yes **In what form?**

.....
2. No

17.6. Do advisers/ non-lawyers have an opportunity of a consultation with a lawyer?

(please mark an appropriate field with an X, and if the answer is "yes," please specify)

1. Yes **In what form?**

.....
2. No

18. How often (how many times a week) do such persons provide assistance; do they have regular duty times?

18.1. Number of duty hours per week (what days and hours?)

(please specify)

18.2. comments

19. How do you select persons providing legal aid? *(please mark an appropriate field with an X, and if the answer is "yes," please specify; you may select more than one answer)*

- 1. private contacts
- 2. volunteers
- 3. announcements
- 4. other manner

What?

.....

Statistics and reporting

20.1. Do you maintain a case register?

- 1. Yes
- 2. No *(omit questions 20.2 and 20.3.)*

20.2. If yes, what type? *(please specify)*

.....

20.3. If yes, how many cases have been entered since the beginning of 2001?

.....

21.1. Do you keep statistics concerning legal aid?

- 1. Yes
- 2. No

21.2. If yes, what type?

.....

22. Source of financing of activities with respect to legal aid within last year *(please mark an appropriate field with an X, and specify the percentage; more than one answer may be selected)*

- 1. grants from private foundations %
- 2. grants from intra-governmental organizations (e.g, the European Union)

- 3. own funds (membership fees, income from economic activities) %
- 4. donations

5. grants from local governments %

6. sums adjudicated by courts %

7. other %

What?

.....

23. What educational tools do you have?

(please mark an appropriate field with an X, and if the answer is "yes," also specify)

23.1. legal reference library

1. Yes

How many books?

2. No

23.2. computer databases and software for lawyers

1. Yes

Which?.....

2. No

23.3. other

1. Yes

Which?.....

2. No

24. What tools are available to clients?

(please mark an appropriate field with an X, and if the answer is "yes," also specify)

24.1. legal reference library

1. Yes

how many books?

2. No

24.2. computer databases and software for lawyers

1. Yes

what?

2. No

24.3. information or leaflets prepared by your organization

1. Yes

(please attach a copy)

2. No

24.4. information or leaflets from other institutions

(e.g., the ombudsman)

1. Yes **what**.....

2. No

24.5. other

1. Yes **what?**.....

2. No

Problems related to activities and expectations

25.1. Do you encounter any problems when providing legal aid?

1. Yes

2. No

(omit question 25.2)

25.2. If yes, what do these problems concern? (please specify)

1. assistance as to the merits (lawyers).....

2. finances.....

3. equipment (e.g., computer, legal literature).....

4. training.....

5. other

What?.....

26.1. Would you like a lawyer (e.g., a trainee) to work socially in your organization—e.g., provide advice?

1. Yes

2. No

(omit question 26.2.)

26.2. If yes, would you be able to create and equip a place of work for a lawyer?

1. Yes

2. No

3. Comments, proposals

27. Representatives of which social groups, category of persons apply to you most often?.....

28. Do you select cases you are dealing with?

- 1. Yes In what manner?
- 2. No

29. What type of activities carried out by your organization do you prefer? (more than 1 answer may be selected)

- 1. verbal legal advice (meetings)
- 2. telephone legal advice
- 3. written legal advice
- 4. assistance in drafting official writs
- 5. assistance in drafting pleadings
- 6. hiring of an attorney or legal adviser
- 7. observation of court proceedings
- 8. participation in proceedings in the capacity of a social representative
- 9. other
- (what?)

30. What activities carried out by your organization seem to be most effective? (please select no more than 2 answers)

- 1. verbal legal advice (meetings)
- 2. telephone legal advice
- 3. written legal advice
- 4. assistance in drafting official writs
- 5. assistance in drafting pleadings
- 6. hiring of an attorney or legal adviser
- 7. observation of court proceedings
- 8. participation in proceedings in the capacity of a social representativ . . .
- 9. other
- (what?)

31. What actions have you undertaken in the last five cases in which your organization provided legal aid? (other than legal advice—e.g., accession to proceedings, complaint to a public administration body)
.....

32. What proposals of changes in particular procedures do you have that would facilitate your activities as a non-governmental organization (concerning, e.g., participation of a social representative, access to files)

1. criminal procedure

2. civil procedure

3. administrative procedure

4. other

33. Based on your experience, what problems with access to legal aid do you see? What positive or negative phenomena have you encountered?
.....

34. Person fulfilling the questionnaire and manner of contact
.....

35. Date of filling in the questionnaire

36. How much time did you spent on filling in this questionnaire?
.....

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.

1. CHANGES WITHIN THE CURRENT MODEL OF LEGAL AID PROVISION

1.1 Examination of the phenomenon and collection of data

The Ministry of Justice, legal corpora-

tions, and scientific institutions should gather information and statistical data, as well as 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.

1.2 Development of clear criteria for granting ex officio legal aid

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 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 pre-

pare clear guides for citizens explaining their right to *ex officio* legal aid.

1.3 Changes in the procedure for appointing attorneys and legal advisers

The Ministry of Justice, judicial bodies, and legal corporations should consider compiling new, different lists of attorneys and legal advisers, 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 types of *ex officio* cases are concerned)—to be used in the first place;
- lists of specializations 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.

1.4 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.

1.5 Promoting positive attitudes among lawyers and taking care of the legal profession's image

The Ministry of Justice and legal corporations should introduce the element of promoting *pro bono* attitudes among lawyers into their training system; for example, a part of the training could take place at non-governmental organizations that provide 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 rewarded for their activity (promoting positive attitudes)—criteria and a procedure for granting the award should be developed in cooperation with legal corporations and with the application of existing models used all over the world.

2. SYSTEMIC CHANGES

2.1 Legal aid fund

The Council of Ministers should consider separating sums of money for

state-financed legal aid within the budget of the Ministry of Justice.

2.2 Legal Aid Board

The Council of Ministers should consider a possibility of creating an independent institution dealing with problems of access to legal aid and administration of the system—the Legal Aid Board.

2.3 Alternative models for provision of legal aid

The Council of Ministers should plan for introduction of models for legal aid provision alternative to *ex officio* legal aid, such as, for example:

- separating some funds from the legal aid budget and developing a pilot public defender office program modeled on those of other countries (within the jurisdiction of a single regional court), 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 as applied by many countries;
- combining a pilot public defender office program with the lawyers' training - supervised by experienced attorneys, so that the trainees could provide *ex officio* legal aid during their training.

2.4 Recruitment to the legal professions

The Ministry of Justice and legal corporations should introduce fully objective criteria and procedures of recruitment for attorneys and legal advisers.

The Bar should open access to the attorney's profession, to significantly raise the number of attorneys (accepted on the basis of high but objective requirements).

2.5 Legal Aid Act

The Council of Ministers should draft provisions of a Legal Aid Act, which would regulate all major issues related to access to legal aid.

2.6 Assistance provided by non-governmental organizations

Legal corporations and non-governmental organizations should develop standards for cooperation.

Non-governmental organizations should create an Internet database of leaflets, guides, handbooks, etc., prepared by various organizations and institutions.

2.7 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 partially paid for (depending on means) consultation or legal advice. Such a system would permit the resolution of many cases without involv-

ing the administration of justice.

2.8 Alternative methods for resolving disputes

The Ministry of Justice, responsible for educating judges and prosecutors, as well as professional self-management educating attorneys and legal advisers, should in all such training place an emphasis on the use of existing possibilities of alternative resolution of conflicts and disputes (e.g., mediation and settlement).

When drafting legislative changes, the Council of Ministers should create the possibility of alternative dispute resolution.

Five

SAMPLE LEGAL AID LAWS AND OPERATIONAL DOCUMENTS

This chapter includes:

- Summary of Legal Aid Provisions in France, Germany, Sweden, and Finland
- Finland:
 - Legal Aid Act, 257/2002
 - Government Decree on Legal Aid, 388/2002
 - Government Decree on Legal Aid Fee Criteria, 389/2002
- Legal Aid Act of the Republic of Slovenia, 31 May 2001
- Legal Aid in Israel
 - Public Defender Law of the Republic of Israel, 1995
 - Attorney's "Feedback Form"
 - Notification of the Level of Professional Supervision
- Legal Aid in Lithuania:
 - Access to Justice for Indigent Criminal Defendants: A Pilot Project in Šiauliai and Vilnius, Lithuania
 - Law on State-Guaranteed Legal Assistance of the Republic of Lithuania, 28 March 2000
 - Corporation Agreement Establishing the Public Institution Vilnius Public Attorneys Office, 11 October 2001
 - Statute of the Vilnius Public Attorneys Office, 2002
 - Legal Aid Agreement Between the Vilnius Public Attorneys Office and Individual Attorneys for Provision of Legal Assistance, 29 April 2002
 - Bar Council Decision Confirming the VVAK Lawyers as a Joint Practice

- Legal Aid in the Netherlands
 - Application for Assignment in Criminal Case
 - Application for Assignment in Civil/Administrative Case
 - Procedure to Apply for Legal Aid Certificate
 - Statement of Income and Capital for 2001

Summary of Legal Aid Provisions in France, Germany, Sweden, and Finland¹

1. FRANCE

There are legal aid councils (*Conseils départementaux de l'aide juridique*, or CDAJ) throughout France. They deal with both information and advice (*aide à l'accès au droit*), as well as with requests for representation and defense in court (*aide juridictionnelle*). *Aide à l'accès au droit* includes providing help for those who appear before public authorities outside the ordinary courts.

The system of providing *aide à l'accès au droit* is intended to cover such things as information about legal rights and duties, advice on how to obtain one's rights, and help needed by an applicant who wishes to embark on a legal transaction (e.g., entering into a contract for goods, services, or employment, getting married or divorced, etc).

1.1 Legal aid for court proceedings (*aide juridictionnelle*)

Legal aid for court proceedings (*aide juridictionnelle*) is administered by an office (*Bureau d'aide juridictionnelle*, or BAJ) at each Palais de Justice (principal court) except in Paris. If aid is refused, the applicant can appeal from the BAJ to the court that is to hear the case, but there is no appeal beyond that. Civil and criminal legal aid requests are granted on more or less the same basis. Aid is available for one year from the date the grant is notified; it needs renewal thereafter.

1.2 Eligibility tests

1.2.1 Merits. One is normally entitled to legal aid if he or she satisfies the means test, provided that the case is not obviously without foundation. However, even this test is not applied if one is:

- a defendant in a civil case,
- a person whom a court may find

- civily responsible for another's loss,
- a witness who needs help in order to testify (e.g., a non-French speaker),
- a person accused of an offense,
- a convicted person (e.g., who wishes to appeal).

1.2.2 Full legal aid. Someone with no dependents and a net monthly income below 670 euros receives full legal aid, and no additional fee is payable to the lawyer.

1.2.3 Partial legal aid. Someone with no dependents is entitled to partial legal aid under the following formulation:

Net monthly income (in euros)	State contribution
670–700	85%
700–740	70%
740–793	55%
793–854	40%
854–930	25%
930–1,006	15%
1,006 or above	0

*(Add 76 euros for each dependent) (Means [(1992) figures, revisable annually).

For the year 1997, the ceilings were changed to 740 euros for full aid (allowing the recipient to bring legal proceedings without incurring any financial

expense) and 1,108 euros for partial aid (which requires the recipient to pay a fixed fee for his or her lawyer).

These figures include income from all sources, except state benefits paid to the applicant's family and certain other social welfare payments. The value of land and buildings is also taken into account, except property that cannot be sold or used to raise a loan without serious hardship for the applicant.

Even persons who do not meet the above requirements may qualify for the granting of this aid in the following cases:

- Applicants who appear to be particularly deserving on account of the subject-matter of the case or the likely cost of the proceedings may be exempted from the income requirement.
- Foreigners who are minors, assisted witnesses, defendants, accused or convicted persons, parties claiming damages in criminal proceedings, or those who are the subject of proceedings connected with the conditions governing entry to and residence in France by foreigners are entitled to legal aid without any residence requirements.
- Foreigners having lawfully entered France and normally residing there or

holding a residence qualification valid for at least one year are entitled as a right to legal aid before the Refugees' Commission.

Applicants must produce evidence of means as required by the BAJ. In the case of cohabitants and other persons habitually living in the same household, the resources of all are taken together, except in cases of dispute between them about some item of property. False or misleading information about means cancels the grant and can lead to prosecution.

Applicants may choose their own lawyers, but if they do not, the leader of the local Bar makes the appointment.

If an aided party loses a civil case, it must pay the opponent's costs; they are not paid out of legal aid, unless for good reason (e.g., fairness in all the circumstances, or the aided person's poverty) the judge decides otherwise. If the aided party wins in a civil case, the costs that the party that lost the case pays go to the public purse.

Citizens of other European Union member states are entitled to apply for legal aid in France, as are certain refugees and asylum-seekers.

Legal expenses insurance is recognized and growing in France. One clear advantage is that a policy can cover fees that, under the state scheme of partial

legal aid, the applicant would have to pay personally.

Applications for legal aid must be made on a standard printed form. Applications must be accompanied by documentary evidence relating to income, the subject of the application, and the court hearing the case.

A request for legal aid can be registered at one of the legal aid offices, which are organized as follows:

- A single office is established in each regional court (*tribunal de grande instance*).
- Offices attached to regional courts (*tribunaux de grande instance*) within the jurisdiction of which a court of appeal, an administrative court, or an administrative court of appeal is located will include specialist sections to deal with cases relating to other court or courts.
- Deviating from the rule of the single office, one legal aid office each is also attached to the Court of Cassation, the Council of State (the supreme administrative court), and the Refugees' Commission.

Applicants whose request for legal aid has been rejected have a right of appeal. This can take the form of either an application for a fresh hearing by the legal aid

committee concerned or an appeal to the president of the court that is hearing, or will be hearing, the case itself. In the latter case, there is no appeal against the new decision.

A person who has successfully initiated an action after being refused legal aid on the grounds that the action had no realistic chance of success is entitled to retroactive legal aid.

2. GERMANY

Legal aid in Germany is administered by the *Länder* (administrative districts). There are consequently some variations in the way in which legal services are provided, though not in the essential nature of those services.

By federal law, anyone lawfully present in Germany can ask for legal aid. This includes refugees, stateless persons, and those with dual (i.e., including German) nationality. Applicable laws are the Basic Law (*Grundgesetz*), Article 31.1; Civil Procedure Ordinance (*ZPO*), Section 114; and the 1980 Law on Legal Advice (*BerHG*), Section 1.

Fees for legal services, including conducting cases in court, are fixed by law and not by the legal profession or by individual lawyers. Special scales of fees apply to legal aid work, lower than

non-legal aid scales, which explains why some lawyers are reluctant to do legal aid work. One is entitled to see the fee scales before incurring any expenses.

A distinction is made in Germany between legal advice aid and legal aid. Assistance for legal advice and representation outside court proceedings (legal advice aid) is received by persons in need, in accordance with the Act on Legal Advice Aid and Representation for Citizens on a Low Income—Legal Advice Aid Act (*Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen*).

Legal advice aid (advice and, where required, representation) is granted in matters under civil law, including labor law, administrative law, constitutional law, and social law. In matters of criminal and administrative law, only advice is granted. In matters in which the law of other states is to be applied, legal advice aid is granted if the facts reveal a domestic connection. No legal advice aid is granted for fiscal law matters.

Legal aid is granted for all sorts of civil procedure disputes, for proceedings of non-contentious jurisdiction, and for labor, administrative, social, and finance court proceedings. No legal aid is received by the accused in criminal proceedings or by debtors in insolvency proceedings. For the accused in criminal pro-

ceedings, the provisions on obligatory defense contain final special provisions. Debtors in insolvency proceedings are granted respite in respect of the procedural costs.

In thirteen of sixteen Länder, legal information and advice (Beratungshilfe) in general and in contentious matters are provided by certain lawyers in private practice. One can find out who does so by asking at the local District Court (Amtsgericht).

The client is granted legal advice aid by a lawyer of his or her choosing. In the Länder of Bremen and Hamburg, legal advice aid is provided by public legal advice agencies. Lawyers are obliged to grant legal advice aid; acceptance of a legal advice aid case can be refused in an individual case only for an important reason.

The lawyer providing legal aid may also be selected freely. The party seeking justice must select a lawyer entitled to represent him or her. Only if those seeking justice do not find a lawyer prepared to represent them does the presiding judge of the court appoint a lawyer.

The lawyer is entitled to levy a fee of 10 euros against the person seeking justice to whom he or she provides legal advice aid, which he or she may waive, depending on the client's circumstances. Deviating agreements regarding fees are

invalid. The lawyer receives further payment from the state coffers.

The equivalent of 18 euros is payable to the Land government that finances this service. Fees are chargeable according to the work done, since Beratungshilfe not only covers advice but may include practical assistance, e.g., in writing letters on your behalf, for which the charge is 46 euros, or 56 euros if the help given results in settling a dispute out of court. In the three-city Länder of Berlin, Bremen, and Hamburg, free legal advice is provided by salaried legal staff in Land-funded agencies. In Berlin, this free service is offered alongside that provided by lawyers in private practice, described above.

Advice and assistance do not include preparing cases for hearings in the courts. The extent of the advice available varies among the Länder. All of them provide it for civil, criminal, and public law matters; some add employment and social welfare law; and one (Bavaria/Bayern) extends it to tax law.

Exceptions include the following: (1) advice will not be given on foreign law matters that have no connection with Germany, and (2) the advice given does not include preparing a case for court.

Land and federal government departments are obliged to provide basic legal information about their areas of activity.

Information and advice related to

non-contentious matters are available from lawyers who are notaries. For historical reasons, there are three kinds of notary, found in different parts of Germany. The distinctions survive from the legal traditions of different parts of Germany before its unification in the second half of the nineteenth century, notably the Rhenish legal tradition in much of the south, and the Prussian legal tradition in parts of the north.

1. The Nur-notar (a lawyer who exercises no legal functions except that of notary) is found in the Länder of Bavaria, Rhineland-Palatinate, Hamburg, the Saarland, all of former East Germany (now the Länder of Brandenburg, Mecklenburg-Vorpommern, Saxony, Saxony-Anhalt, and Thuringia, but not the former East Berlin); and in parts of two other Länder, in North Rhine-Westphalia (in the jurisdiction of the provincial appeal courts of Cologne and Düsseldorf, in part of the provincial court district of Duisburg and of the District Court of Emmerich) and in the Land of Baden-Württemberg, in the jurisdiction of the provincial appeal court of Stuttgart.
2. The Anwaltsnotar (a lawyer who, in addition to exercising the functions of an ordinary lawyer, Rechtsanwalt,

is also a notary) functions in the rest of Germany except Baden-Württemberg (see below), that is, in Berlin (including the former East Berlin), Bremen, Hesse, Lower Saxony, North Rhine-Westphalia (except as noted above), and in Schleswig-Holstein.

3. In the Land of Baden-Württemberg, the Federal German Ordinance for Notaries does not apply and the functions of notaries are exercised by officials. In Baden (in the appeal court district of Karlsruhe), this is done by officials fully trained in law, including judges (Richternotaren); in Württemberg (in the appeal court district of Stuttgart), it is done by officials with more limited legal qualifications (Beamten-notaren). Exceptionally, all three kinds of notary are to be found in the Stuttgart appeal court district.

Applicable laws are the Federal German Ordinance for Notaries (Bundesnotarordnung) and the Baden-Württemberg provincial law of 12 February 1975, BWGBl 1975, page 116.

2.1 Legal aid in court (Prozesskostenhilfe). If a person goes to a civil or criminal court, then except at the lowest level (the District Court, or Amts-

gericht), he or she must be represented or defended by a lawyer.

The representing or defending lawyer must be a member of the local Bar, admitted to practice at that court (though he or she may advise you, out of court, on matters arising anywhere in Germany). If the case moves to another court, including an appeal court, another lawyer may need to be retained.

Even in the Amtsgericht, if one's opponent is legally represented, one can apply for legal aid. The scheme is intended to pay court costs (which are quite high) and include any experts' and witnesses' expenses, as well as to contribute to lawyers' fees. Because the sums payable by Land treasuries to lawyers are often well below the open market rate, some lawyers are reluctant to take on legal aid work.

Except at the lowest level, a person must normally be represented or defended in court by a lawyer. (In criminal cases, this is so if the charge is one that can lead to imprisonment). At courts where representation is not obligatory, a person may still ask for legal aid if his or her opponent is legally represented.

Forms to apply for legal advice aid and legal aid are available from Local Courts and from lawyers. An application for legal advice aid is made to the Local Court in whose district the person seeking justice

has general venue (place of residence). If a client has no general venue in domestic territory, the competent Local Court is the one in whose district the need for legal advice aid arises. It is also possible to approach a lawyer directly in respect to legal advice aid. In that case, the necessary application to the Local Court must be lodged subsequently.

The application to grant legal aid is to be submitted to the court where the proceedings for which legal aid is requested are pending or are to be made pending. This court examines the application and rules on whether the preconditions for granting legal aid are met.

2.2 Eligibility tests

2.2.1 Merits. In civil cases, there is a double test of merits:

- that one has a good claim or defense, which you have a fair chance of persuading the court to accept;
- that, in all circumstances, it is reasonable for one to bring or defend his or her action (for example, by reference to the value of the claim involved, or that a person is not merely acting spitefully).

These tests do not apply to legal aid applications for criminal defense.

2.2.2 Means. If one receives welfare benefits, or if his or her family would suffer substantially if he or she had to go to court without legal aid, it will be granted in full or in part. The assessment is related to disposable monthly income, as follows:

- 850 marks (approximately 434 euros) for a person without dependents;
- 1,300 marks (665 euros) for someone with one dependent;
- rising to 1,575 marks (about 805 euros), then 1,850 marks (about 946 euros), etc., in steps of 275 marks (about 140 euros), for each additional dependent.

The same test is used for advice (except in Berlin, Bremen, and Hamburg, where it may be free) as for legal aid.

If one wins a legal aid case, his or her lawyer claims all costs from the losing side. If one loses, the lawyer claims his or her legal aid fees from the state (Land) treasury. If an unaided party wins against an aided party, the winner cannot recover costs from the state, but can try to get his or her costs from the losing party; if this party cannot pay (as the grant of legal aid might suggest), however, the loss falls on the “winner.”

If legal aid is granted, all costs of the proceedings are covered, other than those expenses of the party seeking justice that

were not necessary to assert rights. The party in need of assistance incurs no further costs.

The granting of legal aid does not automatically cover appeals. It ends at the ruling closing the instance. For appeal proceedings, however, it is possible to apply once more for legal aid to be granted. The appeal court examines whether the party is still in need and the appeal is not wanton and has prospects of success. If these preconditions are met, the party seeking justice has a right to the granting of legal aid for the appeals instance.

The granting of legal advice aid may be revoked if it is based on false information provided by the person seeking justice.

Legal aid may be revoked only in the following cases:

- if the preconditions for granting aid are deceitfully met by providing incorrect information regarding the dispute described,
- as a result of incorrect information regarding the subjective preconditions for granting and non-submission of declarations,
- by the lack of application of the claimed personal or economic circumstances,
- if the person falls into arrears with installments.

If an application to grant legal aid is rejected, the applicant may submit an immediate appeal against this decision by the court within a period of one month, if the value at dispute is higher than 600 euros. If the value at dispute of the main case is not higher than 600 euros, a complaint is permissible only if the court has exclusively rejected the personal and economic circumstances for legal aid.

Germany has the largest legal expenses insurance market of any EU country. It covers certain forms of legal liability, e.g., payment of fines (or administrative penalties) and is available also for minor offenses.

3. SWEDEN

Legal advice and legal aid in Sweden are regulated by the law on legal aid and detailed rules made under it, revised from time to time, most recently in effect from 1 July 1994 (1994:7,B29).

The statutory system takes four forms: (1) legal information and advice; (2) general legal aid in non-criminal cases; (3) defense in criminal cases, which is a distinct constitutional right, not regarded as legal aid; and (4) assistance in obtaining administrative remedies, for example in child custody cases.

The Legal Aid Authority, with the

help of the Bar, administers the first two forms. It is only concerned with granting or refusing legal aid, and if granted it has no control over subsequent proceedings. It cannot recover legal aid payments from the value of property preserved or recovered in legally aided proceedings. The actual decision to grant or refuse legal aid in family law matters is made by the lawyer consulted, by the court in criminal cases, or in all other cases by the Legal Aid Authority.

Legal advice and aid can be obtained from lawyers working for public law offices, who provide this service as public counsels. Lawyers in private practice may also provide legal aid, and specific kinds of help are available from various public authorities such as the courts, the police, and social and employment administrations. Information on where to find a lawyer and on services provided by lawyers is given in the Matrikel, the Bar Association list, published annually and distributed free of charge by the Bar Association.

In civil proceedings, it is not necessary to appoint a lawyer who is a member of the Bar; any suitable person may appear.

Those accused of a crime may be entitled to the services of a public defender, which is considered as a part of the due administration of criminal justice, not a form of legal aid. Anyone may

defend a person accused of crime, although the court can refuse to hear a manifestly incompetent defender. (It rarely exercises this power, however, unless heavy costs would otherwise fall on the state, or if the case raises great difficulties.)

Legal aid can be granted in most cases, once the eligibility tests have been satisfied. Exceptions include property disputes and tax liability (for legal advice), and commercial matters if the applicant is in that business. Non-resident foreigners are not eligible for legal aid.

Once granted, legal aid is provided throughout the entire case, including appeals. It can be reduced or withdrawn, however, if the economic circumstances of the applicant improve markedly, or if the court decides (e.g., on appeal) that the case for legal aid is not sustainable.

3.1 Eligibility: Means and merits

3.1.1 Means. The Swedish legal aid scheme is based on an income-related contribution by the assisted person. The tariff was revised in effect from 1 July 1994.

There is an income limit applying to the qualification for legal aid. When the applicant's income is estimated, his or her economic situation as a whole is taken into consideration; for example, child

maintenance expenses, property, and debts should be considered. The income limit for qualification for legal aid is approximately 28,170 euros a year.

Capital assets up to the equivalent of 5,490 euros is ignored. Thereafter, half the remaining net capital (e.g., after deduction of legal liabilities) is added to the annual income for calculating eligibility.

3.1.2 Merits. In theory, legal aid can be refused if the case does not seem to deserve it, or is of no real significance to the applicant. In practice, few cases are ever refused for these reasons.

There are five different forms of legal aid:

- legal advice, according to the Legal Aid Act;
- legal aid in civil matters, according to the Legal Aid Act;
- services of a public defense counsel;
- counsel for the aggrieved person;
- public counsel.

Legal advice can be obtained in all legal matters. For example, information and advice may be given for issues regarding:

- rules applying to marriage or other forms of cohabitation;
- rules of divorce;

- maintenance;
- wills and succession;
- purchase and contract;
- criminal proceedings.

Home insurance normally includes legal expenses insurance. This legal expenses insurance covers, to a great extent, the same scope as legal aid. Both legal aid and legal expenses insurance mean that the counsel's fee is paid by either the state or the insurance company. Insurance companies pay the same rate per hour to the counsel as the state does.

Legal aid can be granted in most legal matters, but there are some exemptions. It can never be granted, for example, in matters where a public defense counsel or a public counsel can be appointed. Public counsel and counsel for the aggrieved person are granted regardless of the person's economic situation.

All barristers and some other lawyers with their own law firms can provide legal aid. Only members of the Swedish Bar Association can be appointed as a public defense counsel. The barristers and other lawyers are not employed by the state, and there are no public law offices.

However, there is no obligation to be represented by a counsel. A person can always represent himself or herself in

court if he or she so prefers, or can be represented by someone who is not a lawyer.

The National Courts Administration, as well as the person who is claiming legal aid, can appeal against decisions concerning legal aid. If it is the court that has made the decision, it can be appealed in the ordinary way. A decision made by the Legal Aid Authority can be appealed to the Legal Aid Board.

4. FINLAND

Legal aid and cost-free legal proceedings are provided in Finland to persons of limited means. Other applicants have to pay part of the costs: 25, 50, 75, or 90 percent, depending on income. Applicants may freely choose between legal aid counsel and private counsel as their representative in court. Legal aid counsels are lawyers working at state legal aid offices.

Foreigners, including non-residents, stateless persons, and refugees, can apply for free or reduced-cost legal advice or aid in court on the same basis as Finnish citizens; see, e.g., Section 1 of the basic law on legal aid in court, the Cost-free Court Proceedings Law of 1973, amended in 1988 and supplemented by decree.

This law and the rules on public legal

advice provision guarantee advice and aid in court to those who “taking account of their income and capital as well as of their obligations to make periodical maintenance payments and other circumstances affecting their economic status, are unable, without hardship, to obtain expert advice” or “to bear all the costs of a case in which they are a party.”

4.1 Legal Advice Offices

Each municipality in the twelve provinces of Finland is permitted to provide legal advice service, either alone or jointly with a neighboring community. There is no serious restriction on the legal advice that can be given. Advice is given orally, but it may extend to writing letters, negotiating a settlement, and so on. It includes criminal law matters. In about a quarter of all cases, the official goes on to represent the applicant in legal proceedings—which was not the intention of the scheme.

To encourage municipalities to provide this service, the government contributes between 50 and 95 percent of the running costs. Advice centers are staffed by salaried lawyers. Most offices are small, however, with only one official. About a third of the workload deals with family law, and nearly half concerns either family or inheritance law.

A court itself grants, or refuses to

grant, legal aid. Application for legal aid can be made before court proceedings begin or at any stage of the proceedings.

4.2 Legal aid availability

Legal aid is available for:

- all cases in the ordinary civil and criminal courts;
- courts-martial;
- water rights courts and appeals from them;
- land courts;
- administrative courts dealing with many matters concerning corrective training and child welfare;
- appeals, including the review of judgments that are otherwise final.

Applicants who are plaintiffs in civil cases must lodge a statement of claim with the court.

If someone who expects criminal charges to be made against him or her applies for legal aid, that person must lodge a general statement of what is being investigated and a response to it. The investigating (police) officer must provide this information if the applicant requests it. Legal aid for criminal defense can also be granted during the preliminary investigation period, even when no trial is to follow.

Legal aid is not to be granted if the value of the matter in dispute is insignificant for the applicant, or where the case has been transferred by one party to another, apparently in order to take advantage of cost-free proceedings.

4.3 Means test

The Legal Aid Office calculates how much has to be paid, and takes into account any income of the applicant's partner and the size of the family. Taxes and such costs as, for example, children maintenance and living expenses are then deducted from the monthly income. Possessions also influence the final result.

When applying to the court for legal aid, one must produce a sworn statement of his or her means, certified by the authorities of the municipality (although certification can be waived if it is difficult to establish one's residence, or if the court decides that the statement of means substantially corresponds with the truth).

There is no scale for determining eligibility. The court has discretion to grant or refuse legal aid in light of the means of the applicant. The assisted person may have to contribute to the costs of the case. Again, there is no set scale, and the court, when granting legal aid, will say how much the aided person will have to

pay or repay to the state and under what circumstances.

There is a general exemption from paying official fees. Thus, none are charged for lodging a petition in civil cases—expenses of any necessary appearance in court will be met by the state. If the services of a legal representative are necessary, the resulting fees are assessed by the court and do not fall on the assisted party. Fees otherwise payable, for taxes (stamp duty) on legal documents, official costs, publication in the *Official Gazette*, or costs incurred by the state for producing evidence in certain courts, are waived. The costs of providing copies of court proceedings needed for an appeal are also waived.

If someone granted legal aid cannot assert or defend his or her rights without legal representation and assistance unless granted the services of a “legal assistant,” the court orders the appointment of: an *asianajaja* (a member of the Finnish Bar), a *lakimies* (a lawyer who is not a member of the Bar, and who offers legal services), or a *varatuomari* (a lawyer who has completed a period as a judge as part of his or her legal education). A professional representative is mandatory in criminal cases where the assisted person risks imprisonment. In some cases, the court might appoint a person who is not practicing as a lawyer. Normally, legal

assistance is not granted to somebody accused of a minor offense for which the sanction is a simple fine.

A legal assistant who is not already employed in a public Legal Advice Office is paid “reasonable compensation” by the state for work done and for loss of income from other work, as well as for out-of-pocket expenses. The legal assistant must submit records of work done, and the court then decides the amount to be paid on the basis of the time taken and the difficulty of the case. The Ministry of Justice issues detailed rules on the matter. A salaried public Legal Advice Office lawyer who is appointed to be an assisted person’s legal representative is not paid extra for this work.

Each year, the Finnish Bar Association publishes a directory of law offices, as well as identifying advocates who speak foreign languages or have some knowledge of foreign law.

If an unaided party loses a case to an aided party, the party that lost the case repays the state the amount provided in legal aid. If the winning party was assisted by someone from a public Legal Advice Office, the unaided party that lost the case pays the municipality that funds that office. If a public official would lose his or her fees, he or she is to be compensated by the state. If a person who has been granted legal aid or free legal proceedings loses the case in court, that person usually has to compensate the adverse party for the trial costs.

Appeals against granting or refusing legal aid are possible in some circumstances, e.g., against an order to contribute to legal aid costs, or concerning the appointment of a legal assistant. In general, however, there is no appeal against the grant or refusal of non-contributory legal aid or the appointment of a legal assistant.

NOTES

¹ The following information is extracted from the European Union and the Council of Europe Websites: http://europa.eu.int/comm/dgs/health_consumer/library/pub/legalaid/de.html; http://www.coe.int/T/E/Legal_Affairs/Legal_cooperation/Operation_of_justice/Access_to_justice_and_legal_aid/Germany%20%20legal%20aid%20paper.asp.

Legal Aid Act (257/2002; *Oikeusapulaki*)

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Chapter 1 — Legal aid

Section 1 — *Legal aid: general principle and coverage*

- (1) Legal aid shall be given at the expense of the state to persons who needs expert assistance in a legal matter and who for lack of means cannot self pay the expenses of having the matter dealt with.
- (2) Legal aid covers the provision of legal advice, the necessary measures and representation before a court of law and another authority, and the waiver of certain expenses of the consideration of the matter, as provided in this Act.

Section 2 — *Persons entitled to legal aid*

- (1) Legal aid shall be given to persons resident in Finland, as well as to citizens of a member state of the European Union or the European Economic Area who are working or seeking work in Finland, as required by the Regulation on freedom of movement for workers within the Community (EEC) No. 1612/68 and the Agreement on the European Economic Area.

- (2) In addition, legal aid shall be given irrespective of the criteria provided in paragraph (1), if the person has a matter to be heard by a Finnish court of law or if there otherwise is a special reason for legal aid to be given. Legal advice, as a part of legal aid, shall be provided irrespective of the criteria provided in paragraph (1) under the conditions laid down in the Convention on International Access to Justice (TrS 47/1988).

- (3) Legal aid shall not be given to a company or a corporation. Legal aid shall be given in a business matter, other than a court case, of a person pursuing a business only if there is a special reason for the same, taking due note of the nature and extent of the business operations, the financial and personal situation of the person and the circumstances as a whole.

Section 3 — *Means-testing*

- (1) Legal aid shall be given, on application, for free or against a deductible, on the basis of the means of the applicant. The means of the applicant shall be tested by making a calculation of the funds available to him or her

per month (*available means*). The calculation shall be based on the monthly income, necessary expenses, wealth and maintenance liability of the applicant, his or her spouse, or his or her domestic partner.

- (2) Legal aid shall be given to a person whose available means do not exceed an amount determined by a Decree of the Government. More detailed provisions on the income and expenses to be taken into account and on the effect of wealth and maintenance liability to the available means shall be issued by a Decree of the Government, as shall provisions on the basis for the determination of the deductible of a person receiving legal aid. No deductible shall apply to minor legal advice.
- (3) Legal aid shall not be given if the applicant has legal expenses insurance that covers the issue at hand. However, in a matter before a court of law, legal aid may be granted in so far as the costs exceed the maximum cover stated in the insurance policy, provided that there are special reasons for the same, taking into account the person's need for access to justice and the nature and extent of the matter. A maximum shall be set in the legal aid decision for the billable hours of the attorney. If, however,

the means of the applicant are such that he or she is entitled legal aid for free, legal aid may be granted also to cover the deductible stated in the insurance policy.

Section 4 — *Benefits of legal aid*

- (1) The granting of legal aid shall release the recipient from liability for:
 - (1) the fees and reimbursements for an attorney appointed or approved under this Act, in full or in part, as stated in the legal aid decision;
 - (2).the fees and reimbursements arising from the interpretation and translation services required in the consideration of the matter; and
 - (3).handling charges, document charges and the reimbursement of miscellaneous expenses in the authority seized of the main matter; the said charges shall likewise not be collected by other authorities for their measures and documents in so far as necessary for the matter being dealt with.
- (2) The compensation for witnesses called by a party receiving legal aid shall be paid from state funds. The other costs of evidence submitted by a party receiving legal aid shall be paid from state funds if the evidence has been necessary for the resolution of the matter.
- (3) If a party receiving legal aid, other than

the defendant in a criminal matter, has been summoned to the court in person in order to resolve the matter, the compensation for the costs of coming to court shall be paid from state funds.

- (4) Moreover, the granting of legal aid shall release the recipient from liability for the enforcement charge pertaining to the judgment or the court order and from the expenses payable in advance. All necessary costs of enforcement shall be covered from state funds, if they cannot be collected from the opposing party. However, the provision in this paragraph does not apply to renewed enforcement proceedings in so far as the earlier enforcement attempt has failed because of the lack of means of the debtor.

Section 5 — *Measures of an attorney covered by legal aid*

- (1) In a given matter, legal aid shall cover those measures of an attorney that are necessary in view of the nature and extent of the matter, the value of the object of the dispute and the circumstances as a whole. Legal aid may be limited to predetermined measures only. A determination of this sort may be extended later, if there is need for the same.
- (2) Legal aid shall cover the measures of the attorney for at most one hundred hours. However, the court seized of

the matter may decide that legal aid is to continue, if there are special reasons for the same in view of the person's need for access to justice and the nature and extent of the case. In this event, the court shall set a maximum for the billable hours of the attorney.

- (3) Section 23 applies to legal aid in matters to be considered abroad.

Section 6 — *Coverage of legal aid in certain cases*

- (1) An applicant who is deemed not to need an attorney, but whose means would entitle him or her to legal aid for free, may be given the benefits referred to in section 4(1)(2), 4(1)(3) and 4(2)–4(4) by way of legal aid.
- (2) Legal aid shall not cover an attorney's services:
 - (1) in a petitionary matter before a general court of law, unless there are especially weighty reasons for the same;
 - (2) in a simple criminal case, where the prevailing penal practice indicates that the foreseeable penalty will not be more severe than a fine or where, in view of the foreseeable penalty and the results of the investigation of the matter, the access of the defendant to justice does not require an attorney;
 - (3) in a matter of taxation or a public

- charge, unless there are especially weighty reasons for the same; nor
- (4) in a matter where the person's standing to request a rectification or to appeal is based on membership of a municipality or another public corporation.
 - (3) However, if necessary in a matter referred to in paragraph (2), a public legal aid attorney may provide legal advice and draw up any required documents.

Section 7 — *Barriers to legal aid*

Legal aid shall not be given if:

- (1) the matter is of little importance to the applicant;
- (2) it would be clearly pointless in proportion to the benefit that would ensue to the applicant;
- (3) the pursuit of the matter would constitute an abuse of process; or
- (4) the matter is based on an assigned right and there is reason to believe that the purpose of the assignment was the obtainment of legal aid.

Section 8 — *Attorney*

- (1) Legal aid shall be given by public legal aid attorneys. However, in matters to be heard by a court of law, also a private attorney who has consented to the task may be appointed as an attorney. In addition, a private attorney may be appointed in events referred

to in section 10 of the Act on State Legal Aid Offices (258/2002; *laki valtion oikeusaputoimistoista*).

- (2) An appointment as a private attorney may only be given to an advocate or to another person eligible to serve as an attorney under chapter 15, section 2(1), of the Code of Judicial Procedure (*oikeudenkäymiskaari*). Appointment as an attorney for a suspect in a criminal case may only be given to a public legal aid attorney or an advocate, or for a special reason also to another person who holds the degree of Master of Laws, if the suspect has been arrested or detained, if the suspect is charged with an offence with no statutory penalty less severe than imprisonment for four months or with an attempt of or participation in such an offence, or if the suspect is younger than 18 years of age.
- (3) Where the person receiving legal aid has self nominated an eligible person as his or her attorney, that person shall be appointed unless there are special reasons to the contrary.
- (4) In his or her task, the attorney shall adhere to proper conduct as advocate.

Section 9 — *Replacement of the attorney*

- (1) In a matter heard by a court of law, an attorney shall not send a replacement without the permission of the court.

The replacement shall be eligible as an attorney in his or her own right.

- (2) In a matter being heard by a court, the court, and in another matter, the legal aid office, may, on the reasoned request of the person receiving legal aid or of the attorney, or for a valid reason also on its own motion, revoke the appointment of the attorney and appoint a replacement.

Chapter 2 — **Legal aid decision**

Section 10 — *Application for legal aid*

- (1) Legal aid shall be applied for from the legal aid office. The application can be made at any stage of the proceedings, up to the time when the court decision on the matter has become *res judicata* or the consideration of the matter has otherwise been concluded. The application may be made orally or in writing. The applicant shall supply information on his or her means and on the matter for which legal aid is being applied for. More detailed provisions on the information to be supplied on the means and the matter shall be issued by a Decree of the Ministry of Justice.
- (2) A state authority and a municipal authority, the Social Insurance Institution, the Central Pension Security Institute, a pension fund and another

pension institution, as well as an insurance institution, shall, on demand and notwithstanding any provisions on secrecy, supply the legal aid office with the information in its possession that is necessary for the performance of the statutory duties of the office, so as to determine whether the means of the applicant are such that he or she is entitled to legal aid and whether he or she has legal expenses insurance that covers the issue at hand. The same obligation shall apply also to a banking institution, if the legal aid office cannot obtain adequate information from the parties referred to above, and if there is justified reason to doubt the adequacy or the reliability of the information supplied by the applicant. The demand shall be given to the banking institution in writing; the applicant shall be given an advance notice of the demand.

- (3) On the conditions referred to in paragraph (2), the legal aid office may access, by way of a technical interface, the secret personal data in the data files of the tax authorities and the Social Insurance Institution, so as to verify the information supplied by the applicant on his or her means. The legal aid office shall give an advance notice to the applicant of this possibility.

Section 11 — *Granting of legal aid*

- (1) The legal aid office shall decide on the granting of legal aid, unless otherwise provided in another Act. If a public legal aid attorney is disqualified from the main matter, the applicant shall be advised to make the application to another legal aid office. However, on the request of the applicant, the decision may be made in the legal aid office in question, provided that the circumstances do not require that the matter be transferred. A public legal aid attorney assisting the opposing party shall, however, not make the decision on the application for legal aid. The decision may be sent to the applicant by post. In the absence of evidence to the contrary, the decision shall be deemed to have been served on the applicant on the seventh day after the posting of the document to the address supplied by the applicant.
- (2) If legal aid has not been given as applied, the applicant may submit the question of legal aid to a court of law for a decision, as provided in section 24.

Section 12 — *Legal aid charge*

- (1) The legal aid office shall collect a legal aid charge when it grants legal aid or forwards a submission referred to in section 11(2) to the court for a decision. The amount of the charge shall

be laid down by a Decree of the Government.

- (2) There shall be no charge when legal aid is granted for the provision of minor advice. Provisions may be issued by a Decree of the Government on the waiver of the charge for lack of means.

Section 13 — *Commencement and duration of legal aid*

- (1) Legal aid may be granted from the date of application or, if the relevant criteria are met, also retroactively to cover the necessary measures already undertaken in the matter. Legal aid shall be in effect at all levels of the court hierarchy seized of the matter.
- (2) In a matter before an appellate court, legal aid shall not be granted retroactively to cover the measures preceding the appeal, unless the applicant establishes the probability that he or she has had a valid reason for not applying for legal aid at an earlier stage.
- (3) Legal aid granted in a matter before an administrative court shall not cover the measures in the earlier administrative proceedings or the tribunal referred to in section 1(2) of the Act on Administrative Judicial Proceedings (586/1996; *hallintolainkäyttölaki*); legal aid granted in the Insurance Court shall not cover the measures in the preceding proceedings. If the

court remands the matter to the administrative authority or the tribunal referred to above, the appointment of a private attorney shall remain in effect also there, if the remanding court so orders.

- (4) When a court transfers a criminal matter to another court by virtue of chapter 4, section 8 or 9, of the Criminal Procedure Act (689/1997; *laki oikeudenkäynnistä rikosasioissa*) or when a higher court transfers the matter to a lower court not earlier seized of the matter, by virtue of section 10 of the said chapter, the appointment of the attorney in the matter shall remain in effect, unless the transferring court orders otherwise.

Section 14 — *Contents of the legal aid decision*

The legal aid decision shall be issued in writing. It shall contain the following information:

- (1) the matter for which legal aid is granted;
- (2) the means of the applicant;
- (3) the date as of which legal aid is granted;
- (4) the benefits deriving from legal aid;
- (5) the possible deductible of the recipient of legal aid; and
- (6) the name of the attorney.

Section 15 — *Change of financial circumstances*

While a commission is in effect, the recipient of legal aid shall notify the legal aid office of changes in his or her financial circumstances. The attorney shall remind the client of the said obligation in the event of a change in the financial circumstances of the client.

Section 16 — *Amendment of the legal aid decision and cessation of legal aid*

- (1) If the criteria for legal aid have not in fact been met, or if the circumstances have changed or ceased, the legal aid office may amend the legal aid decision or decide that legal aid is to cease. The applicant may submit the question of amending the legal aid decision and the cessation of legal aid to be decided by a court of law, as provided in section 24.
- (2) The court seized of the main matter may always, on the conditions referred to in paragraph (1), amend the legal aid decision or order that legal aid is to cease.
- (3) When the deductible of the recipient of legal aid is amended, a decision shall be made as to whether the amendment is to apply retroactively. When the cessation of legal aid is decided, a decision shall be made as to whether the recipient is to compen-

sate the state for legal aid rendered, and the amount of the compensation determined.

- (4) A public legal aid attorney may carry out a commission even if the recipient is no longer entitled to legal aid owing to a change of financial circumstances or changes in the matter at hand. This service by the legal aid office shall be subject to a full charge.

Chapter 3 — **Compensation**

Section 17 — *Fee and expenses of a private attorney*

- (1) A reasonable fee for the necessary measures and for time spent shall be determined for a private attorney, as shall compensation for his or her expenses. The fee and the expenses shall be paid from state funds, less the deductible provided in section 20. For the fee to be determined, the attorney shall produce the legal aid decision and a detailed account of his or her measures in the matter and of his or her expenses. In criminal matters, the public prosecutor shall comment on the requested fee and expenses, if this is necessary in view of the amounts requested or for some other reason. If the appointment as attorney has been given to a person who does not normally pursue cases before the court in

question, the extra travel expenses and time spent shall be compensated only if the use of such an attorney can be justified. More detailed provisions on the bases for the fees and expenses of attorneys shall be issued by a Decree of the Government.

- (2) In so far as legal aid is being given on the basis of this Act, the attorney shall not collect any fees or expenses, except for the deductible, from the recipient of legal aid. An agreement to the contrary shall be void.
- (3) If the attorney has been permitted to be replaced by another person, the fee and expenses arising from the measures undertaken by the replacement may be separately determined as payable to the replacement.
- (4) An appellate court may decide that the fee and expenses of the attorney are not to be paid from state funds, if the appeal is clearly ill-founded.

Section 18 — *Determination of fees and expenses*

- (1) In a case heard by a court, the court seized of the main matter shall determine the fees and expenses payable from state funds to a private attorney, a witness and an interpreter, as well as the compensation payable to a recipient of legal aid.
- (2) The fee and expenses of an attorney shall be determined by the court when

the tasks of the attorney before that court are concluded. If legal aid is granted retroactively to cover measures before a lower court only after the proceedings before that court have been concluded, the appellate court shall determine the fee and expenses of the attorney also for the measures undertaken before the lower court. However, if the appeal is not pursued to the end, the fee and the expenses shall be determined by the court last seized of the case. If the task is to continue for a longer period, the fee and the expenses may be determined on a semi-annual basis or, for a special reason, also on the basis of shorter periods. An attorney may be paid an advance for the considerable expenses foreseen in the performance of his or her task, if there is a special reason for the same.

- (3) The provisions on the compensation payable to witnesses from state funds shall govern the determination of the compensation to a witness and a recipient of legal aid, the payment of such expenses and other costs of evidence, and appeals against an order on the amount of the compensation.
- (4) In cases that he or she has prosecuted, the public prosecutor has standing to appeal against orders on the amount of the fee and expenses of an attorney.

- (5) In cases not heard by a court, the legal aid office shall determine the fee and expenses of an attorney and an interpreter.

Section 19 — *Compensation of the costs of evidence in certain cases*

If the hearing of a witness called by the recipient of legal aid has been clearly unnecessary, the recipient may be obligated to reimburse the state for the compensation ordered to be paid to that witness.

Section 20 — *Determination of the deductible*

- (1) The amount of the deductible shall be calculated from the determined attorney's fee and expenses, inclusive of VAT. If the deductible set at the granting of legal aid would thereby be clearly unreasonable in view of the means of the recipient, the deductible may be limited. The deductible shall be calculated on a case-by-case basis. An advance towards the deductible or a part thereof may be collected.
- (2) When a private attorney has given legal aid against partial compensation in a case heard by a court, the court referred to in section 18(2) shall, after having reserved the recipient of legal aid an opportunity to comment on the correctness of the bill, order the recipient of legal aid to pay the deductible to the attorney at the same time as it determines the attorney's fee

paid from state funds. In other events, the legal aid office shall determine the amount of the deductible.

- (3) The deductible ordered to be paid to a private attorney shall on demand be ordered to bear overdue interest, at the rate referred to in section 4(3) of the Interest Act (633/1982; *korkolaki*) as from one month after the date of the order.

Section 21 — *Collection of the compensation in enforcement proceedings and overdue interest*

- (1) On the basis of the decision of the legal aid office, the deductible to the state, the expenses paid from state funds on behalf of the recipient of legal aid but not covered by legal aid, and the legal aid charge may be collected from the recipient without a judgment or order in accordance with the provisions of the Act on the Enforced Collection of Taxes and Charges (367/1961; *laki verojen ja maksujen perimisestä ulosottoimin*). Before collection measures are undertaken, the legal aid office shall reserve the person liable an opportunity to be heard.
- (2) If the deductible or the legal aid charge to the state has not been paid on the due date, the overdue amount shall bear interest at the rate referred to in section 4(3) of the Interest Act

as from one month after the date when the relevant court order has been available to the person liable or when a bill has been sent to the person liable.

Section 22 — *Liability of the opposing party to pay compensation*

- (1) If the party opposing the recipient of legal aid is liable to compensate in full or in part the recipient's legal costs by virtue of chapter 21 of the Code of Judicial Procedure, chapter 9 of the Criminal Procedure Act or chapter 13 of the Act on Administrative Judicial Proceedings, that party shall likewise be ordered to compensate the state for the expenses paid from state funds on the basis of this Act and for the estimated fee of the public legal aid attorney; the amounts shall bear overdue interest, at the rate referred to in section 4(3) of the Interest Act as from one month from the date when the relevant court order has been available to the person liable.
- (2) If legal aid has been granted retroactively to cover expenses that the party opposing the recipient of legal aid has been ordered by a *res judicata* order of the lower court to pay to the recipient as legal costs, the right to the compensation shall revert to the state up to the amount paid from state funds.

- (3) A public legal aid attorney shall produce an account of the measures undertaken and the expenses incurred in the case.

Section 23 — *Legal aid in a case considered abroad*

- (1) In cases considered abroad, legal aid shall cover the provision of general legal advice.
- (2) For very weighty reasons, the Ministry of Justice may grant more extensive legal aid for a case to be considered abroad. In such cases, the Ministry of Justice shall determine the necessary fees and expenses to be paid from state funds.
- (3) Provisions may be issued by a Decree of the Ministry of Justice on the maximum legal aid to be given abroad and on the filing and contents of an application for legal aid in a case considered abroad.

Chapter 4 — **Appeals**

Section 24 — *Submission of the decision of the legal aid office to a court for a hearing*

- (1) A decision made on the basis of this Act by a legal aid office may be submitted to the court for a hearing (*submission*). The submission shall be made within 30 days of the service of the decision of the legal aid office. However, in a case heard by a court, the

submission may be made at any time until the decision in the main matter becomes *res judicata*. The submission shall be filed with the legal aid office that made the decision. It shall be filed in writing and it shall mention the decision that the submission concerns, as well as state how and on what basis the applicant is discontent with the decision.

- (2) The legal aid office shall without delay forward the submission to the court seized of the main matter or the court with jurisdiction over the main matter. If the hearing of the main matter in the court has been concluded and the statutory appeal period has not yet ended, the submission shall be forwarded to the court last seized of the case. If the legal aid decision pertains to a matter that cannot be brought to court, or a matter where the avenue of appeal is directly to the Supreme Administrative Court, the submission shall be forwarded to the Administrative Court in whose jurisdiction the legal aid office that made the decision is located. The court to which the legal aid office forwards the submission shall have jurisdiction over it.
- (3) The decisions of the legal aid office based on this Act shall not be open to appeal, unless so provided in another Act.

Section 25 — *Self-rectification by the legal aid office*

- (1) The legal aid office may self rectify its decision, if a submission referred to in section 24 shows cause for the same.
- (2) The decision to self-rectify shall at once be notified to the applicant who filed the submission. The decision may be delivered to the applicant in the manner referred to in section 11(1).

Section 26 — *Appeal*

- (1) A decision made on the basis of this Act by a court shall be open to appeal in conjunction with an appeal in the main matter or, if the decision has been made before the main matter is decided, separately in accordance with the provisions on appeals in the main matter.
- (2) If the order of the Administrative Court pertains to the granting of legal aid in a matter that cannot be brought to court, or a matter where the avenue of appeal is directly to the Supreme Administrative Court, the order shall be open to appeal only by the leave of the Supreme Administrative Court. Leave to appeal may be granted on the basis of:
 - (1) the importance of a ruling by the Supreme Administrative Court to the application of the law in other similar matters or because of the coherence of case-law;

- (2) there being is a special reason for this because of a clear error that has been made in the matter; or
- (3) there being another important economic or other reason for granting leave to appeal.

Section 27 — *Court proceedings*

- (1) A matter of the granting, amending or ceasing of legal aid that is to be heard by the court separately from the main matter shall be heard urgently. In a District Court, a legal aid matter heard separately from the main matter shall be heard, in so far as appropriate, as provided for proceedings in petitionary matters; in an Administrative Court and in the Insurance Court the matter shall be heard, in so far as appropriate, as provided in the Act on Administrative Judicial Proceedings.
- (2) The District Court, Administrative Court and Insurance Court shall have a quorate composition for purposes of legal aid matters also with one legally qualified member present. If the applicant is not present when the decision is to be made, and appeal is dependent on a declaration of discontent, the date of the decision shall be notified to the applicant in writing well in advance of the decision being handed down in the event that the matter is not decided as applied for.

Chapter 5 — **Miscellaneous provisions**

Section 28 — *Measures when an application for legal aid is rejected*

If the legal aid office has rejected an application for legal aid and the decision has been submitted to the court, a public legal aid attorney shall on the request of the applicant undertake the measures necessary for the safeguarding of the rights of the applicant until such time that the matter is decided by the court. If the court upholds the decision of the legal aid office, the applicant shall be charged for the measures thus undertaken. An advance against the charge or a part thereof may be collected.

Section 29 — *Detailed provisions*

More detailed provisions on the implementation of this Act shall be issued by a Decree of the Ministry of Justice.

Section 30 — *Entry into force*

- (1) This Act enters into force on 1 June 2002.

- (2) This Act repeals the Act on Cost-Free Legal Proceedings of 2 February 1973 (87/1973; *laki maksuttomasta oikeudenkäynnistä*) as amended, and the Public Legal Aid Act of 6 February 1998 (104/1998; *laki yleisestä oikeusavusta*).

- (3) Measures necessary for the implementation of this Act may be undertaken before its entry into force.

Section 31 — *Transitional provisions*

- (1) In the event of references in other legislation to the Act on Cost-Free Legal Proceedings or the Public Legal Aid Act, the provisions of this Act apply, in so far as appropriate, instead of the same.
- (2) In a case where cost-free legal proceedings have been granted before the entry into force of this Act, the preceding provisions in force continue to apply.
- (3) In a case where public legal aid has been granted before the entry into force of this Act, the preceding provisions in force continue to apply.

Government Decree on Legal Aid (388/2002; *Valtioneuvoston Asetus Oikeusavusta*)

Translation © Ministry of Justice, Finland, 2002

Section 1

- (1) Legal aid shall be granted on the basis of the available means and the assets of the applicant, as provided in this Decree. The deductible of a recipient of legal aid shall be composed of the basic deductible and a supplementary deductible, as provided in sections 5–7.
- (2) The granting of legal aid shall be based on the information and evidence supplied by the applicant on his or her income, maintenance liability, expenses, assets and the matter for which legal aid is being sought. The prerequisites of legal aid shall be accounted for as reliably as possible, with regard to the provision in section 10(2) of the Legal Aid Act.

Section 2

- (1) The available means of an applicant shall be calculated on the basis of his or her, and his or her spouse's, or his or her domestic partner's (spouses), monthly income, less any withholding taxes or advance taxes and the connected statutory charges payable by employees. The necessary expenses shall likewise be deducted from the

income, in so far as they exceed a total of EUR 250 per month. The following shall be deemed necessary expenses: reasonable housing expenses, day-care fees, child maintenance payments, payments by distraint and payments in accordance with a debt adjustment payment schedule.

- (2) If there are dependents in the household of the applicant, a deduction of EUR 250 from the income shall be made for each child. If a person to be maintained has regular income sufficient for his or her own livelihood, no deduction shall be made for him or her. The deduction may be made also for a child over 17 years of age, if the applicant in reality maintains the child.
- (3) Assets shall be taken into account in the calculation of available means as provided in sections 15 and 16.

Section 3

If a person under 18 years of age applies for legal aid, the available means of his or her custodians shall not be taken into account.

Section 4

- (1) If spouses are opposing parties or are separated by reason of irreconcilable

differences, legal aid shall be granted solely on the basis of the financial position of the applicant and in accordance with the table concerning single persons. In this event, the expenses referred to in section 2 shall in the calculation of available means be taken into account in so far as the applicant in reality pays them, and the persons who are deemed to be dependent of the applicant shall be taken into account as dependents.

(2) Financial circumstances may be taken into account as provided in paragraph

(1), if an applicant in an important personal matter would be liable to suffer a serious injustice were he or she denied legal aid because of the income of the spouse.

Section 5

The basic deductible means the percentage of the attorney's fee and expenses, inclusive of VAT, that the recipient of legal aid is to pay. It shall be determined on the basis of the available means of the applicant, as follows:

Single person		Spouses, per person	
up to EUR 650	0%	up to EUR 550	0%
up to EUR 850	20%	up to EUR 650	20%
up to EUR 1,000	30%	up to EUR 800	30%
up to EUR 1,200	40%	up to EUR 1,000	40%
up to EUR 1,300	55%	up to EUR 1,100	55%
up to EUR 1,400	75%	up to EUR 1,200	75%

Section 6

Legal aid shall not be granted, if the available means of a single person exceed EUR 1,400 or the available means of spouses exceed EUR 1,200 per person.

Section 7

The recipient of legal aid shall be charged a supplementary deductible, if he or she has funds on deposit or other comparable easily liquidated assets worth more than EUR 5,000.

The supplementary deductible shall consist of one half of the deposits or comparable assets in excess of EUR 5,000.

Section 8

(1) The applicant shall present proof or receipts and other necessary accounts of his or her income and the expenses that are requested to be subtracted. Where necessary, bank account information and data on other assets and debts shall likewise be presented.

- (2) The applicant shall present an account of his or her insurance policies which may contain cover for legal expenses applicable to the matter at hand and, where necessary, present the decision of the insurance company.

Section 9

If an applicant requests that a private attorney be appointed, he or she shall supply reasons for the need for an attorney and provide sufficient information of the matter for which legal aid is being sought. In a matter before a court of law, the following information shall be provided:

- (1) in a civil matter, the plaintiff and the defendant shall present the application for a summons or a draft for the same, the court exhortation to respond or make a statement or, for a special reason, some other sufficient information;
- (2) in a criminal matter, the defendant and the injured party shall present the prosecutor's application for a summons, the pre-trial investigation protocol, the injured party's claim for compensation, a doctor's opinion, or other sufficient information;
- (3) in a petitionary matter, the petitioner and a party to the matter

shall present the petition, the response, or other sufficient information.

Section 10

- (1) The following income types, among others, shall be taken into account as income:

- (1) wages and salary;
- (2) interest, dividends, rent and other income on capital;
- (3) business and professional income;
- (4) child support and municipal child support subsidies;
- (5) unemployment allowances and payments from unemployment benefit societies;
- (6) accident insurance allowances and periodic payments;
- (7) allowances and maternity allowances under the Illness Insurance Act;
- (8) national pensions and employees' pensions;
- (9) student subsidies;
- (10) child allowances and home care subsidies.

- (2) Social benefits that are not generally dependent on income and that are granted for a given purpose are omitted from consideration. Such benefits include e.g. the care subsidy under the National Pensions Act (347/1956), the handicap subsidy under the Act on Handicap Subsidies (124/1988)

and the care subsidy under the Act on Child Care Subsidies (444/1969).

Section 11

In case of fluctuation in the wages or salary of an employee, the available means shall be calculated on the basis of the income from the preceding six months. The monthly available means of an entrepreneur shall be calculated on the basis of the annual earnings and capital income as confirmed by the final tax statement. If there have been essential changes in the activities after the preceding tax statement, the available means may be calculated on the basis of the income as estimated for purposes of advance taxes.

Section 12

(1) Reasonable rents, apartment maintenance charges and house maintenance costs shall be deemed acceptable housing expenses. In the absence of proof, at most EUR 200 shall be accepted as monthly house maintenance costs. The monthly interest payments on a mortgage shall be accepted as housing expenses for an owner-occupied residence. Housing expenses may be disregarded in so far as the residence is larger than necessary in view of the size of the family. Housing support and the housing supplement of a student subsidy shall be deducted from the housing expenses.

(2) When calculating housing expenses for the purpose of determining the available means of an institutionalised person, also the treatment costs paid by the applicant or the spouse may be taken into account.

Section 13

Monthly payments, as laid down by a court order or a confirmed agreement and made by the applicant or the spouse shall be deemed acceptable as maintenance payments. Subject to reliable proof, also maintenance payments made regularly without a court order or agreement may be accepted.

Section 14

(1) Regular monthly payments into enforcement shall be accepted as payments by distraint.

(2) Payments made to creditors in accordance with a payment schedule referred to in the Act on the Adjustment of the Debts of a Private Person (57/1993) shall be accepted provided that the debtor has kept to the payment schedule. Subject to the same criteria, payments based on a written accord covering all the debts of the debtor, as referred to in the Act on the Adjustment of the Debts of a Private Person, shall also be accepted.

(3) When legal aid is being sought in a matter under the Act on the Adjustment of the Debts of a Private Per-

son, also the funds that the debtor actually uses in service of his or her debts shall be deducted in the calculation of available means.

Section 15

- (1) The following assets, among others, shall be taken into account as assets of the applicant or the spouse:
 - (1) cash and funds on deposit;
 - (2) real property;
 - (3) shares in housing companies and other shares;
 - (4) mutual funds and other investments;
 - (5) a share in a decedent's estate;
 - (5) a share in a partnership or limited partnership; and
 - (6) vehicles and other comparable objects.
- (2) Assets shall be calculated by subtracting any debts from the taxable value of the assets (net assets). If an asset does not have a taxable value, it shall be assessed at the current price.
- (3) An owner-occupied residence that is the primary home of the family and a car essential for work or commuting shall not be taken into account, if their value is in reasonable proportion to the size of the family and the need for work-related driving. Debts incurred for purposes of such assets shall not be subtracted when calculating the net assets.

- (4) The funds that the applicant has on deposit and the other comparable easily liquidated assets shall be included in the net assets if their value does not exceed EUR 5,000. If the value of the easily liquidated assets of the applicant exceeds EUR 5,000, they shall not be included in the net assets, but they shall instead serve as a basis for the supplementary deductible, as provided in section 7.

Section 16

When the net assets referred to in section 15 exceed EUR 25,000 or, for agricultural or business entrepreneurs, EUR 33,000, one per cent of the excess shall be added to the calculated available means.

Section 17

When legal aid is being sought for the inventory of a decedent's estate, also the assets of the decedent shall be taken into account in the determination of the supplementary deductible of the applicant. In the inventory of an estate with no assets, the State Treasury or another person liable to make the inventory may for a special reason be provided legal aid free of charge.

Section 18

When legal aid has been granted in relation to the distribution of a decedent's estate or of matrimonial assets,

the inheritance or equalisation received by the applicant shall after the conclusion of the matter be calculated as his or her assets and the final deductible of the recipient of legal aid shall be assessed thereafter. The same procedure shall apply when the recipient of legal aid gains a valuable benefit in another matter for which legal aid was granted. If the easily liquidated value of the assets received by inheritance, equalisation or otherwise exceeds EUR 5,000, it shall not be added to the net assets, but it shall instead serve as a basis for the supplementary deductible, as provided in section 7.

Section 19

When applying for legal aid, a person not resident in Finland shall present written accounts of the matter for which legal aid is being sought and of the available means of the applicant. The applicant shall certify in writing that the information thus presented is correct. The application shall be accompanied with the accounts referred to in sections 8 and 9 and a statement or certificate of the financial position and maintenance liability of the applicant issued by the competent authorities of the state where the applicant is resident. If such a statement or certificate cannot be obtained

without undue inconvenience, the matter may be decided notwithstanding the absence.

Section 20

The legal aid charge shall be EUR 35. The legal aid charge shall not be collected, if the available means of the applicant are less than EUR 500.

Section 21

Legal aid may in the legal aid decision be limited to given measures and a given number of hours, if this is justified in view of the nature and significance of the matter, the value of the object of the dispute and the circumstances as a whole.

Section 22

- (1) The court shall send its order on a submission to the legal aid office for information.
- (2) The legal aid office shall send its decision on the amendment or cessation of legal aid to the court seised of the main issue for information.

Section 23

A decision to grant legal aid, based on a submission heard during the statutory appeal or response period, shall be sent to the appellate court on the deciding authority's own motion.

Section 24

When an appellate court grants retroactive legal aid, to cover such fees and expenses of a private attorney or

other expenses that the party opposing the recipient of legal aid has been obligated by a *res judicata* judgment of a lower court to compensate as legal costs to the recipient, the appellate court shall notify the Legal Register Centre of the order. The Centre shall collect the receivable to the state.

Section 25

In a matter where legal aid has been granted, if an insurance benefit has been granted after the main issue has been decided by a *res judicata* decision, the legal aid office shall collect from the insurance company a sum corresponding to the amount paid out as legal aid or to the fee and expenses of the legal aid office.

Section 26

On the request of the suspect in a criminal case, the legal aid office shall issue an account of the financial criteria for legal aid under this Act, for

the purpose that the court may make a decision on the fee payable to a public defender, as referred to in chapter 2, section 11, of the Criminal Procedure Act.

Section 27

An application for legal aid, an account under section 26, a decision to grant legal aid and a submission shall in so far as possible be drawn up in accordance with the forms approved by the Ministry of Justice for the said documents.

Section 28

Where necessary, the Ministry of Justice shall issue more detailed instructions on the application of this Decree.

Section 29

- (1) This Decree enters into force on 1 June 2002.
- (2) This Decree applies when legal aid is being granted after the said date.

Government Decree on Legal Aid Fee Criteria (389/2002; *Valtioneuvoston Asetus Oikeusavun Palkkioperusteista*)

Translation © Ministry of Justice, Finland, 2002

Section 1

(1) Fees and expenses shall be assessed in accordance with this Decree to:

- (1) a private attorney appointed by virtue of the Legal Aid Act (257/2002);
- (2) a defense counsel and the attorney of the injured party appointed by virtue of chapter 2, sections 1 and 1a of the Criminal Procedure Act (689/1997).

(2) Section 11 contains provisions on the criteria for the charging of fees by legal aid offices.

(3) A fee shall be assessed for a support person appointed by virtue of chapter 2, section 3 of the Criminal Procedure Act as provided in section 12.

Section 2

(1) The fees for preparing for a trial in a District Court shall be as follows:

- (1) in a criminal matter, EUR 252;
- (2) in a matter pertaining to coercive measures or a complaint referred to in chapter 7, section 1 of the Act on the Enforcement of Sentences, EUR 84;
- (3) for the attorney of the plaintiff or

of the petitioner in a civil matter or petitionary matter, EUR 505;

(4) for the attorney of the defendant or of the party to be heard in a civil matter or petitionary matter, EUR 420.

(2) Preparations for a trial shall cover *inter alia* consultation, obtaining and perusal of documents, assistance in the application for legal aid and the drafting of an application for a summons, a petition and a response.

(3) Notwithstanding the provision in paragraph (1), the fee shall be as provided in section 6 if, for reason of the nature or extent of the matter, the preparation for the trial takes longer than three hours in a criminal matter, longer than one hour in a matter pertaining to coercive measures, longer than six hours on the part of the plaintiff or the petitioner in a civil matter or petitionary matter, or longer than five hours on the part of the defendant or the party to be heard in a civil matter or petitionary matter. In this event, specific justification shall be supplied for a fee payable by the hour.

- (4) Notwithstanding the provision in paragraph (1), the fee shall also be as provided in section 6 if, for reason of the nature of the case or another comparable circumstance, the preparation for the trial takes less than the hourly limits laid down in paragraph (3). In this event, specific justification shall be supplied for a fee payable by the hour.

Section 3

The fee for continued written preparation in a District Court shall be EUR 185. Continued written preparation shall cover the drafting of preparatory documents after the application for a summons, the petition or the response, and the consultation pertaining to the same.

Section 4

- (1) The fee for appearing as an attorney in the oral hearing of the matter shall be EUR 303, if the hearing and journey time is at most three hours. However, in the hearing of a matter pertaining to coercive measures and a complaint referred to in chapter 7, section 1 of the Act on the Enforcement of Sentences, the fee shall be EUR 168, if the hearing and journey time is at most two hours; in a repeated hearing of a matter pertaining to coercive measures and a hearing pertaining to an immigration custody deci-

sion, as referred to in section 48 of the Aliens Act (378/1991), the fee shall be EUR 84, if the hearing and journey time is at most one hour.

- (2) In so far as the hearing and journey time exceeds that referred to in paragraph (1) or if it is noted at the opening of the main hearing that it must be cancelled, the fee shall be as provided in section 6.
- (3) No fee shall be assessed for journey time if the matter is heard in the attorney's own court locality, nor shall any fee be assessed for lunch breaks. For each 24-hour period, a fee for journey time shall be assessed for at most three hours, or for a longer period if there is a special reason for the same.

Section 5

The fee for appearing as an attorney in a pre-trial investigation shall be EUR 118 for an inquiry not exceeding two hours. Beyond two hours, the fee shall be as provided in section 6.

Section 6

- (1) For other measures within the scope of application of this Decree, such as the drafting of appeals and responses to appellate courts, the fee shall be assessed by the hour. The hourly rate shall be EUR 84.
- (2) However, for separately billable journey and waiting time, the hourly rate shall be EUR 67. The fees shall be

paid by the hour so that the combined journey time and other time are rounded off to the closest hour.

Section 7

If an attorney has several clients in the same matter, the fee for the second client and any further clients shall be at most 70 per cent of the normal fee for each client. If there is a necessary procedural connection between the clients, the attorney shall be deemed to have assisted one client only.

Section 8

(1) The fee of the attorney shall be assessed at a maximum of 20 per cent higher than the normal fee, if:

- (1) the task will for a reason not attributable to the attorney have to be performed out of office hours, in a foreign language, under exceptional circumstances or especially urgently;
- (2) the task is exceptionally difficult and its performance requires special expertise, experience and skill; or
- (3) the responsibility of the attorney is considerably heavier than normal either because of the scope of the financial interest at stake or because the matter is otherwise of special importance to the client.

(2) For coercive measures hearings and other necessary attorney work dur-

ing a pre-trial investigation performed on a Saturday, a Sunday or another holiday, the fee shall be assessed at 50 per cent higher than the normal fee.

Section 9

The fee of the attorney shall be assessed at less than the normal fee, if:

- (1) the attorney does not have the degree of *oikeustieteen kandidaatti* or a corresponding degree, the attorney does not practice advocacy professionally or the attorney otherwise does not incur the overhead of an advocacy business;
- (2) a replacement does not have the same skill and experience as the regular attorney;
- (3) the attorney is taking care of several related cases, where the trial material is to a large extent the same;
- (4) there have been neglect or deficiencies attributable to the attorney in the performance of the task.

Section 10

(1) The reimbursement of the overhead of an advocacy business is included in the fees. Overhead covers *inter alia* the wages and salaries of clerical staff, the rent and maintenance of office premises, insurance, equipment costs and other fixed costs. Customary

postal, telecommunications and copying costs are deemed to be covered by the overhead.

- (2) Expenses to be reimbursed include travel costs, postal, telecommunications and copying costs beyond the customary, and other direct costs.
- (3) The travel regulations for state officials apply to the reimbursement of travel and accommodation expenses. The attorney is entitled to present a bill for the use of his or her own car, if this mode of travel is cheaper than the use of public transport. If the attorney has performed several tasks during the same journey, the travel expenses shall be divided among them.

Section 11

- (1) When a legal aid attorney provides legal aid in court, the criteria for the fee to be billed shall be determined in the same manner as for the fees for private attorneys.
- (2) In other matters, the fees of the legal aid offices shall be as follows:
 - (1) consultation, possibly including the drafting of a simple document, EUR 50;
 - (2) drafting of a document or appeal and other legal assistance, where the performance of the task lasts for at most two working hours, EUR 168; the hours in excess of that shall be billed at EUR 84 per

hour.

- (3) However, when a legal aid office provides legal assistance for a full charge, the fee to be billed shall be based on the going rate of attorney services in the locality of the legal aid office.

Section 12

- (1) The fee of a support person appointed by virtue of chapter 2, section 3 of the Criminal Procedure Act shall be EUR 84 per hour. If the appointed support person does not pursue this activity on a professional basis or if he or she otherwise does not incur the overhead relating to the activity, the fee shall be EUR 42 per hour. When a person in the service of a public corporation is appointed as a support person on the basis of his or her position, the fee shall be EUR 17; it shall be paid directly to the appointed support person.
- (2) The expenses that the support person incurs by the activity shall be reimbursed as provided in section 10.

Section 13

The fees provided in this Decree are exclusive of VAT.

Section 14

- (1) In order to have the fees and expenses to be paid from state funds assessed, the recipient of the payment shall supply a bill in duplicate, indicating:

- (1) the fee claimed, itemised as provided in sections 2–5 into preparation, continued written preparation and oral hearings. In so far as the fee claimed is based on hourly billing, as referred to in section 6(1), the measures and the time spent on them shall be itemised on a daily basis;
 - (2) the journey and waiting times;
 - (3) the basis for an increase, if the attorney deems that the fee should be determined in accordance with section 8;
 - (4) the expenses claimed;
 - (5) the amount of the value added tax in EUR, with itemisation of any tax-free amounts; and
 - (6) the names of the client and the attorney, the name, address and bank account information of the business or, alternatively, the personal identification number, address, tax domicile and bank account information of the attorney, if the fee is to be paid directly to him or her.
- (2) When the recipient of legal aid is partially liable to compensate for the same, the bill shall indicate the amount of legal costs and an itemisation of the amount payable from state funds and the deductible of the recipient of legal aid.

Section 15

When legal aid has been granted for legal costs exceeding the deductible of a legal expenses insurance policy or the maximum benefit under such a policy, the court shall be supplied with an account of the total legal costs and an itemisation as to what part of them is claimed from state funds.

Section 16

- (1) Attorneys' fees shall be determined as provided in sections 2–5. When the fee claimed is based on hourly billing, as referred to in section 6(1), and it is paid on this basis, a reasonable number of hours required for the handling of the case shall be laid down in the judgment or order of the court or the decision of the chief legal aid attorney.
- (2) The amount payable as expenses and the value added tax payable to the attorney shall be separately laid down. Any advances shall be taken into account as deductions.
- (3) When legal aid has been granted for the deductible of a legal expenses insurance policy, the fees to be billed shall not be based on sections 2–10 of this Decree, but instead the legal costs bill or account of the attorney shall be assessed in accordance with regular legal costs provisions and the amount payable from state funds to the attor-

ney shall be assessed as stated in the decision of the insurance company.

- (4) When legal aid has been granted for legal costs exceeding the maximum benefit under a legal expenses insurance policy, the fee criteria in this Decree shall be applied.

Section 17

The hearing of the recipient of legal aid on the correctness of the bill, as provided in section 20(2) of the Legal Aid Act, may be carried out by way of the written approval of the recipient on the bill itself.

Section 18

An administrative court and the Insurance Court shall assess the fee and expenses of a private attorney when they remit the main issue to the administrative authority in accordance with section 13(2) of the Legal Aid Act or to a judicial authority referred to in the same section and decide that the appointment of the private attor-

ney is to continue before the said authority. If, after the remission, the case is closed by the said authority, the legal aid office shall assess the fee in respect to the proceedings before the authority.

Section 19

- (1) The fees and expenses referred to in this Decree shall be paid by the Ministry of Justice.
- (2) If the recipient of a payment has been entered into the advance tax register, the attorney shall see to it that the Ministry is in possession of a valid extract from the register, or of a tax card.

Section 20

Where necessary, the Ministry of Justice may issue more detailed guidelines on the implementation of this Decree.

Section 21

This Decree enters into force on 1 June 2002.

Legal Aid Act of the Republic of Slovenia

No. 740-01/00-8/1

31 May 2001

Legal Aid Act (ZBBP)

1. GENERAL PROVISIONS

Article 1

For the purposes of this Act, legal aid shall encompass the exercise of the right to judiciary protection, based on the principle of equality and taking into account the social position of persons who are not able to exercise this right without causing harm to their livelihood and the livelihood of their families.

For the purposes of this Act, in addition to the rights, obligations and legal relationships, and protection against charges in criminal cases before domestic and international courts legally authorized for this, judicial protection shall also be deemed to include all legally defined forms of out-of-court settlement of disputes.

For the purposes of this Act, legal aid shall mean the right of the eligible person to the entire or partial provision of funds necessary to cover the costs of legal assistance and the right to exemption of payment of the costs of the judicial proceeding.

All individuals who under the conditions laid down in this Act may become persons eligible for legal aid and who are a party in a dispute relationship must endeavor to reach out-of-court settlement of the dispute relationship if appropriate legal conditions are in place for this.

Article 2

Legal aid shall be approved in the manner, under the conditions, and in accordance with the criteria laid down in this Act.

Legal aid shall be approved as regular, extraordinary, exceptional, special, or emergency legal aid.

The decision on granting legal aid approval shall be adopted by the president of the district court or the president of the specialized court in the first instance (hereinafter referred to as Legal Aid Authority). The president of the court may for this decision authorize another judge holding the position of district court councillor or specialized court councillor.

Professional and administrative-technical tasks relating to the approval of legal

aid shall be carried out by the Legal Aid Professional Service.

Article 3

Legal aid may be regulated by statute in a manner different from that laid down in this Act if this is necessary with respect to the type of proceeding and form of legal aid.

In cases in which the right to legal aid is exercised on the basis of a special statute, the provisions of this Act shall apply exclusively to issues not governed by this special statute.

Eligible persons who are granted legal aid approval on the basis of a special statute may not invoke this Act to exercise the right to legal aid in the same matter and for the same form of legal aid.

Article 4

The state shall ensure the exercise of the principle of equal accessibility to judicial protection in such a manner as to ensure budgetary funds necessary to pay the services provided by the persons who pursuant to this Act are authorized for the provision of legal aid, to exempt eligible persons from payment of the costs of the proceeding, to offer, if this is legally admissible, tax and other reliefs to persons who pursuant to this Act are autho-

rized for the provision of legal aid if they renounce payment for the services provided, and to ensure the funding and conditions required for the organization and operation of the services and authorities responsible for conducting proceedings and adopting decisions on the right to legal aid.

Article 5

For the purposes of this Act, legal aid services may be provided exclusively by the persons set out in this Act.

Article 6

Granted legal aid may be restricted or seized for reasons laid down in this Act.

Article 7

Pursuant to this Act, legal aid may be approved for legal advice, legal representation, and other legal services laid down in this Act, for all forms of judicial protection before all courts of general jurisdiction and specialized courts based in the Republic of Slovenia, before the Constitutional Court of the Republic of Slovenia, and before all authorities, institutions, or persons in the Republic of Slovenia authorized for out-of-court settlement (hereinafter referred to as judicial pro-

ceedings), as well as in the form of exemption from payment of the costs of the judicial proceeding.

Legal aid shall also be approved for proceedings before international courts or arbitration panels if the rules of these international courts or arbitration panels do not govern the right to legal aid, or if the individual is not eligible for legal aid pursuant to the rules governing legal aid.

Article 8

Pursuant to this Act, legal aid shall not be approved in matters regarding:

- criminal offenses involving insulting behavior, libel, defamation, and slander, unless the injured party proves the probability that he or she has suffered legally admissible damage due to these offenses;
- disputes involving reduction in maintenance when the person obliged to pay maintenance has failed to settle the due liabilities arising from maintenance, unless he or she has failed to settle these liabilities for reasons out of his or her control;
- damage disputes involving compensation of non-property and property damage caused by defamation and libel, unless the

injured party provides credible evidence that this has affected his or her material and financial, or social, position.

Article 9

The approved legal aid shall not cover the costs of the proceeding and actual expenditure of and remuneration for the person authorized by the opposing party.

2. PERSONS ELIGIBLE FOR LEGAL AID

Article 10

For the purposes of this Act, persons eligible for legal aid shall be deemed to include:

1. citizens of the Republic of Slovenia with permanent residence in the Republic of Slovenia;
2. aliens holding a permit for permanent or temporary residence in the Republic of Slovenia and stateless persons residing legally in the Republic of Slovenia;
3. other aliens subject to the condition of reciprocity or under the conditions and in cases laid down in international treaties binding the Repub-

- lic of Slovenia;
4. not-for-profit non-governmental organizations and associations that operate in the public interest and that are entered in the appropriate register pursuant to the valid legislation, in relation to disputes involving the performance of activities in the public interest or activities for the purpose of which they were founded;
 5. other persons determined by law or an international treaty binding the Republic of Slovenia to be persons eligible for legal aid.

With respect to the right to legal aid, the persons referred to in the preceding paragraph shall enjoy a status equal to that enjoyed by citizens of the Republic of Slovenia.

The condition of reciprocity referred to in point 3 of the first paragraph of this article shall be deemed to be in place if Slovenian citizens are eligible for legal aid pursuant to the regulations valid in the alien's country. At the alien's request, a foreign law inquiry shall be sent by the ministry responsible for justice via diplomatic channels. In the proceeding for dealing with legal aid approval, the foreign law notification sent by the foreign country on its legislation governing legal aid shall have the character of a public document pur-

suant to the act governing the general administrative procedure.

3. CONDITIONS FOR GRANTING LEGAL AID

Article 11

Persons who pursuant to Article 10 of this Act are eligible for legal aid may apply for legal aid in any stage of the proceeding (e.g., upon commencement of an out-of-court proceeding or proceeding in court, as well as in any stage of a proceeding that already is in progress).

The adoption of a decision on the application for legal aid shall include the determination of the financial position of the applicant and of other conditions laid down in this Act (regular legal aid).

In the case of persons eligible for legal aid pursuant to point 4 of the first paragraph of Article 10 of this Act, there shall be no determination of the financial position of the applicant.

Article 12

The financial position of the applicant shall be determined taking into account the applicant's incomes and receipts and the incomes and receipts of the applicant's family and the property owned by

the applicant and the applicant's family, unless otherwise determined by this Act.

In the procedure for granting legal aid, the financial position of the applicant shall not be determined if the applicant receives social security assistance on the basis of a decision issued by the competent authority pursuant to the provisions of the act governing social security benefits (extraordinary legal aid).

Article 13

Legal aid shall be granted to persons who, given their financial position and the financial position of their families, are not able to meet the costs of the judicial proceeding without causing harm to their social position and the social position of their families.

It shall be deemed that the social position of the applicant and his or her family is put at risk by the costs of the judicial proceeding if the monthly income of the applicant (personal income) or average monthly income per family member (personal family income) does not exceed the amount of the minimum wage laid down in the act governing the minimum wage (hereinafter referred to as minimum income).

Article 14

The income of the applicant and the income of the applicant's family shall be deemed to include inheritance, gifts, incomes, and benefits, including non-taxable incomes and benefits, received in Slovenia and abroad, except for:

- supplements for assistance and attendance and other benefits received for care and assistance, and supplements for care and assistance by other persons;
- child supplements;
- child care supplements;
- assistance for newborn supplies;
- costs of transportation to work and meals during work;
- grants and other benefits intended for or enabling training and education;
- income from occasional work by disabled persons receiving institutional care and received outside the criteria applying to regular employment;
- funding intended for addressing the consequences of a natural disaster;
- an allotment for a foster child received by the applicant's family;
- compensation for non-property damage resulting from diminished capacity in everyday activity.

Paid maintenance in the amount of the executable legal title shall be deducted from the determined personal income.

Article 15

The determination of personal income (of a single person, or of the applicant and his or her family), as the basis for granting legal aid approval, shall take into account the average monthly incomes and receipts determined to be received by the applicant (either a single person or the applicant and his or her family) in the period of six calendar months prior to the month in which the application has been submitted.

The determination of personal income shall take into account all incomes and receipts that the applicant and his or her family effectively receive.

Income from activities on which taxpayers are liable to pay tax on income from activities pursuant to the regulations governing income tax and income from agricultural activities shall be included in personal income in accordance with the methodology prescribed by the act governing social security to govern the inclusion of income from activities and income from agricultural activities in personal income.

Article 16

If personal income cannot be calculated in the method set forth in the preceding article because the applicant or applicant's family members have ceased receiving periodical incomes in the period specified in the first paragraph of the preceding article, the periodical incomes received shall not be taken into account in the determination of personal income.

If the applicant or his or her family members begin to receive periodical incomes in the period specified in the first paragraph of the preceding article, the determination of personal income shall take into account the amount of the periodical income received last.

For the purposes of this Act, periodical incomes shall be deemed to include salaries, pensions, maintenance, life annuities, and other incomes received by the applicant and his or her family in equal or similar amounts.

Article 17

Casual incomes received by the applicant or applicant's family only once for a one-off job in the period specified in the first paragraph of Article 15 of this Act shall be included in personal income in proportionate shares (1/6).

Article 18

Occasional, non-periodical incomes, which pursuant to this Act shall include inheritance, gifts, damages, redundancy payments, remuneration, and other incomes received by the applicant and his or her family only once in the period specified in the first paragraph of Article 15 of this Act, shall be taken into account to the amount of income received, divided into proportionate shares (1/6).

Article 19

Notwithstanding the provisions of this Act, legal aid shall not be approved if the applicant or his or her family have savings or property the value of which reaches or exceeds the amount of twenty minimum wages.

For the purposes of this Act, property shall not be deemed to include:

- the apartment in which the applicant lives and which is determined to be a legally suitable apartment;
- the items that pursuant to the regulations governing the execution of judgements in civil matters and insurance of claims are exempt from execution, except for cash referred to in point 5 of Article 79 of the Execution of Judgements in

Civil Matters and Insurance of Claims Act (*Uradni list* RS, Nos. 51/98 and 89/ 99–ZPPLPS);

- a personal vehicle in the value of up to eighteen minimum wages;
- property-generating income that pursuant to this Act is taken into account in the determination of the applicant's personal income.

For the purposes of this Act, the property referred to in the first paragraph of this article shall be deemed to include all movable and immovable property of which the applicant and applicant's family members dispose.

The decision on granting legal aid shall be entered *ex officio* in the land register in the form of an official note.

Article 20

The material conditions of the applicant and applicant's family under the preceding article shall be determined on the basis of the applicant's written statement, which shall be given by the applicant in the application form on the material position of the applicant and applicant's family. The Legal Aid Professional Service may check the material position of the applicant with the competent authorities that keep a record of individual types of property. The Legal Aid Professional

Service must check the material position in any case if so required by the Legal Aid Authority or by the attorney general.

State bodies and organizations shall be obliged to submit, free of charge, the data required for the purposes referred to in the preceding paragraph.

If in the statement referred to in the first paragraph of this article the applicant intentionally submits inaccurate data on his or her material position or on the material position of his or her family in order to be granted legal aid approval, a decision shall be issued to reject the application, which the applicant shall not be permitted to resubmit for six months following the day of issue of the decision.

If after legal aid is approved a different material position of the applicant or his or her family is determined, the provisions of this Act governing unjustifiably received legal aid shall apply.

Article 21

The determination of the financial position of the applicant and his or her family members shall not take into account the incomes and property of those family members who in the matter for which the applicant has applied for legal aid appear as opposing parties or opposing participants in the proceeding.

Article 22

Notwithstanding the provisions of this Act governing financial position, legal aid may also be granted if the personal income of the applicant and the income of his or her family does not exceed twice the amount referred to in the second paragraph of Article 13 of this Act and if the applicant's property and property of his or her family does not exceed the value of the property referred to in the first paragraph of Article 19 of this Act, if the application for legal aid approval is founded on the family circumstances of the applicant, the applicant's state of health, extraordinary financial liabilities imposed on the applicant, or other reasons out of the family's control for which they found themselves at material risk (exceptional approval of legal aid).

An application for exceptional legal aid approval shall be deemed to be based on family circumstances if the cost of living of the applicant's family is burdened with extraordinary costs of medical treatment of a family member, costs of maintenance of a disabled or otherwise affected family member, costs of education and training of children with special needs, and other costs caused by *force majeure*, or other reasons out of the applicant's or applicant's family's control.

An application for exceptional legal aid approval shall be deemed to be based on the applicant's state of health if the cost relating to the applicant's treatment is burdened with justified costs that are not covered by compulsory health insurance but are necessary due to the applicant's level of disability or other forms of physical injury or mental disturbance.

A demand for exceptional legal aid approval shall be deemed to be justified if the applicant and applicant's family become burdened by an extraordinary financial liability of which the applicant could not be aware or could not count take into account because it has emerged as a consequence of *force majeure* (earthquake, floods, etc.).

An opinion on the facts referred to in the preceding paragraphs of this article must be given, at the request of the Legal Aid Authority, by the competent social work center if it disposes of data on the applicant and applicant's family.

Article 23

For the purposes of this Act, the applicant's family members shall be deemed to include the following persons:

- the spouse or the person living with the applicant a minimum of one year in cohabitation, which

pursuant to the Marriage and Family Relations Act (*Uradni list SRS*, Nos. 15/76, 30/86–ZNP, 1/89 and *Uradni list RS*, Nos.13/94–ZN, 82/94–ZN, 26/99–ZPP, 70/00–ZZNPOB) is equalized with marriage in terms of legal consequences;

- the applicant's children as long as the applicant is obliged to sustain them—in the event of university education at the latest until the completion of undergraduate studies or until the age of twenty-six, or the applicant's children who due to a protracted disease or injury, or due to national service, fail to complete their schooling within the prescribed time limit, through the time the schooling has been protracted for these reasons;
- the applicant's stepchildren if they are cared for and brought up by the applicant's spouse or person living with the applicant a minimum of one year in cohabitation, which pursuant to the Marriage and Family Relations Act is equalized with marriage in terms of legal consequences;
- the applicant's grandchildren or nephews or the persons referred to in the first indent of this article if this person is responsible for the

sustenance of parentless grandchildren or nephews;

- an adult person who pursuant to a legal or another act must be sustained primarily by the applicant or a member of the applicant's family if this person has no income or property in accordance with the criteria laid down in this Act.

A single person shall be deemed to be a person who has no family members pursuant to the preceding paragraph.

Article 24

In the assessment for granting legal aid, the conditions shall be deemed to be all circumstances and facts on the matter in relation to which the applicant has filed an application for legal aid approval, and in particular that:

- the matter is clearly not unreasonable; or
- the matter is important for the applicant's personal and socioeconomic status; or
- the expected outcome of the matter is of vital importance for the applicant or applicant's family; or
- the matter is likely to succeed and it is reasonable to institute it or defend it or complain in the proceeding using legal remedies with

respect to the outcome of the matter; or

- the unresolved matter is the reason for which the person has found himself or herself in distress.

A matter shall be deemed to be clearly unreasonable if the applicant's expectations or demands are clearly disproportionate with the actual situation, if it is clear that the party is abusing the possibility of applying for legal aid in a matter for which the party would not resort to legal services even if the party had an adequate financial position to do so, or if the applicant's expectations or demands are clearly in contrast to the outcomes in matters with similar actual situations and legal bases, or if the person's expectations or demands plainly contradict the principles of fairness and morality.

Applicants shall not be granted legal aid approval if it is determined that in the same matter action has already been abandoned for reasons to the benefit of the applicant for legal aid.

Notwithstanding the provisions of the preceding paragraphs, legal aid shall be granted without determining the conditions referred to in the first and second paragraphs of this article in cases relating to constitutional action before the Constitutional Court of the Repub-

lic of Slovenia and in proceedings before international courts and international arbitration panels if this involves alleged violations of human rights and fundamental freedoms and if the conditions are in place pursuant to the act governing constitutional action, or if the conditions are in place for instituting a proceeding or for participation in a proceeding before international courts and international arbitration panels (special legal aid).

4. FORMS OF LEGAL AID AND SCOPE OF LEGAL AID APPROVAL

Article 25

Initial legal advice is free for all eligible persons referred to in the first paragraph of Article 10 of this Act and it shall not be subject to the determination of conditions referred to in Chapter III of this Act.

The initial legal advice referred to in the preceding paragraph shall be deemed to be the provision of the eligible person with an explanation as to his or her legal status in the matter and brief advice on the possibilities for out-of-court settlement, the rights and obligations upon the institution of a proceeding, court

competencies, procedural rules, costs, and method of execution of the decision.

The legal advice referred to in the preceding paragraph may also be given to eligible persons within the general administrative procedure in matters involving health, pension, disability and social insurance, and insurance in the event of unemployment.

Eligible persons shall have the right to initial legal advice only once in the same matter.

Article 26

In the same matter, legal aid may be granted:

- for legal advice surpassing initial legal advice;
- for the formulation, verification, and certification of documents on legal relations, facts, and statements;
- for legal advice and representation in cases of out-of-court settlement;
- for legal advice and representation before courts in the first and second instances;
- for legal advice and representation involving extraordinary appeals;
- for legal advice and representation involving constitutional action;

- for legal advice and representation before international courts;
- for legal advice and representation involving the filing of a petition for the assessment of constitutionality;
- in the form of exemption from payment of the costs of the judicial proceeding.

If the applicant fails to specify in the application a specific form of legal aid, the decision on this form of legal aid shall be adopted by the Legal Aid Authority based on its investigation of the matter and at its own discretion.

Legal advice referred to in the first paragraph of this article shall be deemed to comprise the investigation of the legal status and appropriate legal regulations in order to acquaint the eligible person with all issues and circumstances essential to his or her rights, obligations, and legal relations, and with the conditions, form, and content of legal remedies and proceedings for their perpetuation.

Legal representation referred to in the first paragraph of this article shall be deemed to comprise advice and representation in proceedings before domestic and international courts and before institutions founded for out-of-court settlement of disputes.

Legal aid may also be granted in the

form of an exemption from payment of the costs of proceedings before courts, particularly in the form of an exemption from payment of:

1. court fees;
2. costs of experts, witnesses, interpreters, servicing orders and translations, costs of external operations of the court or other authority in the Republic of Slovenia, and other justified costs;
3. security deposits for the costs, or of the costs, of the implementation of the proceeding (advance payments);
4. costs of public documents and receipts required for the proceeding before a court;
5. other costs of the proceeding.

Funding for covering the costs referred to in points 2, 3, 4, and 5 of the preceding paragraph shall be provided from the funding referred to in Article 44 of this Act.

Article 27

Legal aid shall be granted as a rule for every individual matter separately.

At the applicant's request or at its own discretion, the Legal Aid Authority may approve legal aid for a number of

matters collectively if these matters are interconnected as a result of the same actual state (e.g., criminal cases and cases of civil-damage action), or if the settlement of the entire subject of dispute depends on the resolution of a number of matters (e.g., trespass on property and cessation of easement).

Article 28

Legal aid shall be approved as a rule to the scope exercised by the applicant and for the time required for the form of legal aid approved.

The Legal Aid Authority may:

- determine a different scope of individual forms of legal aid if it estimates that individual forms of legal aid will achieve the expected result;
- grant legal aid for the requested forms of legal aid only partially in such a manner as to link the approval to the completion of individual stages of the proceeding in the same matter (e.g., in the first-stage legal advice with an attorney exclusively, in the second-stage legal advice and representation in the proceeding in the first instance following the attorney's advice and recommendation);
- determine or restrict the type of ser-

vices or the number of hours of legal advice;

- restrict the legal aid to a specified quantity or type of evidential material related to disproportionate costs.

The Legal Aid Authority may link the approval of legal aid to a specified deadline and condition (e.g., deadline for out-of-court settlement, deadline for filing an appeal).

If the applicant fails to abide by the deadline or condition referred to in the preceding paragraph, his or her right to legal aid shall expire or, if costs have already incurred (e.g., if the applicant has already used the attorney's legal advice to file an appeal by the specified deadline but has failed to give the attorney an authorization to file the appeal, while at the same time legal aid for the proceeding in the first instance has already been approved), the legal aid shall be deemed to have been unjustifiably received.

In the case referred to in the preceding paragraph, the applicant may not reapply for legal aid for this matter, unless he or she proves that the circumstances for omitting the required action were out of his or her control. These circumstances shall be decided upon by the Legal Aid Authority.

5. PERSONS AUTHORIZED FOR LEGAL AID PROVISION

Article 29

In accordance with this Act, legal aid shall be provided by attorneys who pursuant to the act governing attorneys are entered in the Directory of Attorneys, by law firms founded on the basis of the act governing attorneys, and by notaries in matters dealt with pursuant to the act governing notaries (hereinafter referred to as attorney).

Article 30

Attorneys for the provision of legal aid shall be appointed by the Legal Aid Authority by issuing a decision on legal aid approval.

The Legal Aid Authority shall appoint an attorney from the list submitted to it by the regional chamber of attorneys or from the list submitted by the Chamber of Notaries of Slovenia.

If the attorney referred to in the first paragraph cannot assume the provision of legal aid for justified reasons, he or she shall specify, in the referral laid down in Article 39, the reason for which he or she cannot assume the provision of legal aid in addition to his or her name and family name.

The justifiability of reasons referred to in the preceding paragraph shall be decid-

ed upon by the Legal Aid Authority following the previous opinion by the Chamber of Attorneys of Slovenia or the Chamber of Notaries of Slovenia, which shall be binding.

Pursuant to this Act, for the provision of legal aid attorneys shall be eligible for remuneration and reimbursement of costs incurred by their work, calculated using the attorneys' or notaries' tariffs in the amount of the legal aid approved.

Any agreements between the person eligible for legal aid and the attorney on higher payment or agreements on payment in a percentage or lump sum from the amount to be granted by the court to the party that would replace payment at the attorneys' or notaries' tariffs shall be void.

Attorneys shall be obliged to keep a record of costs on legal aid services provided and to specify this record in or attach it to the referral for the purpose of calculating and charging legal aid services provided.

At the eligible person's request or on the basis of the eligible person's approval, the Legal Aid Authority may decide to discharge an appointed attorney who fails to perform his or her function properly. The Legal Aid Authority shall replace the discharged attorney with a new attorney. The Chamber of Attorneys of Slovenia and the Chamber of Notaries of Slovenia shall be notified of the discharge.

6. PROCEDURE OF GRANTING LEGAL AID AND COMPETENT AUTHORITIES

Article 31

Applications for legal aid approval shall be decided upon by the Legal Aid Authority operating at the court based in the region where the applicant has permanent or temporary residence or where his or her head office is based, to wit:

- the relevant district court in matters for which courts of general jurisdiction are competent;
- labor and social courts in matters involving individual and collective labor and social disputes;
- the relevant administrative court in matters involving administrative disputes; and
- that court from the aforesaid courts whose jurisdiction covers constitutional action, petitions for assessment of constitutionality and lawfulness, disputes before international courts, and out-of-court settlement of disputes.

If the applicant—as an alien or stateless person that pursuant to this Act can be an eligible person—does not have permanent or temporary residence in the Republic of

Slovenia, the decision on the application referred to in the preceding paragraph shall be adopted by the Legal Aid Authority operating at one of the courts selected by the applicant.

Pursuant to the provisions of the first and second paragraphs of this article, the Legal Aid Authority shall provide the initial legal advice referred to in Article 25 of this Act.

Professional and administrative-technical tasks shall be carried out on behalf of the Legal Aid Authority by the Legal Aid Professional Service, which shall be organized at all competent courts.

The material costs incurred by the tasks performed by Legal Aid Professional Services shall be covered from the funds referred to in Article 44 of this Act.

The employment relations of Legal Aid Professional Service employees shall be subject to the provisions of the Courts Act governing the status of administrative-technical workers and professional associates at courts.

Legal Aid Professional Services shall carry out all professional and administrative-technical tasks on behalf of the Legal Aid Authority, provide eligible persons with the initial legal advice referred to in Article 25 of this Act, provide free advice and information for all interested persons on the possibilities of and conditions for obtaining legal aid and on other issues

relating to the approval and provision of legal aid, and shall assist applicants in compiling an application for legal aid, using a referral, and give any necessary instructions during the provision of legal aid.

Legal Aid Professional Services must employ at least one person fulfilling the conditions applying to a professional associate pursuant to the Courts Act and at least one person fulfilling the conditions applying to administrative-technical workers pursuant to the Courts Act (*Uradni list* RS, Nos. 19/94, 45/95, 26/99–ZPP, 38/99, 28/00 and 26/01–PZ).

In accordance with law, the president of the court may assign professional associates at courts or persons trained at courts for taking the state bar examination to work in a Legal Aid Professional Service.

The number of employees in individual Legal Aid Professional Services shall be determined, in agreement with the minister responsible for justice, by the president of the court in accordance with the job systemization.

The initial legal advice referred to in Article 25 of this Act and the free legal advice referred to in Article 26 of this Act may also be provided by persons who, with no intention to generate profit, perform the activity of the provision of legal aid on the basis of approval by the minister responsible for justice, and who are entered in the register kept by the ministry respon-

sible for justice.

Persons may obtain the approval referred to in the preceding paragraph if they fulfil the following conditions:

- if they are registered in the Republic of Slovenia;
- if they may perform the activity of the provision of legal advice pursuant to the regulations on the basis of which they were founded;
- if they have concluded a contract of employment with a lawyer who has completed university education and who has passed the state bar examination, or if the person himself or herself is in possession of such education;
- if they have appropriate premises and equipment required for the provision of legal advice;
- if they issue appropriate rules of operation to ensure adequate supervision of the provision of legal aid pursuant to this Act;
- if they conclude a liability insurance contract for the event of possible damage caused by the advice for at least the minimum insurance amount.

The number of persons who may obtain the approval referred to in the preceding paragraph, the procedure of testing

the fulfillment of conditions, the more detailed conditions applying to premises and equipment, and the procedure for issuing the approval and keeping the register containing data on the name or title and temporary and permanent residence or head office, the rules of supervision of the provision of legal aid, and the amount and method of payment for legal advice, and the minimum insurance amount referred to in the preceding paragraph shall be laid down by the minister responsible for justice by issuing the relevant rules.

Article 32

Applicants shall submit their applications for legal aid approval using the prescribed application form, which must be accompanied by suitable documents.

If an application is not filed using the prescribed application form, the content of individual columns in the application and the order of columns must be equal to the content of the application form referred to in the preceding paragraph.

The application must contain in particular:

- the personal name, personal identification number, tax number, and address of permanent residence or address of temporary residence of the applicant;
 - the personal name, personal identification number, tax number, and address of permanent residence or address of temporary residence of the applicant's family members;
 - the personal name, date and place of birth, and address of permanent residence or address of temporary residence if the applicant is an alien;
 - data on the matter;
 - specification of the desired form and scope of legal aid;
 - data on incomes and other receipts of the applicant and applicant's family members;
 - data on the material conditions of the applicant and applicant's family members.
- In the case of applicants for legal aid referred to in point 4 of the first paragraph of Article 10 of this Act, the application must contain in particular:
- the name or company name, permanent or temporary residence, and head office of the applicant;
 - data on the matter;
 - specification of the desired form and scope of legal aid.
- The application must be accompanied by documents proving the existence of the conditions laid down in this Act and at the

applicant's disposal.

The documents referred to in the preceding paragraph must be submitted either as originals or as true copies, unless the Legal Aid Professional Service certifies the authenticity of the copy by signing and stamping the copy after checking the original document.

The application form and the types of documents referred to in the preceding paragraph shall be prescribed by the minister responsible for justice.

Article 33

The Legal Aid Authority shall collect data on the applicant or eligible person, or opposing party, and other data pursuant to the third paragraph of the preceding article for the purpose of implementing this Act and regulations issued on the basis thereof, when and if this is necessary in order to:

- approve legal aid;
- check the data specified in the application;
- ensure the repayment of funds paid as the result of unjustifiably received legal aid;
- collect the amounts owed pursuant to this Act in the procedure of execution.

State and other bodies and organizations disposing of the data referred to in the preceding paragraph must submit, free of charge, the required data to the Legal Aid Authority that put forward the request.

If not otherwise determined by an international treaty, the acquisition of personal data on an alien pursuant to the first paragraph shall be subject to the provisions of the act and international treaties binding the Republic of Slovenia that govern the provision of international legal aid in judicial proceedings.

Article 34

The applicant shall file the application for legal aid with the competent court or county court that covers the territory where the applicant has permanent or temporary residence or his or her head office. The president of the county court must ensure that the received applications are sent immediately to the competent court.

If not otherwise determined by this Act, the Legal Aid Authority shall act in accordance with the act governing the general administrative procedure.

Applications for legal aid shall be decided upon by the Legal Aid Authority by issuing a decision and, for proceeding-related issues, by issuing an order.

An appeal against decisions and orders issued by the Legal Aid Authority shall not

be possible; instead, an administrative dispute may be instituted. An administrative dispute appeal may also be filed by the attorney general and state prosecutor. Pursuant to this Act, administrative dispute matters shall be deemed to be urgent.

Remuneration and actual costs incurred by an attorney for preparing the appeal and for representation in an administrative dispute, as well as the court fees related to the action, shall be covered from the funds referred to in Article 44 of this Act if the administrative court does not grant the appeal. If the administrative court dismisses the appeal or refuses it as unfounded, all costs shall be covered by the appellant.

Article 35

The applicant may for well-founded reasons request the Legal Aid Authority for a priority trial of the application. The applicant shall file the request for priority trial in writing or in the form of a record with the Legal Aid Professional Service or with the county court. In such cases the president of the county court must act in accordance with the first paragraph of the preceding article.

Article 36

If, due to the deciding on the application

for legal aid or due to the procedure for preparing and filing the application, the applicant misses the deadline for a legal act and therefore forfeits the right to perform this act, the Legal Aid Authority shall, notwithstanding the provisions of this Act governing the conditions and procedure for legal aid approval, immediately approve legal aid for the particular act indispensable for the applicant to avoid the consequences (emergency legal aid).

The applicant may also put forward an application for deciding in the cases referred to in the preceding paragraph orally in the form of a record taken by the county court, where the applicant must submit documents to prove the emergence of the conditions referred to in the preceding paragraph (e.g., day of service of the ruling in which the deadline for filing an appeal is specified).

An applicant who has received approval for legal aid in the manner laid down in the first paragraph of this article must immediately and no later than within eight days of the approval for legal aid prove the fulfillment of all conditions required pursuant to this Act.

If the approval referred to in the first paragraph is not founded, or if the applicant fails to act in accordance with the preceding paragraph, the provisions of this Act governing unjustifiably received legal aid shall apply.

Article 37

Upon deciding on applications for legal aid, the Legal Aid Authority shall observe the principle of expeditiousness and efficiency of the proceeding.

By issuing a decision or order to adopt a decision on an application for legal aid, the Legal Aid Authority:

1. dismisses the application as inadmissible;
2. refuses the application as unfounded;
3. grants the application for legal aid.

In the decision that grants the application, in addition to data on the eligible person, the Legal Aid Authority shall determine or specify the explicit form and scope of legal aid approved, and set forth in more detail the matter for which legal aid has been approved (e.g., description of the matter or reference number of the registration record under which the instituted judicial proceeding is kept).

Article 38

The decision issued by the Legal Aid Authority to adopt a decision on the application for legal aid shall also be submitted to the attorney general, state prosecutor, and Supreme Court of the Republic of

Slovenia, and to the competent court before which the proceeding, if the latter has already been instituted, is conducted.

Article 39

On the basis of the decision issued by the Legal Aid Authority to adopt a decision on the application for legal aid, the Legal Aid Professional Service shall issue the eligible person with a “referral.”

A referral must be issued using the application form prescribed by the minister responsible for justice.

Referrals shall be issued and signed by a person employed by the Legal Aid Professional Service authorized by the Legal Aid Authority for issuing and signing authorizations.

A referral must contain in particular:

- the personal name or company name of the person eligible for legal aid, personal identification number, and address of permanent residence or address of temporary residence or the head office;
- the number and date of issue of the decision by the Legal Authority Aid on legal aid approval;
- the brief code of the matter for which legal aid has been approved;
- the form and scope of legal aid approved;

- the signature of the authorized person who has issued the referral;
- the date of issue of the referral;
- the type, scope, and date of completed acts of legal aid and the body that provided the legal aid (including attachments);
- the total costs incurred by the provision of legal aid;
- the date on which the referral was returned;
- the cost balance and individual amounts to be repaid or reimbursed;
- the signature of the person who compiled the balance;
- a signature by the Legal Aid Authority including a proposed repayment;
- a legal caution of the legal consequences of violation of the provisions of this Act governing referral handling.

On the basis of the decision on legal aid approval, the Legal Aid Authority may issue a number of referrals for the eligible person; if a number of forms of legal aid have been approved, for every form separately (e.g., separately for legal advice and representation, separately for the exemption from payment of costs of the judicial proceeding), or separately for individual stages within every form of legal aid (e.g., for preparing an appeal or legal remedy).

Article 40

The eligible persons shall be obliged to return the referral after the completed legal aid immediately after the referral is furnished with all records of costs and certificates of exemption from payment of proceeding costs.

The referral that the applicant returns to the Legal Aid Professional Service for the purpose of calculating the costs incurred must be accompanied by the records of costs for the completed acts of legal aid in their original forms, or by the original certificates issued by the court or another body or person confirming exemption from payment of proceeding costs.

Instead of the eligible person, the referral may be returned to the Legal Aid Professional Service by the person or body that has provided the legal aid.

If the eligible person fails to return the referral within eight days of the day the referral was complete, it shall be deemed that legal aid has not been approved, and the legal aid shall be subject to the provisions of this Act governing unjustifiably received legal aid if the legal aid has already been used to provide or pay specific services.

The provision of the preceding paragraph shall also apply if the eligible person abuses the referral by adding data to

it, deleting data, or modifying in any other manner the content of the referral. Possible corrections shall be valid only if they are signed by a person authorized for this.

The certificate of an issued referral and the certificate by the persons who have provided legal aid shall be an executory title for collecting legal aid services paid.

7. CHANGE IN CIRCUMSTANCES AND UNJUSTIFIABLY RECEIVED LEGAL AID

Article 41

The eligible person must fulfill the conditions for legal aid approval throughout the period for which the legal aid has been approved.

In the period from approval of legal aid to the day of the final balance of costs, the eligible person must notify the Legal Aid Professional Service of all facts and circumstances and all changes that have an impact or might have an impact on the right to legal aid and on the form, scope, and period of receipt of legal aid.

The eligible person must report the changes referred to in the preceding paragraph within eight days of the day he or she became aware of them.

Article 42

The Legal Aid Professional Service shall commence the procedure of determining legal aid eligibility *ex officio* if it finds that circumstances are in place due to which a different decision on legal aid eligibility should be issued because the eligible person is no longer eligible for legal aid or is eligible to a lesser scope or is eligible for specific forms of legal aid exclusively.

After the completed procedure of determination of eligibility, the Legal Aid Professional Service shall propose to the Legal Aid Authority that it issue a decision stating the cessation of legal aid eligibility, or determining a different scope or form of legal aid (unjustifiably received legal aid).

The changes referred to in the preceding paragraph shall be decided upon by the Legal Aid Authority immediately. If this is not possible for objective reasons, the Legal Aid Authority shall decide by the first day of the following month after receipt of the proposal by the Legal Aid Professional Service.

Article 43

Unjustifiably received legal aid shall be deemed to include already paid legal aid granted to the eligible person based on false statements or concealment of data or changed data within the meaning of the

second paragraph of Article 41 of this Act.

The eligible person shall be obliged to return unjustifiably received legal aid and cover all costs from which he or she has been exempted, including legal penalty interest. The returned or paid funds shall be deemed to be income of the budget of the Republic of Slovenia.

The method and time of repayment of unjustifiably received legal aid shall be determined by the Legal Aid Authority in a decision ascertaining that legal aid has been received unjustifiably and requiring the eligible person to repay the unjustifiably received legal aid.

Notwithstanding the preceding paragraph, at the proposal of the eligible person the Legal Aid Authority and the eligible person shall conclude a written agreement on the method of repayment, where the amount of personal income and social position of the eligible person shall be taken into account. The agreement shall be an executory title.

If the agreement referred to in the preceding paragraph is not concluded and if the eligible person fails to reimburse or repay voluntarily the owed amount within the time limit specified in the decision, the Legal Aid Authority shall propose to the court an *ex officio* execution, where the decision issued by the Legal Aid Authority referred to in the third paragraph of this article shall be an executory title.

8. FINANCING OF LEGAL AID

Article 44

The Supreme Court of the Republic of Slovenia shall be provided with the funding necessary for the implementation of this Act from the budget of the Republic of Slovenia.

9. METHOD OF PAYMENT OF SERVICES ARISING FROM LEGAL AID APPROVED

Article 45

Funds for the payment of services under this Act shall be paid pursuant to the order by the president of the Supreme Court of the Republic of Slovenia, at the proposal of the Legal Aid Authority.

10. REPAYMENT OF FUNDS ARISING FROM LEGAL AID

Article 46

The claim by the party (person eligible for legal aid) against the opposing party in relation to the costs of the proceeding, ruled by the court to the benefit of the eligible person on the basis of a decision

finalizing the proceeding before the court shall be transferred, to the amount of the costs paid within the framework of legal aid pursuant to this Act, to the Republic of Slovenia on the day the decision, or resolution on the costs of the proceeding, becomes final.

With the transfer of the claim to the Republic of Slovenia, the Republic of Slovenia enters a relationship vis-à-vis the opposing party as a party (person eligible for legal aid as a creditor). The proposal for execution shall be filed *ex officio* by the Legal Aid Authority that decided on the approval of legal aid.

Article 47

If the person eligible for legal aid is successful in the proceeding and on the basis thereof acquires property and if the opposing party fails to fulfil voluntarily the liabilities arising from the costs of the proceeding, the debt against the Republic of Slovenia shall be the subsidiary responsibility of the person eligible for legal aid, except if the eligible person obtains maintenance or compensation for non-property damage due to diminished capacity in everyday activity.

Article 48

If the person eligible for legal aid is par-

tially or entirely successful in the proceeding and on the basis thereof the court awards him or her property or incomes except for the property referred to in Article 47 of this Act, he or she shall be obliged to repay the Republic of Slovenia the difference between the costs effectively paid as legal aid and the amount repaid by the opposing party and arising from the costs of the proceeding or the amount the Republic of Slovenia has collected from the opposing party pursuant to Article 46 of this Act.

Article 49

If the person eligible for legal aid is not successful in the proceeding, he or she shall not be obliged to repay the costs paid within the framework of legal aid unless his or her financial or material position, within one year of the day of finality of the decision on the basis of which the proceeding in which legal aid was approved is completed, changes to the extent that he or she is capable of repaying, entirely or partially, the interest-free costs incurred within the framework of legal aid (e.g., receipt of inheritance, gift, change of jobs, winning a game of chance).

In the period specified in the preceding paragraph the eligible person shall be obliged to act in accordance with Article 41 of this Act.

For the purposes of the first paragraph the attorney general and the state prosecutor shall have the right to access the record that in connection with the tax liabilities of the taxpayer-person eligible for legal aid is kept by the competent tax body and to other records kept in connection with his or her incomes and property.

If it is determined that the circumstances referred to in the first paragraph of this article have emerged, the Legal Aid Authority shall act in accordance with the provisions of this Act governing the change in circumstances and unjustifiably received legal aid.

11. SUPERVISION AND LEGAL AID RECORD

Article 50

Supervision of the implementation of the provisions of this Act included in Chapters VIII, IX, and X shall be the responsibility of the Court of Auditors of the Republic of Slovenia.

The forcible collection of amounts owed pursuant to this Act shall be subject to the provisions of the act governing the court execution of judgements in civil matters and insurance of claims. The Legal Aid Authority that issued the deci-

sion pursuant to this act shall propose an *ex officio* execution.

Article 51

The Supreme Court of the Republic of Slovenia shall every year notify the National Assembly of the Republic of Slovenia, the Government of the Republic of Slovenia, and the human rights ombudsman of:

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

The notification referred to in the preceding paragraph must be submitted by the Supreme Court of the Republic of Slovenia no later than 31 March of the current year for the previous year.

Article 52

The Legal Aid Authority shall keep the Legal Aid Record.

The Legal Aid Record referred to in

the preceding paragraph shall contain in particular:

- the reference number of the matter;
- data on the applicant or eligible person (personal name or company name, personal identification number, address of permanent residence or address of temporary residence, or address of head office) and, if an alien is question, his or her personal name, date and place of birth, address of permanent residence, and address of temporary residence;
- the number and date of the decision;
- the amount of legal aid approved;
- the amount of funds paid within the framework of legal aid;
- the amount of funds repaid;
- other data pursuant to this Act.

More detailed instruction on the keeping and content of the Legal Aid Record referred to in the preceding paragraph shall be issued by the minister responsible for justice.

12. TRANSITIONAL AND FINAL PROVISION

Article 53

The implementing regulations referred to in the thirteenth paragraph of Article 31, sixth paragraph of Article 32, second paragraph of Article 39, and third paragraph of Article 52 shall be issued by the minister responsible for justice within three months of the day this Act enters into force.

Within sixty days of the day this Act enters into force, the Legal Aid Authority must organize the operation of Legal Aid Professional Services.

Article 54

This Act shall enter into force on the ninetieth day after its publication in the *Official Gazette* of the Republic of Slovenia.

No. 740-01/00-8/1

Ljubljana, 31 May 2001-09-26

President of the National Assembly
of the Republic of Slovenia
Borut Pahor

Public Defender Law of the Republic of Israel

(Law Number 57564-1995), 1995*

CHAPTER ONE: ESTABLISHING THE OFFICE OF PUBLIC DEFENDER

Establishing the office of public defender

1. (a) The minister of justice shall establish, within the Department of Justice, an office of public defender.
(b) The office of public defender shall provide legal representation in criminal proceedings to those entitled thereto under this law.

CHAPTER TWO: BOARD OF PUBLIC DEFENDER

Board of public defender

2. (a) A board of public defender is hereby established; the board shall be composed of five members as follows:
 1. The minister of justice, who shall preside;
 2. A retired Supreme Court justice appointed by the president of the Supreme Court;

3. A lawyer, engaged in the representation of defendants in criminal trials, selected by the national council of the Bar Association;
4. A lawyer engaged in the representation of defendants in criminal proceedings, appointed by the minister of justice upon the consent of the chairman of the Bar Association;
5. A criminal law specialist appointed by the minister of justice upon consultation with deans of law faculties.

(b) The term of office of a member of the board of public defender, except for the minister of justice, is five years; and it may be extended by an additional term not exceeding five years; a member of the board of public defender shall hold office until another member is appointed as a replacement.

Board's duties

3. The board shall appoint the state public defender and supervise the activities of the office of public defender.

CHAPTER THREE: THE STRUCTURE OF THE OFFICE OF PUBLIC DEFENDER

Article One: State Public Defender

Structure

4. (a) The Office of Public Defender shall be headed by the state public defender, and he or she shall be in charge of district public defenders.
(b) The minister of justice shall establish offices of district public defenders.
(c) A district public defender shall serve in each district and shall be in charge of the Office of Public Defender in his or her district.

Qualification of the state public defender

5. Any person registered as a member of the Bar Association, who engaged in the practice of law for at least ten years, and is an experienced defense counsel is eligible to serve as state public defender.
6. (a) The state public defender's term of office is five years, and it may be extended for five additional years.
(b) The office of the state public defender shall terminate upon any of

the following instances:

1. the end of this term of office as stated in sub-section (a);
2. his resignation;
3. his retirement;
4. a resolution of the board of public defender.

The powers of the state public defender

7. (a) The state public defender shall manage the affairs of the Office of Public Defender, set its policy, provide training to the staff, and supervise the professional standard of lawyers acting on its behalf.
(b) The state public defender shall also have all the powers granted to a district public defender.
(c) Information handed to the state public defender by a public defender shall be used thereby solely in the performance of his or her duties.

Annual report

8. The state public defender shall submit to the minister of justice, in the end of every year, an annual report with respect to the activities of the Office of Public Defender; the minister of justice shall deliver the

report, with his or her own comments, to the board of public defender; the board shall discuss the report and may demand clarifications and complementary material; the report shall be published at such manner as the board shall order.

Article Two: District Public Defenders

Qualifications of district public defenders

9. Any person registered as a member of the Bar Association, who engaged in the practice of law for at least six years, and is an experienced defense counsel is eligible to serve as a district public defender.

Term of office

10. The district public defender's term of office shall be governed by Section 6 (b) (2) to (4).

Powers of a district public defender

11. (a) A district public defender shall be in charge of providing legal representation by the Office of Public Defender in his or her district, and among other matters he or she shall

be in charge of the following:

1. hiring public defenders in his or her office;
2. appointing public defenders who are not employed by the Office of Public Defender as stated in Section 12, and the professional supervision thereof;
3. allocating and coordinating the public defenders' work;
4. determining the payment for legal representation rendered by public defenders who are not employed by the Office of Public Defender according to Section 12;
5. approving expenses required for legal representation, including experts' and investigators' fees.

(b) A district public defender may delegate powers to his or her deputy; if the district public defender is temporarily unable to perform the duties of the position, the deputy shall act as substitute, and shall have, for this purpose, all the powers of a district public defender.

(c) Information handed to a district public defender by a public defender shall be used thereby solely in the performance of his or her duties; this section shall add to Section 15.

(d) A district public defender may con-

sult with the Subcommittee on Criminal Affairs of the Bar Association District Committee in his or her district.

Appointment of a public defender who is not employed by the Office of Public Defender

12. (a) A lawyer who is not employed by the Office of Public Defender, and wishes to serve is a public defender, shall submit to the district public defender a written application; the district public defender shall compose a list of lawyers qualified to serve as public defenders.
- (b) The district public defender shall appoint public defenders from the list, and he or she may also appoint a lawyer who is not included in the said list, upon the consent of the said lawyer.
- (c) The district public defender may refuse to include a lawyer in the list or exclude the lawyer therefrom, if the district public defender is convinced that this is required in order to ensure appropriate representation of defendants.
- (d) A decision handed down by a district public defender may be appealed by the lawyer before an appellate tribunal appointed by the

minister of justice, the composition of which is as follows:

- a retired judge, who shall preside;
- the state public defender;
- a representative of the Bar Association, selected by the Central Committee of the Bar Association.

Status of the Office of Public Defender

13. The status of the state public defender and of the employees of the Office of Public Defender shall be similar to that of the state attorney and the employees of the Office of State Attorney. The civil service commissioner and the wage commissioner in the Ministry of Finance, respectively, shall determine their employment terms.

Representation in a criminal proceeding

14. (a) The district Office of Public Defender shall provide legal representation to an arrested person, suspect, or defendant entitled thereto under this law; a lawyer appointed by the district public defender should render the representation.
- (b) Compensation of a public

defender who is not employed by the Office of Public Defender shall be made according to rates prescribed in regulations upon consultation with the Bar Association.

(c) Subject to sub-section (d), a power of attorney with respect to representation of a person, made to the state or district public defender, shall be deemed as a power of attorney made to anyone whom the state or district public defender assigns; the appointment of a public defender by a court shall be deemed as a power of attorney made to the state or district public defender.

(d) Representation of a defendant, suspect, or arrested person by a public defender shall be governed by Sections 16 to 20 of the Criminal Procedure Law [Consolidated Version], 5742-1932 1 (hereinafter the criminal procedure law), as if he or she was appointed by the court.

Fiduciary duties to the client

15. (a) In the course of his or her duty, a public defender shall act the way a lawyer pursues the interests of his client, with dedication and in confidence, and he or she shall be subject to such rules of ethics as applicable to a lawyer representing a client.
- (b) If conflict of interest arises between the duties of a public defender employed by the Office of Public Defender to a client and duties as a state worker, his or her duties to the client shall override the duties as a state worker.

Termination of representation

16. (a) A public defender shall not cease to represent a defendant or suspect except upon an order by the district public defender, and with the permission of the court.
- (b) A district public defender may order the termination of representation by the Office of Public Defender upon permission by the court.

Public defender's register

17. The district public defender shall keep a register in which each appointment of a public defender who is not employed by the Office of Public Defender shall be recorded; the register shall be open for public inspection; the minister of justice shall prescribe the particulars of the registration and inspection procedures.

CHAPTER FOUR: ENTITLEMENT TO REPRESENTATION

Entitlement to representation

18. (a) The following shall be entitled to representation in a criminal proceeding, under this law;
 1. a defendant or suspect charged with an offense that meets the provisions of Section 15(a) (1) to (3) of the criminal procedure law;
 2. anyone with respect to whom a hearing is conducted for the issuance of an order pursuant to Sections 15 to 17 of the Treatment of People with Mental Illness Law, 5751-1991 2;
 3. a defendant against whom an application for arrest was filed pursuant to Section 21 A of the criminal procedure law, who meets the provision of Section 21 A (c);
 4. a defendant who is indigent according to such standards as shall be prescribed by the minister of justice upon consultation with the minister of labor and welfare and upon the approval of the Knesset Constitution, Law and Justice Committee; except for such categories of proceedings and offenses with respect to which defendants shall not be entitled to representation, as the minister of justice shall prescribe in an order, with the approval of the Knesset Constitution, Law and Justice Committee;
 5. a suspect or arrested person whom the court decided shall be appointed a defense counsel under Section 15 (d) of the criminal procedure law;
 6. a person whom the court decided should be appointed a defense counsel under Section 15(e) of the criminal procedure law;
 7. an arrested person who is indigent, according to such standards as shall be prescribed by the minister of justice upon consultation with the minister of finance and the minister of police and with the approval of the Knesset Constitution, Law and Justice Committee;
 8. a minor whom the Youth Court decided shall be appointed a defense counsel under Section 18 (a) of the Youth (Trial, Punishment and Modes of Treatment) Law, 5731 1971.
 9. a convicted person who is requesting a retrial, who qualifies under one of the conditions specified in Section 15 (a) (1) to (3) or (c) of the criminal procedure law, and whom

the state public defender has determined that it is appropriate to present an application for a retrial on his or her behalf.

10. a person detained or when a petition requesting his or her extradition to a foreign country has been presented according to the Extradition Law, 5714-1954.
11. a prisoner whom a parole board or a special parole board has decided to appoint a defense counsel according to Section 16(d) of the conditional release from imprisonment law, 5761-2001.
12. a defendant who was summoned to the beginning of his or her trial for the purpose of conducting a procedure under Section 143 of the criminal procedure law, within the framework of a session designated for such a procedure, and that procedure is conducted in a manner that reasonably leads to resolution of the case at the same date or at an additional date scheduled by the court, including for the purpose of sentencing; an appointment of a defense counsel according to this subsection shall be only for the purpose of conducting the procedure mentioned in this subsection and shall not refer to a defendant who, pur-

suant to a procedure under this subsection, was summoned to a trial according to subchapter E of chapter E of the criminal procedure law.

(b) This section shall not deny the court power to appoint defense counsel for reasons articulated in writing if it is convinced that the defendant has no means to retain a defense counsel to represent him or her and that there is a serious concern that the non-representation may result in a miscarriage of justice; in such a decision by the court to appoint a defense counsel; the president or the deputy president of the court may change that decision, after hearing the concerned party, if he or she determines that there was no justification to appoint a defense counsel under this subsection.

(c) The minister of justice, with the consent of the minister of finance and upon approval of the Knesset Constitution, Law and Justice Committee, may prescribe that other persons shall be entitled to representation in addition to those enumerated in this section, and he or she may do so in general, gradually, or according to regions.

CHAPTER FIVE:
FILING APPLICATIONS

**Notice to arrested person
on the possibility to employ
a public defender**

19. (a) Whereupon a person has been arrested and brought to a police station or to a facility of an investigating agency under law, or whereupon he or she is a suspect charged with an offense, the officer in charge of the station or investigation shall notify that person as soon as possible of the option to apply for a public defender, if he is entitled thereto under this law.
- (b) An application for public defender shall be delivered to the district public defender in such manner as shall be determined by the minister of justice.

**Filing an application for
public defender**

21. (a) An application for a public defender by a person meeting any of the terms enumerated in Section 18 (a) (1) to (4) or (7) shall be submitted in writing to the Office of the Public Defender in the district where the legal proceeding is being conducted.
- (b) The district public defender may interrogate the applicant and demand

any information necessary for the examination of his or her entitlement; an interrogation under this sub-section shall be governed by the provisions of client-lawyer privilege, except with respect to the disclosure of an offense committed for the purpose of unlawfully procuring the services of a public defender.

(c) If the district public defender sees that an applicant had failed to meet the terms prescribed in Section 13 (a), he or she shall inform the applicant in writing, as soon as possible, that he or she is refusing the application, and he or she shall state the reasons for the refusal.

(d) If the court decides that a person should be appointed a public defender as stated in Section 18 (a) (5), (6), or (8), or 18 (b), the court shall notify the district public defender, in order that he or she shall appoint a public defender thereto.

Appeal

22. A decision by the district public defender under Section 21(c) may be appealed by the applicant to the state public defender in such manner and date as shall be prescribed by the minister of justice.

Implementation and regulations

23. (a) The minister of justice is responsible for the implementation of this law, and he or she may, upon the approval of the Knesset Constitution, Law and Justice Committee, promulgate regulations with respect to its implementation.

Amendment of the criminal procedure law

24. In Section 15 of the Criminal Procedure Law (Consolidated Version), 5742-1982:

1. In sub-section (c), the following shall be added after the words “indigent according to such standards as prescribed in the Public Defender Law, 5756-1995”
2. In the last passage, the following shall be added:
 - “(f) Appointment of a defense counsel under sub-sections (a) and (b), in a district where an Office of Public Defender was established, shall be according to the Public Defender Law. 5756-1995.”
 - “(g) Whereupon a court situated in a district where a public

defender office was established decides to appoint defense counsel under sub-sections (d) or (e), the court shall refer the suspect or arrested person to the Office of Public Defender in that district so that it shall appoint defense counsel thereto; whereupon a court decides that defense counsel should be appointed by reason of indigence of the suspect or arrested person, the court may order the district public defender to examine his or her entitlement.”

Amendment of the Youth Law

25. In Section 18 of the Youth (Trial, Punishment and Modes of Treatment) Law, 5731-1971, sub-section (b) shall be replaced with the following:

“(b) Whereupon the court decided to appoint a defense counsel to a minor as stated in sub-section (a), the provisions of Sections 16 to 20 of the Criminal Procedure Law [Consolidated Version], 5742-1982, shall apply, *mutatis mutandis*, in a district where an Office of Public Defender was established, the court shall refer the minor to the Office of Public Defender

office in that district, in order that it shall appoint a defense counsel there-to.”

Commencement and application

26. (a) The minister of justice may establish such district offices as stated in section 4 (b) gradually, according to such regions and dates as he or she shall prescribe, provided that the establishment thereof shall be completed, nationwide, no later than three

years from the commencement of this law; the establishment of a district office shall be published in *Reshumat* stating its address, jurisdiction, and the date of the beginning of its services.

(b) The commencement of Section 18 (a) (7) shall be at such date as shall be prescribed by the minister of justice.

Ezer Weitzman—President of the State
Shevah Weiss—Chairman of the Knesset

NOTES

* Passed by the Knesset on 26th Cheshvan 5756 (20 November 1995); the Bill and an Explanatory Note were published in *Hatza'ot Chok* 2410, of 23 Sivan 5755 (21 June 1995), p. 502, and in *Hatza'ot Chok*

2414 of 29 Sivan 5755 (27 June 1995), p. 522.

1. Sefer Ha-Chukkim 5742, p. 42.
2. Sefer Ha-Chukkim 5751, p. 55.
3. Sefer Ha-Chukkim 5731, p. 134.

Attorney's "Feedback Form"

Attorney's name _____ Client' name _____

Court File No. _____ P.D.O File No. _____

Court Date _____ Before Judge(s) _____

Set for reading of charges/hearing of evidence/sentencing/other _____

I would like to inform the public defenders office of the following information:

1. General:

I received the appointment on _____(date) I photocopied the evidence dossier on _____(date) I met with the client on _____(date) at _____(venue of the meeting)

The client is detained at _____(name of jail or prison)/under house arrest/released on bail/not detained.

2. Synopsis of the case:

- a. Previous acquaintance with the client (including former representation) _____.
- b. Description of the charges and their background _____
- c. Client's previous criminal record _____
- d. Was all evidence material discovered by the prosecution/police? _____
- e. Was a certificate of privilege issued (concerning the concealment of evidence because of overriding State interest)? _____
- f. Client's version of the case as contained in the evidence material _____
- g. Does the evidence contain an oral admission of guilt by the client/ videotaped reconstruction at the scene of the crime?

- h. Are there arguments against the admissibility of evidence (voire dire)?
- i. Client's version at the meeting with you _____
- j. Incriminating or implicating evidence in the prosecution's dossier _____
- k. Evidence supporting the client's version _____
- l. Does the case raise substantive questions of criminal law?
- m. Does the case raise special issues regarding Rules of Evidence?
- n. Does the case raise issues of criminal procedure?
- o. Is there a conflict of interest between several defendants?
- p. Are there grounds for recusing the Judge?
- q. Are there any preliminary issues to be raised ? (double jeopardy, immunity, statute of limitations etc.)
- r. Is there an alibi defense?
- s. Is there any expert testimony on behalf of the prosecution?
- t. Is there a need for expert testimony on behalf of the defense? (Please give details)
- u. Expectation of negotiation with the prosecution/ plea bargain.
- v. Special requests by the client.
- w. General Assessment of the case and additional comments.

Date _____ **Name and signature of the attorney** _____

Notification on the level of professional supervision

To: the attorney representing in this case

a. Please note that according to the decision of the chief of supervisor, the in-house attorney supervising this case will be Mr./Ms. _____

b. the level of supervision in this case shall be (please mark the relevant option):

“Reading” (no special consultation required)

“Follow up”. Points of required consultation shall be (please mark the required option):

After review of evidence material

Decision on the plea and possible preliminary arguments

Before any substantive session

Before the prosecution’s case

Before the case for the defense

Before closing arguments

After the verdict

Before sentencing arguments

After probation officer’s report/ department of corrections report

“Close follow up” (please contact the supervisor after receiving this notification)

Date _____ **Signature** _____

Access to Justice for Indigent Criminal Defendants: A Pilot Project in Šiauliai and Vilnius, Lithuania¹

SUMMARY

The adoption of a rights-based constitutional democracy in Lithuania has revitalized the nation's concept of justice and prompted a re-examination of the systems to support access to justice that predated Lithuania's independence. Concerned that the previous era's legal aid provisions might not meet new demands, the Ministry of Justice of Lithuania and the Lithuanian Bar Council, in partnership with the Open Society Fund–Lithuania and the Open Society Justice Initiative (formerly COLPI), founded two public attorney pilot projects to test an alternative approach to the provision of legal aid to indigent criminal defendants in the cities of Šiauliai and Vilnius. These initiatives seek to establish public defenders as a unified institution dedicated to strengthening access to justice through the delivery of high-quality legal services to the poor.

The Šiauliai and Vilnius Public Attorney Offices show great potential to promote equality of arms between the defense and the prosecution, introducing a more prominent role for the defense in

a justice system that traditionally has been slanted in favor of the prosecution. However, to make way for the full range of benefits that the public attorney offices can offer, certain changes must take place in the way attorneys' service to indigent clients are compensated and monitored.

The existing measure of attorneys' work in state-subsidized cases is a voucher system dating back to the Soviet period, which prioritized the *pro forma* actions of lawyers and the need to control them, over the substance of the right to counsel and the quality of that counsel's work. The vouchers recognize only a limited range of lawyers' actions as worthy of payment—most of them only tangentially related to a defendant's right to a defense. Additionally, the piecemeal nature of *ex officio* attorney services and payment for them has hampered attempts to track either the effectiveness of the legal services provided or the costs associated with the administration and implementation of legal aid under the *ex officio* appointment system.

The Ministry of Justice of Lithuania, the Lithuanian Bar Council, and other key players in the country's legal system have

been examining legal aid models worldwide in order to devise improved legal frameworks to accommodate Lithuania's new imperative to furnish effective legal assistance to indigent members of society. In cooperation with the Open Society Justice Initiative, they have established a Working Group on Legal Aid to study options for comprehensive legal reform aimed at the creation of an independent body for the management, administration, and monitoring of legal aid. Lithuania would thus become the first country of Eastern Europe to establish an institution for the protection of the rights of the poor and disadvantaged as a necessary pillar of the justice system.

1. BACKGROUND

The fall of the Soviet Union ushered in a period of rediscovery and rejuvenation of long-atrophied civil and human rights. Where the rights of individuals to due process—the presumption of innocence; the right against self-incrimination; the right to a defense; the right to legal assistance; the right against arbitrary detention and incarceration—had been at best spottily realized during the Soviet period, the rebirth of an independent, democratic Lithuania spawned new hopes of breaking the government monopoly on

justice, and gave rise to expectations of fairness under the laws. But the economic stagnation and difficult transition to a market economy that followed independence sent much of the population reeling into poverty and poverty-driven crime; they were unable to afford basic daily supplies, let alone the services of a lawyer.

Under the Soviet regime, the formal right to legal assistance was provided through a compulsory “volunteer” service for lawyers, operated by the centralized bar associations of the Soviet Union, the Collegia of Advocates. Collegium membership, obligatory for all practicing lawyers, required that the lawyers take assignments “*ex officio*” to be present at various stages of criminal matters. They received wages in exchange for presentation of vouchers, evidencing the lawyers’ fulfillment of those obligations on which the Soviet system placed a premium: physical presence during police investigators’ interrogations of the defendant; physical presence during prosecutorial interrogations of the defendant; and presence during court proceedings.

With the institution of new laws and newly recognized priorities for the justice system, Lithuania, like other independent countries of the former Eastern Bloc, faced an unprecedented need for lawyers, with only the Soviet assignment system in

place to supply that need. In the meantime, the former obligation for lawyers to take assigned cases faded into an expectation with no enforcement mechanism. Although attorneys receive pay for *ex officio* cases, the work is erratic and difficult for attorneys to plan for in advance; the pay is minimal, and often delayed for months at a time.

Lawyers who can do so often opt for more lucrative private practice, forgoing *ex officio* assignments with no penalty. Others have come to depend on *ex officio* appointments for a guaranteed minimum income, but their training and practice date back to a time when zealous advocacy was not valued, producing erratic quality of *ex officio* legal services. There are no established standards of minimum acceptable quality; if they existed, no entity would have the means to monitor and require compliance with them.

These circumstances spurred the Ministry of Justice of Lithuania and the Lithuanian Bar Council to join forces with the Open Society Fund–Lithuania and the Constitutional and Legal Policy Institute of the Open Society Institute–Budapest to explore institutional alternatives for meeting the needs of indigent criminal defendants. Together they founded the Šiauliai Public Attorney Office (ŠPAO).

2. PUBLIC ATTORNEY OFFICES IN ŠIAULIAI AND VILNIUS

The practice of five full-time criminal defense lawyers in Šiauliai opened its doors to the public in April 2000. A groundbreaking pilot initiative in the region of the former Soviet Union and Eastern Europe, the ŠPAO became the first law office in the area dedicated exclusively to providing legal defense from arrest through trial and appellate review in criminal cases in which the defendant is entitled to appointment of a lawyer under Lithuanian law.

The successes of Šiauliai led the same founders to open, two years later, a second Public Attorney Office, in Vilnius.

The public attorney offices aim to fulfill three chief objectives:

- to service a substantial portion of the public's need for criminal defense in the pilot regions;
- to ensure consistently good-quality legal defense in accordance with the Lithuanian Constitution, international legal standards, and the Criminal Procedure Code and Criminal Code of Lithuania, fulfilling the individual's right to counsel and other rights of criminal defendants;
- to offer a functional, viable institu-

tional model of legal aid that will uphold the rights and priorities of the justice system of today's Lithuania at reasonable cost.

2.1 Šiauliai experience

When the ŠPAO opened, it was unclear whether it would mesh with a criminal justice system rooted in Soviet-era tradition, which placed a low premium on the rights of plaintiffs and defendants to competent legal representation. However, the response from law-enforcement and judiciary representatives in Šiauliai has been overwhelmingly positive. The ŠPAO enjoys support that bodes well for its continued existence and possible expansion.

Prior to the ŠPAO's founding, prosecutors and investigators reportedly lost entire days at a time—as much as 30 percent of their overall work time—persuading reluctant *ex officio* lawyers to provide services to defendants whose cases required legal representation. When investigators or prosecutors faced statutory time limits on their detention of defendants, on occasion the lack of an attorney came close to forcing the release of defendants whom the agencies felt should be detained pending trial. Judges complained that they routinely postponed hearings and trials because of an

assigned counsel's failure to appear.

The chair of the Šiauliai City Court reported that within months of its opening, the ŠPAO was handling roughly one-half of the 80 percent of the cases in criminal court requiring free legal aid. The remainder falls to thirty-four private lawyers on an *ex officio* assignment basis. Police investigators reported that the ŠPAO covers roughly 80 percent of cases in investigative stages requiring a lawyer's presence. Prosecutors lacked precise figures, but they confirmed that the ŠPAO had relieved them of a substantial burden.

The ŠPAO very quickly became a fixture in the city's justice system, without which judges, prosecutors, and police investigators in Šiauliai cannot imagine being able to function effectively. They are eager to see the office expand in order to increase its caseload. The ŠPAO has all but eliminated the burden on the judiciary, prosecution, and police investigators described above, and 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 volume of cases they could take. It is an impressive record. Police investigators and prosecutors have proclaimed the ŠPAO a success: "It's only a plus."

2.1.1 ŠPAO organizational structure. ŠPAO lawyers work in a vertical representation system. Once cases are acquired by the ŠPAO, the office stays with the client until the case is closed, including any ensuing 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.

The ŠPAO initiated several practices that have made for smoother workings of the criminal justice system in Šiauliai. The ŠPAO operates a centralized intake process, enabling law-enforcement agencies and the courts to make a single call to the ŠPAO when a defendant is in need of defense counsel. New assignments are distributed among the ŠPAO staff attorneys in accordance with their schedules and caseloads. Lawyers routinely conference their cases with one another. As a rule, each ŠPAO lawyer keeps track of his or her caseload, and makes almost all of his or her appearances on it. But if one ŠPAO lawyer is engaged in trial, and also expected elsewhere at the same time, another ŠPAO lawyers can handle that second appearance, avoiding the assignment of a new lawyer who knows nothing of the case.

A mid-term evaluation of the ŠPAO conducted by COLPI revealed that the

ŠPAO lawyers make a greater effort on behalf of their clients than the average *ex officio* attorney. Indicators show that the ŠPAO lawyers made more oral motions on their clients' behalf, and achieved alternatives to incarceration or reduced charges in a substantial portion of its cases.

2.2 Vilnius Public Attorney Office

The Vilnius Public Attorney Office (VPAO) opened on 1 May 2002. Its staff of eight lawyers and one assistant service clients in criminal matters within the jurisdiction of trial courts in a single administrative-territorial district of Vilnius, as well as appellate courts, and higher courts of first instance. The VPAO anticipates taking on law-student assistants and apprentice attorneys as its caseload expands. Additionally, thanks to the generous support of the United Nations Development Project in Lithuania, two of the VPAO staff attorneys are developing a specialized practice in the representation of juvenile suspects and defendants.

The VPAO is already having an impact on the workings of the justice system:

- After initially facing barriers to obtaining appointments in criminal

cases due to the long-standing and unchallenged monopoly of law-enforcement agencies over attorney assignments, the VPAO's experiences gave rise to the first dialogue between law-enforcement agencies and defense attorneys on the permissibility of those agencies' appointment procedures. As a result, the law on appointment of attorneys to indigent defendants has been redrafted to allow the assignment of attorneys only through the Bar Council.

- Where attorneys have for years worked under the voucher system as the only purportedly objective gauge of their work, the VPAO is testing alternative approaches to accounting for the time and quality of an attorney's work, in hopes of proposing a payment equation that rewards defense of rights, rather than assistance to state agencies.

As a complement to its mission to provide high-quality legal services to clients in criminal matters, the VPAO will be a crucial source of data on the functioning of the criminal justice system. A case-tracking system designed by the Legal Information Center of the Lithuanian Ministry of Justice enables

the VPAO to record its actions on each case, as well as the subsequent reactions of law-enforcement, prosecutors, and judges to their requests, motions, and arguments. This will allow the VPAO to measure the direct impact of quality lawyering on the outcome of a wide range of criminal justice matters, while also identifying problems in the justice system that lawyers cannot solve. Two ancillary benefits will result:

- Legislators and government officials will learn where gaps might exist in the enforcement of individuals' rights, and what causes those gaps in the pilot regions.
- The work of the VPAO and the office's methods for regulating the quality of its lawyers' work will suggest minimum standards of quality for legal representation in criminal matters and methods by which to monitor attorneys' adherence to those standards.

2.2.1 VPAO organizational structure. Like their Šiauliai colleagues, the VPAO attorneys work in a vertical representation system, making every effort to represent clients consistently at all stages of their cases. However, to prevent the assignment of outside counsel to VPAO cases when the chief VPAO

attorney is unavailable, the staff attorneys share information on one another's cases and coordinate schedules whenever possible.

The VPAO attorneys have divided responsibility among themselves for practice standards, outreach strategy, adherence to international laws, and other aspects of their daily practice. Among the many goals for their joint practice is to consistently raise constitutional and international law challenges for litigation in domestic courts. By concentrating their joint efforts in one geographic district, they hope to trace the impact of their actions on the conduct of law-enforcement and the courts, documenting the criminal justice system's failure to abide by those standards.

3. LITHUANIA'S COMMITMENT: IDENTIFYING AND OVERCOMING CHALLENGES

The ŠPAO has done a remarkable job of integrating into the criminal justice system in Šiauliai, making an undeniably positive mark on the system there. If the courts and other involved agencies have their say, the ŠPAO will be around for a long time to come. The VPAO can expect similar success.

However, new measures that would

allow an accurate assessment of their value and cost-effectiveness have yet to be created.

3.1 Alternative accounting and payment for legal services

The laws of Lithuania require that expenditure of government subsidies be anchored in recognized proof of proper use. As in many countries in the region, the only proof accepted to document lawyers' proper use of the state funds is a voucher system created before adoption of a rights-centered legal aid mission.

The actions that the vouchers recognize cover only a narrow range of attorneys' actions, making it all but impossible for a lawyer to amass forty hours of vouchered time in a week:

- A lawyer representing his or her client at an investigative interview by asserting the client's right to remain silent would receive no pay for that interview, because it is of negligible duration.
- A lawyer's independent investigation of facts or witnesses not expressly approved by law enforcement or courts for adduction at trial do not count for payment purposes.
- A private attorney-client interview will qualify for only a one-time min-

imum payment; the client-defendant is not authorized to sign a payment voucher, and there are no government officials who can verify the amount of time spent in the attorney-client interview.

- A lawyer conducting research and crafting new legal arguments will receive only a minimal flat payment for that work, irrespective of the effort or hours expended.

Working with the VPAO and the ŠPAO, the Ministry of Justice and the Bar Council are studying alternatives to the outdated voucher system. Among the possibilities for consideration are payment on a case-by-case basis, differentiating for complexity; a set payment for a set volume of cases; and a pay scale geared to the pay of prosecutors, whose involvement in criminal cases is one of many triggers for the assignment of state-guaranteed legal aid.

3.2 Revealing the hidden costs of administering the ex officio legal aid system

The only gauge of the cost of legal aid as provided by *ex officio* attorneys is payment totals from the vouchers they submit. At first glance, public attorneys, who receive a guaranteed minimum salary for

their full-time work, would seem to cost more than *ex officio* lawyers. However, this analysis ignores hidden costs of the *ex officio* system, which entails an examination of applications for payment of up to 900 *ex officio* lawyers, each of whom invoices the government for hourly pay in the form of vouchers, which must be validated by two signatures, then stamped and sealed.

An average case may require anywhere from five to seven vouchers. Moreover, anecdotal evidence indicates that it is not uncommon for *ex officio* attorneys to submit vouchers for work they have not completed or procedural sessions at which they did not appear.²

The Open Society Justice Initiative and the Open Society Foundation–Lithuania are collaborating with the Lithuanian government to bring all these costs to light in order to provide a more realistic backdrop against which to measure the cost of the public attorney offices.

4. CONCLUSION

With criminal justice data around the world showing a significantly lower rate of detention, incarceration, and police abuse toward criminal suspects and defendants who have access to quality legal representation, the Lithuanian

authorities are concerned that their system of legal assistance actually fulfill the substance of the right to counsel by providing good-quality legal services, beyond the mere physical presence of a licensed attorney at constitutionally required stages of the criminal process. They are striving to develop a system of legal aid that will minimize the influence of arbitrary factors on the outcome of criminal cases—to ensure that the justice system hinge on fairness and due process, and not on an individual’s ability to pay.

The experiences of the ŠPAO and VPAO will help shape future efforts to meet the public’s need for criminal defense, as well as informing possible legal services initiatives in civil matters. As the offices encounter barriers to justice, they bring them to light and initiate the first steps to overcoming them. These pilot operations will allow the Ministry of Justice, the Lithuanian Bar Association,

and other actors in the justice system to refine a systematic approach to administering legal services to the poor.

The Lithuanian government, with the assistance of the Bar Association, continues to seek ways to ensure that everyone in the country have access to the services of a skilled, knowledgeable legal professional when facing criminal prosecution. Legal reform is needed for the environment in Lithuania to become conducive to the institution of public attorneys and improved legal assistance of the poor and disadvantaged. The Open Society Justice Initiative and the Open Society Fund–Lithuania are working with the Government of Lithuania to devise new legal frameworks and a fair, rational system of distribution of public government funds for administering legal services to the poor, as well as monitoring their cost-effective use in accordance with an approved standard of quality.

NOTES

- ¹ Copyright © Open Society Institute 2002. All rights reserved. No part of this publication may be reproduced without the permission of the author.
- ² Thus, administering the *ex officio* system expends significant time and labor of

government employees and the lawyers it pays in the following ways that are not currently counted: double calculation of voucher-supported sums (by attorneys and by the Court Administration Agency) submitted piecemeal by more than 900

attorneys at irregular intervals; attorney labor hours in obtaining signatures of personnel present during voucher-supported time periods; attorney labor hours in awaiting the second signatures and official stamps of agency accounting officers who must approve the above signatures; agency labor hours in signing, ver-

ifying, and stamping vouchers; agency labor hours and transaction costs incurred in withdrawing and distributing separate voucher-supported payments; and attorney and Court Administration Agency hours spent copying vouchers and hand-addressing, stamping, and mailing envelopes containing them.

Law on State-Guaranteed Legal Assistance of the Republic of Lithuania, 28 March 2000, No. VIII-1591

CHAPTER ONE GENERAL PROVISIONS

Article 1. The purpose of the Law

This Law shall regulate the provision of state-guaranteed legal assistance to citizens of the Republic of Lithuania as well as to foreign citizens and stateless persons permanently residing in Lithuania, if the Laws of the Republic of Lithuania and international agreements shall not establish otherwise, who due to their property status cannot defend in an appropriate way their rights or interests protected by Law.

Article 2. Types of state-guaranteed legal assistance

According to this Law, the following types of legal assistance shall be provided:

- primary legal assistance;
- state legal assistance;
- legal assistance by public institutions.

Article 3. Basic definitions used in this Law

- State-guaranteed legal assistance: legal information, legal advice, defense, and representation in proceedings as established by this Law.
- Primary legal assistance: legal assistance and legal advice guaranteed by local government executive institutions.
- State legal assistance: defense and representations in proceedings guaranteed by the state.
- Legal assistance provided by public institutions: legal information, legal advice, and representation in proceedings provided by public institutions as established and approved by the Ministry of Justice.
- Legal information: information about the legal system, laws and by-laws, and provision of legal assistance.
- Legal advice: advice on legal issues and preparation of legal documents.
- Defense and representation in the proceedings: procedural actions regulated by law in defending the rights and interests of the suspect, the accused, the defendant, the convict, or the represented person in

criminal, civil, and administrative proceedings.

Article 4. Persons eligible for state-guaranteed legal assistance

(Revision of the Law of the Republic of Lithuania, dated 3 August 2001, No. IX-493 (from 17 August 2001) (*Zin.*, 2001, No. 71-2521)

1. The following persons have the right to state-guaranteed legal assistance:

- persons whose annual income and property are within the limits as established by the Government of the Republic of Lithuania, making the person eligible to receive legal assistance in accordance with this Law;
- other persons in cases provided for in the laws of the Republic of Lithuania and international agreements.

2. State-guaranteed legal assistance shall not be provided to persons entitled to legal expenses insurance benefits.

Article 5. Documents attesting to person's eligibility to receive state-guaranteed legal assistance

1. The documents attesting to eligibility

of persons specified in Article 4 of this Law to receive legal assistance are:

- property and income declaration forms filled in prior to applying for state-guaranteed legal assistance (if the provision of state-guaranteed legal assistance lasts longer than twelve months, property and income declarations shall be submitted every year);
- certificates stating that the person received social benefits or is at a state-supported full-time care institution;
- other written evidence.

2. When state legal assistance is provided, an investigator, an interrogator, a prosecutor, a judge, or the court shall have the right to request additional written evidence about the property status of the person who receives state legal assistance or of his family members.

Article 6. Expenses of state-guaranteed legal assistance

1. Expenses of legal assistance to persons shall be covered by the state according to the level of the person's property and income:

- 1st level: 100 percent;

- 2nd level: 95 percent;
- 3rd level: 80 percent;
- 4th level: 65 percent;
- 5th level: 50 percent.

2. If the level of a person's property and income makes the person eligible for state-guaranteed legal assistance, according to this Law, but the level changes during the provision of legal assistance, the proportion of expenses of state-guaranteed legal assistance shall be changed accordingly.

3. The maximum amount of state-guaranteed legal assistance shall be established by the Government of the Republic of Lithuania.

Article 7. Cessation and termination of legal assistance

1. State-guaranteed legal assistance shall be ceased if:

- it transpires that the person who is receiving legal assistance is not eligible to receive legal assistance in accordance with this Law;
- the person does not pay to the state or local budget the part of the fee for state legal assistance that he or she is obliged to pay;
- the person submits deliberately mis-

leading information about the essence of his or case, property, or income.

2. State-guaranteed legal assistance shall be terminated if:

- the level of person's property and income changes so that he or she is no longer eligible for the reimbursement of a part of the expenses of state-guaranteed legal assistance;
- documents proving the person's right to legal assistance have not been submitted;
- the court rules that it is not expedient to provide state-guaranteed legal assistance to the person, personal rights or law protected interests are not clearly violated and defense or representation in the legal proceedings are not expedient.

3. Decision to terminate state legal assistance shall be adopted by the following:

- the prosecutor controlling the legality of the criminal case, when the state legal assistance was provided on the basis of the interrogator's or investigator's decision, if the defendant was not brought to court;
- an officer or an institution, which

handles the case, when the state legal assistance was provided on the basis of the prosecutor's, judge's, or court's decisions.

4. Having terminated the provision of state-guaranteed legal assistance, the costs of this legal assistance in the manner prescribed by law shall be enforced from the persons to whom this state-guaranteed legal assistance was provided.

CHAPTER TWO PRIMARY LEGAL ASSISTANCE

Article 8. Subjects providing primary legal assistance

Primary legal assistance shall be provided by lawyers and apprentices of lawyers.

Article 9. Persons eligible for primary legal assistance

Persons whose annual income and property correspond with the level of property and income in accordance with this Law shall be eligible for primary legal assistance.

Article 10. Referral for primary legal assistance

1. The local government executive institution shall provide information and refer persons residing in its area to a lawyer or apprentice of a lawyer for primary legal assistance.

2. The local government executive institution shall refer for a one-hour primary legal counseling session.

3. Referrals issued by the local government executive institutions for primary legal assistance shall be issued and registered according to the procedure established by the Government of the Republic of Lithuania or an institution authorized thereby.

4. The refusal of the local government executive institution to refer to a primary legal institution shall be appealed against to the district administrative court according to the procedure established by law.

Article 11. Provision of primary legal assistance

1. Lawyers and apprentices of lawyers shall provide primary legal assistance according to the referrals for primary legal assistance issued by local government executive institutions.

2. Terms and conditions of provision and reimbursement of primary legal assistance rendered by lawyers, apprentices of lawyers, and local government executive institutions shall be established by agreements on the provision of primary legal assistance concluded between lawyers and local government executive institutions. A standard form of agreement shall be approved by the minister of justice.

Article 12. Financing of primary legal assistance

1. Primary legal assistance shall be financed from the budget of the local government.

2. The size of and procedure for remuneration of the lawyer and apprentice of a lawyer who provide primary legal assistance upon the referral of the local government executive institution shall be established in the agreements stipulated in Article 11, paragraph 2, of this Law, taking into account the Recommendations on the Size and Procedure of Computation of Remuneration for the Legal Assistance Provided, approved by the minister of justice and the Lithuanian Bar Council.

CHAPTER THREE STATE LEGAL ASSISTANCE

Article 13. Subjects providing state legal assistance

1. State legal assistance shall be provided by lawyers on the basis of appointment by interrogator, investigator, prosecutor, judge, or the court. In cases and procedure established by law, state legal assistance can be provided by the apprentice of a lawyer.

2. At the request of the person who receives state legal assistance, a lawyer or apprentice of a lawyer indicated by him or her shall be appointed with their consent to provide legal assistance.

Article 14. Persons eligible for state legal assistance

Persons indicated in Article 4 of this Law shall be eligible for state legal assistance in cases established by law when this is required by justice, if these persons are:

- suspects, accused, defendants, or convicts in criminal cases;
- victims and suitors in criminal cases, suitors and defendants in civil cases, and claimants in administrative cases.

Article 15. Request for state legal assistance

Each person who is eligible for state legal assistance has to file an application with an official or an institution that adopts decisions concerning the provision of legal assistance. The standard form of request for state legal assistance shall be approved by the minister of justice.

Article 16. Decision on the provision of state legal assistance

1. Decision regarding the provision of state legal assistance shall be adopted by an official or an institution, which has the jurisdiction over the case.

2. The decision regarding the provision of state legal assistance shall contain the following information: time and place of adoption of the decision, name and surname of the official who adopted the decision, the name of the institution, the person who filed in the request for legal assistance, the legal assistance requested, the grounds for providing or refusing to provide legal assistance, the part of expenses of legal assistance covered by the state, the lawyer or the apprentice of a lawyer appointed to provide legal assistance,

the procedure, and the term of appeal against the decision.

3. The decision adopted by an official or an institution to refuse state legal assistance shall be appealed against in the procedure established by law.

Article 17. Compulsory participation of a lawyer and a representative in the case proceedings

The compulsory participation of a lawyer and a representative in a case proceedings is established by the Code of Criminal Proceedings, by agreement of the suspect, the defendant, or the convicted.

Article 18. Financing of state legal assistance

1. State legal assistance shall be financed from the budget of the state.

2. The size of and procedure for remuneration of the lawyer or the apprentice of a lawyer who provides legal assistance shall be established by the Government of the Republic of Lithuania or an institution authorized thereby.

CHAPTER FOUR
LEGAL ASSISTANCE PROVIDED
BY PUBLIC INSTITUTIONS

Chapter 19. Public institutions that provide legal assistance

1. Pursuant to this Law, public institutions shall provide legal assistance and/or coordinate state-guaranteed legal assistance in the manner established by these institutions and coordinated with the Ministry of Justice.
2. Public institutions providing legal assistance shall have the right to create a possibility for the law students to undergo practical work of legal assistance provision.
3. Public institutions providing legal assistance may conclude primary legal assistance agreements with the local government executive institutions.
4. This Law shall not regulate legal assistance provision by public institutions to stakeholders (owners) and administrative employees of the respective public institutions.

Article 20. Support of public institutions

1. The public institutions providing legal

assistance shall be supported in the order prescribed by the Law on Charity and Support of the Republic of Lithuania.

2. On the basis of this Law, state and municipal non-residential premises and other assets on loan-for-use grounds may be transferred for temporary use to the public institutions providing legal assistance.

CHAPTER FIVE
FINAL PROVISIONS

Article 21. Enforcement of the Law

This Law shall enter into force on 1 January 2000.

Article 22. Implementation of the Law

The Lithuanian Government or institution authorized thereby shall:

- by 1 October 2000, establish levels of assets and income of persons eligible for the state-guaranteed legal assistance according to this Law and the maximum amount of costs for the legal assistance;
- in the new draft Criminal Code, provide for the mandatory participation of the defense lawyer in the court

- proceedings;
- by 1 October 2000, approve the order on issuance and accounting of the remittance for primary legal assistance by local government executive institutions;
 - by 1 October 2000, approve the order and amount of payment to the lawyer and apprentice of a lawyer, providing state legal assistance;
 - on annual basis allocate funds in the state budget of the Republic of Lithuania to finance the state legal assistance.

2. The Minister of Justice by 1 October 2000 shall approve:

- a standard form of the primary legal assistance agreement;
- a standard form to apply for the state legal assistance;
- an order on provision of state legal assistance in the court proceedings by the lawyer and apprentice of a lawyer.

3. Local government executive institutions shall on an annual basis allocate funds required to finance primary legal assistance in the municipal budgets.

I promulgate this Law passed by the Seimas of the Republic of Lithuania.

President of the Republic of Lithuania
Valdas Adamkus

**CORPORATION AGREEMENT ESTABLISHING THE PUBLIC
INSTITUTION VILNIUS PUBLIC ATTORNEYS OFFICE, 11
OCTOBER 2001**

The Ministry of Justice of the Republic of Lithuania, Gedimino Ave. 30/1, Vilnius, represented by Rimvidas Kugis, secretary of the Ministry of Justice of the Republic of Lithuania, in accordance with the authorization No. 50 of 2 October 2001 of the minister of justice, the Lithuanian Bar Council, Jogailos st. 11, Vilnius, represented by Audrone Bugeleviciene, deputy chairman of the Lithuanian Bar Council, in accordance with the authorization No. 256 of 10 October 2001 of the chairman of the Lithuanian Bar Council, public institution Open Society Fund of Lithuania, Didzioji st. 5, Vilnius, represented by Diana Vilyte, director of the public institution Open Society Fund of Lithuania, hereinafter referred to as the founders, seeking to secure provision of the state-guaranteed legal aid in case process, shall agree on the following:

1. To establish the public institution Vilnius Public Attorneys Office (hereinafter, referred to as the “Vilnius Public Attorneys Office”).
2. To determine that Vilnius Public Attorneys Office, seeking its aim, shall organize, coordinate, and finance the state-guaranteed legal aid in interrogatory and investigation bodies of the Vilnius city and district, in Vilnius city and district county courts, in Vilnius District Court, in Vilnius District Administrative Court, in Lithuanian Appeal Court, in Lithuanian Chief Administrative Court, and in Lithuanian Supreme Court.
3. The stakeholders’ capital of Vilnius Public Attorneys Office shall be composed of the three litas. The contribution of each stakeholder shall be equivalent to one litas.
4. Every founder shall undertake to sign all the documentation necessary for establishment of the Vilnius Public Attorneys Office and make contribution to the capital of the Vilnius Public Attorneys Office.
5. The Ministry of Justice of the Republic of Lithuania and the public institution Open Society Fund of Lithuania shall undertake to prepare all other necessary documents related to establishment of the Vilnius Public Attorneys Office.
6. The Ministry of Justice of the Republic of Lithuania shall undertake to approach

the Government of the Republic of Lithuania regarding the transfer of premises located at Kastonu st. 3, Vilnius, to the Vilnius Public Attorneys Office on the basis of the loan-for-use.

7. The public institution Open Society Fund of Lithuania shall undertake to cover incorporation expenses of the Vilnius Public Attorneys Office, and render financial support to cover equipment and activity expenses, separately concluding the support agreement with the Vilnius Public Attorneys Office drafted by the public institution Open Society Fund of Lithuania.
8. To establish the activities of the Vilnius Public Attorneys Office for an indefinite duration.
9. Disputes arising among the founders shall be settled by way of negotiations or, upon failure to reach an agreement, in court.
10. To authorize Linas Sesickas, the assignee of the founder's public institution Open Society Fund of Lithuania, to represent Vilnius Public Attorneys Office in all matters related to establishment and incorporation of the said Attorneys Office, to conclude transactions, except those stated in Item 11 of this Agreement, to open bank accounts on behalf of the Vilnius Public Attorneys Office, and to summon incorporation general meeting of the Vilnius Public Attorneys Office in not less than thirty days from the signature of the Corporation Agreement herein.
11. To authorize Audrone Bugeleviciene, the assignee of the founder's Lithuanian Bar Council, to conclude loan agreements on behalf of the Vilnius Public Attorneys Office with the Ministry of Justice of the Republic of Lithuania and the support agreement with the public institution Open Society Fund of Lithuania.
12. This agreement is concluded in four copies, one of which shall go to each of the founders as well as the registrar.

Founders:

Secretary of the Ministry of Justice of the

Republic of Lithuania

Rimvidas Kugis

Deputy Chairman of the Lithuanian Bar Council

Audrone Bugeleviciene

Director of the Public Institution Open Society

Foundation of Lithuania

Diana Vilyte

Statute of the Vilnius Public Attorneys Office, 2002

1. GENERAL PROVISIONS

1. The public institution Vilnius Public Attorneys Office (hereinafter referred to as the “Vilnius Public Attorneys Office”) is a not-for-profit organization, founded and functioning following the Civil Code of the Republic of Lithuania and the Law on Public Institutions of the Republic of Lithuania.

2. The objective of the Vilnius Public Attorneys Office is to organize, coordinate, and finance state-guaranteed legal aid in interrogatory and investigation bodies of Vilnius City and District, Vilnius City and District County Courts, Vilnius District Court, Vilnius District Administrative Court, Lithuanian Appeal Court, Lithuanian Chief Administrative Court, and Lithuanian Supreme Court.

3. The activities of the Vilnius Public Attorneys Office shall be organized pursuant to the Constitution of the Republic of Lithuania, Law on Public Institutions of the Republic of Lithuania, Law on Advocacy of the Republic of Lithuania, Law on the State-Guaranteed Legal Aid of the Republic of Lithuania, other laws, resolutions of the Government of the Republic

of Lithuania, these statutes (hereinafter referred to as the “Statute”), and other legal acts.

4. The Vilnius Public Attorneys Office is a legal body that has activity initiative and decision-making freedom established by laws. The Vilnius Public Attorneys Office has a stamp with the title and bank accounts. The objective of the activities of the Vilnius Public Attorneys Office shall not be profit-oriented. The Vilnius Public Attorneys Office cannot distribute the received profit to the founders (stakeholders).

5. The Vilnius Public Attorneys Office is a public institution of limited civil liability. In accordance with its liabilities, it shall be liable only by its own capital. The Vilnius Public Attorneys Office shall not be liable for liabilities of founders (stakeholders) or employees. The founders (stakeholders) and employees of the Vilnius Public Attorneys Office shall not be liable for liabilities of the Public Attorneys Office.

6. The residence of the Vilnius Public Attorneys Office is located at Kastonu st. 3, Vilnius, Republic of Lithuania.

7. The founders of the Vilnius Public Attorneys Office are the Ministry of Justice of the Republic of Lithuania, Lithuanian Bar Council, and the public institution Open Society Fund of Lithuania.

8. The financial year of the Vilnius Public Attorneys Office shall be a calendar year.

9. The duration of activities the Vilnius Public Attorneys Office shall be indefinite.

2. OBJECTIVE AND FIELD OF ACTIVITY OF THE VILNIUS PUBLIC ATTORNEYS OFFICE

10. The objective of the Vilnius Public Attorneys Office is to secure provision of state-guaranteed legal aid, i.e., legal activity (code: 74.11).

11. Seeking its objective, the Vilnius Public Attorneys Office shall organize, coordinate, and finance state-guaranteed legal aid in the interrogatory and investigation bodies of Vilnius city and district, Vilnius city and district county courts, Vilnius District Court, Vilnius District Administrative Court, Lithuanian Appeal Court, Lithuanian Chief

Administrative court, and Lithuanian Supreme Court.

3. RIGHTS AND OBLIGATIONS OF THE VILNIUS PUBLIC ATTORNEYS OFFICE

12. In order to implement the objective and activities set in the Statute, the Vilnius Public Attorneys Office may:

- 12.1. purchase or acquire otherwise the property necessary for its activities, manage it, use and dispose with it in the manner prescribed by laws and these statutes, conclude other transactions, and undertake obligations necessary for execution of the activities set in this Statute;
- 12.2. hold bank accounts;
- 12.3. cooperate with local and foreign stakeholders;
- 12.4. render and receive charity and support;
- 12.5. determine its organizational structure, and modify it;
- 12.6. use funds to implement the objectives and goals set in the Statute;
- 12.7. have other rights, unless they contradict laws of the Republic of Lithuania.

13. The Vilnius Public Attorneys Office has obligations, prescribed by laws.

4. STAKEHOLDERS OF THE VILNIUS PUBLIC ATTORNEYS OFFICE, THEIR RIGHTS AND OBLIGATIONS

14. The founders of the Vilnius Public Attorneys Office—the Ministry of Justice of the Republic of Lithuania, Lithuanian Bar Council, and the public institution Open Society Fund of Lithuania—shall become stakeholders of the Vilnius Public Attorneys Office (hereinafter referred to as the “Stakeholders”) as of the day having made the contributions. All stakeholders shall have the same property and non-property rights and obligations.

15. Natural and legal persons may also become stakeholders after submission of a written application and receipt of the agreement of the general meeting and also after having made monetary and non-monetary contributions to the capital of the Vilnius Public Attorneys Office. The stakeholders shall acquire all property and non-property rights and obligations, having registered increase of the capital of the Vilnius Public Attorneys Office in the pre-

scribed manner. Procedure and terms of the admission of new stakeholders and payment of their contributions to the capital of the Vilnius Public Attorneys Office shall be set by the general meeting.

16. Non-property rights and obligations of the stakeholders:

16.1. to take part in the general meetings with a decisive vote;

16.2. to get information on the activities of the Vilnius Public Attorneys Office;

16.3. to appeal at court in relation to decisions made by the bodies of the Vilnius Public Attorneys Office, if they would contradict the laws, other legal acts, this Statute;

16.4. to authorize another person to vote for him or her at the general meetings.

17. Property rights of the stakeholders:

17.1. to get part of the capital in case of liquidation of the Vilnius Public Attorneys Office in the manner prescribed by laws;

17.2. to sell or transfer otherwise his or her own share of the capital to other persons in the manner

prescribed by laws and this Statutes. The right of priority to acquire the transferred part of the capital shall be retained by other stakeholders of the Vilnius Public Attorneys Office. In case there should be a request to acquire the transferred part of the capital from two stakeholders of the Vilnius Public Attorneys Office, they shall acquire this right on equal basis.

18. The rights of the state or municipal institutions, which have transferred the capital on the loan basis to the Vilnius Public Attorneys Office, are set in the agreement between the state or municipal institutions and the Vilnius Public Attorneys Office.

19. The stakeholders shall not have the right to demand to pay back their part of the capital, except in the case of liquidation of the Vilnius Public Attorneys Office.

20. The stakeholders may also have other property and non-property rights, which do not contradict laws of the Republic of Lithuania, other legal acts, and these statutes.

5. MANAGEMENT OF VILNIUS PUBLIC ATTORNEYS OFFICE

21. The bodies of Vilnius Public Attorneys Office shall be the general meeting of partners, the Board and the monitor.

22. The general meeting shall be the highest body of Vilnius Public Attorneys Office. The partners shall be entitled to cast the deciding vote at the general meeting. Irrespective of the share in the capital of Vilnius Public Attorneys Office, every partner shall have one vote at the general meeting. Where the number of votes taken is even, the Ministry of Justice of the Republic of Lithuania shall have the deciding vote.

23. The general meeting of partners shall exercise its jurisdiction to do the following:

- 23.1. to amend and supplement the Articles of Association;
- 23.2. to determine the major directions and methods for conducting the activities of Vilnius Public Attorneys Office as well as for the procedure of funding;
- 23.3. to appoint and dismiss the monitor;
- 23.4. to form the board, appoint and dismiss the chairman of the

board and its members;

- 23.5. to approve an auditor, to set down the conditions of payment for services and the size of payments;
- 23.6. to approve the annual financial accountability, take decisions on the use of income for engaging in the work of Vilnius Public Attorneys Office;
- 23.7. to reorganize, restructure, or liquidate the Vilnius Public Attorneys Office;
- 23.8. to address the issues concerning the transfer of long-term property belonging to the Vilnius Public Attorneys Office by the right of ownership, the rent or use of this property in order to secure the performance of obligations of the third party; and
- 23.9. to address the other issues according to the procedure established by the law and these Articles of Association.

24. The monitor shall summon the regular general meeting of Vilnius Public Attorneys Office on an annual basis once every third month from the end of the financial year.

25. The extraordinary general meeting

shall be summoned at the request of the partners, the members of the board or the monitor. The person who expresses a wish to summon an extraordinary general meeting shall have to submit a request in writing to the monitor, who must summon the general meeting in a month from the day of the submission of the request to the monitor.

26. If the general meeting was not summoned according to the procedure established in the Law on Public Organizations of the Republic of Lithuania and in these Articles of Association and at least one partner, monitor, auditor, or some other interested person addressed the court because of that, the general meeting may be summoned according to the court decision.

27. The notification of the general meeting to be summoned and its draft agenda shall be sent to the partners not later than 7 (seven) working days prior to the date of the general meeting.

28. The general meeting may adopt resolutions if more than a half of its partners are present. The resolutions of the general meeting shall be passed by a simple majority vote of the partners who are present at the general meeting, except for the issues defined in sub-

clauses 23.1, 23.6, and 23.8 of these Articles of Association.

29. The resolutions on sub-clauses 23.1, 23.6, and 23.8 of these Articles of Association shall be passed by at least a two-thirds majority vote of all partners present at the general meeting. Where the partner that is properly notified of the date of the general meeting is not able to attend or refuses to attend the meeting twice in a row, the resolution on the issues defined in sub-clauses 23.1, 23.6, and 23.8 of these Articles of Association shall be passed by at least a two-thirds majority vote of all the partners present at the general meeting.

30. The partners shall appoint the chairman of the general meeting by a simple majority vote. The general meetings shall be recorded. The chairman and the secretary of the general meeting shall sign the minutes of the meetings.

31. The meetings shall be summoned once again in accordance with the agenda of the meeting that did not take place, and the partners shall be notified of the general meeting to be summoned according to the procedure established in the Articles of Association on the summoning and notification of the general meeting.

32. The Board of the Vilnius Public Attorneys Office shall be a collegial management institution that is set up following the decision of the general meeting of shareholders. The board shall consist of five members to be appointed by the general meeting of shareholders.

33. The chairman of the board shall be in charge of the board. The general meeting of partners shall be entitled to appoint the chair from the board members or dismiss the chair. The board chairman may resign of his or her own free will after submitting a request to the monitor of the Vilnius Public Attorneys Office, who then must summon an extraordinary meeting of partners.

34. The board shall exercise its jurisdiction to do the following:

34.1. to set the salaries of the employees of Vilnius Public Attorneys Office;

34.2. to address the issues related to the conclusion of agreements on legal assistance with the lawyers that are included in the list of practicing solicitors;

34.3. to annul legal acts adopted by the monitor if they contradict the law, other legal acts, or these Articles of Association;

- 34.4. to determine the conditions, methods, and means of the state-guaranteed legal assistance that is offered by the Vilnius Public Attorneys Office;
 - 34.5. to determine the form of the organization of work at the Vilnius Public Attorneys Office in order to render the state-guaranteed legal assistance in a more rational way;
 - 34.6. to classify information that is offered to the society on the activities of this public organization; and
 - 34.7. to address other issues that were delegated by the general meeting to the monitor to settle or that were raised by the monitor of the office.
35. The board shall operate in accordance with the works regulations that were prepared by the board and then adopted by the general meeting of partners. The board shall be responsible for the decisions taken, if they cause damage (a loss) to this public organization.
36. The board chairman shall organize the sittings of the board on his or her own or at the initiative of one of the board members. The monitor shall be entitled to participate in the board sittings.
37. The general meeting of partners shall settle the issues of remuneration of the board members.
38. The monitor shall organize and perform the operational activities of the Vilnius Public Attorneys Office. The general meeting shall appoint and dismiss the monitor by passing a resolution. The general meeting shall approve the duties of the monitor.
39. The monitor shall have the following rights and obligations:
- 39.1. to accept and dismiss the chief financier (accountant) and other employees (the same person or persons related by the ties of kinship or marriage—parents, step-parents, spouses, brothers, sisters, children, spouse's brothers, sisters, parents and children—may not carry out the duties of the monitor and the chief financier, or accountant; a legal body may carry out the functions of the chief financier);
 - 39.2. to determine the duties of the employees of the Vilnius Public Attorneys Office;
 - 39.3. to organize the implementation of resolutions passed by the general meeting and the board;

- 39.4. to represent the Vilnius Public Attorneys Office before court, government, and management authorities as well as to represent it while dealing with natural and legal persons; and
- 39.5. to carry out other functions that are necessary to ensure the activities of the Vilnius Public Attorneys Office.

6. FUNDS AND PROPERTY OF THE VILNIUS PUBLIC ATTORNEYS OFFICE

40. The sources of funds of the Vilnius Public Attorneys Office are the following:
 - 40.1. funds allocated by the stakeholders;
 - 40.2. target appropriation of the state and municipal budgets;
 - 40.3. appropriations of Lithuanian and foreign funds;
 - 40.4. funds, received in a form of charity, support, gift, also funds received on the basis of a will or borrowed funds;
 - 40.5. other legally acquired funds.
41. The capital of stakeholders shall be composed of the three litas. Each stakeholders shall contribute one litas.
42. Transferred property is foreseen in

loan-for-use agreements, concluded between the Vilnius Public Attorneys Office and the provider of the loan-for-use.

43. The capital of the stakeholders may be increased only by additional contributions and a reappraisal of the property of the Vilnius Public Attorneys Office. Due to the reappraisal of the property of the Vilnius Public Attorneys Office, the capital of the stakeholders shall be increased (decreased) proportionally to the owned share of the capital at the Vilnius Public Attorneys Office, while the increase (decrease) of the capital of the stakeholders shall be distributed proportionally to the shares of the capital of the stakeholders.

44. The estimate of expenses shall be developed for use of funds, received from the Lithuanian state and municipal budgets and Lithuanian and foreign funds. The estimate of expenses shall be developed for the use of funds, received from other sources, in case it is required by the subjects, which provided the funds.

45. The funds of the Vilnius Public Attorneys Office received in a form of charity or support, also funds received on the basis of a will, shall be used on the basis of the order of a charity (support) provider or a testator for the activities set

in the Statutes. These funds shall be kept in a separate account of the Vilnius Public Attorneys Office.

46. The funds received from the state and municipal budgets shall be kept in a separate fund account of the Vilnius Public Attorneys Office.

47. The stakeholders do not have the right to get disbursements from net income of the Vilnius Public Attorneys Office for the membership in the Vilnius Public Attorneys Office or for the holding share in the capital of the Vilnius Public Attorneys Office. None of the persons may get any disbursements from the funds of the Vilnius Public Attorneys Office if they are not related to the implementation of the task and the objective set in the Statute.

48. The decisions with regard to the disposal of short-term property shall be made by the monitor.

7. CONTROL OF FINANCIAL ACTIVITIES

49. The financial control of the activities of the Vilnius Public Attorneys Office shall be periodically carried out by the auditor, approved by the general meeting, and the conditions of payment and the

fee for his or her services shall be set by the general meeting as well. The auditor shall carry out the checkup of accounting and financial activities of the Vilnius Public Attorneys Office, and evaluate perspectives. The auditor shall report to the general meeting.

8. PROCEDURE OF REORGANIZATION, RESTRUCTURING, AND LIQUIDATION OF THE VILNIUS PUBLIC ATTORNEYS OFFICE

50. The Vilnius Public Attorneys Office shall be reorganized, restructured, and liquidated in the manner prescribed by the Civil Code of the Republic of Lithuania and the Law on Public Institutions of the Republic of Lithuania.

FOUNDERS:

Secretary of the Ministry of Justice of the Republic of Lithuania

Rimvidas Kugis

Deputy Chairman of the Lithuanian Bar Council

Audrone Bugeleviciene

Director of the Public Institution Open Society Foundation of Lithuania

Diana Vilyte

Legal Aid Agreement Between the Vilnius Public Attorneys Office and Individual Attorneys for Provision of Legal Assistance, 29 April 2002

LEGAL AID AGREEMENT

No. 1

29 April 2002

Vilnius

This Agreement is concluded between the public institution Vilnius Public Attorneys Office, represented by _____, on the basis of the authorization of the general stakeholders' meeting of the public institution Vilnius Public Attorneys Office, held on 9 April 2002 (hereinafter referred to as the "Attorneys Office"), and the lawyer _____ (hereinafter referred to as the "Lawyer"), personal code: _____, address: _____, Lithuania.

1. SUBJECT OF THE AGREEMENT

On the basis of this Agreement, the Attorneys Office authorizes and the Lawyer undertakes in accordance with the valid laws to provide legal aid in penal cases according to the assignment, to organize and coordinate provision of

legal aid in the process of penal cases in cases provided by laws in the pre-trial investigation bodies and the courts of all instances.

2. RIGHTS AND DUTIES OF THE PARTIES

The Lawyer shall undertake:

2.1. in accordance with the valid laws to provide legal aid in penal cases only according to the assignment or the client request and to carry out the duties, provided in this Agreement, not less than 40 hours during the working week. In case the Lawyer should provide legal aid and carry out duties, provided in this Agreement, less than 40 hours during the working week, his or her fee shall be reduced in proportion to the number of non-working hours.

2.2. to keep account of working time and once a month submit to the Attorneys Office the monthly report on the working hours.

The Attorneys Office shall undertake:
2.3. to provide the Lawyer with adequate working conditions, including free working place.

2.4. to cover all expenses, related to execution of duties of the Lawyer, indicated in this Agreement (including, but not restricted by transport costs, communication, qualification promotion expenditures, etc.).

2.5. to pay additionally the lacking sum in order to enable the Lawyer receive monthly fee of 3,828 litas for provision of legal aid in criminal cases according to the assignment. This lacking sum shall be added to the sum, which is received by the Lawyer, for provision of legal aid in criminal cases according to the assignment in the manner prescribed by law.

3. FEE OF THE LAWYER

Fee of the Lawyer includes income tax of natural persons, social insurance tax, health insurance tax, civil liability insurance tax of the Lawyer, attorney's membership fee in the Lithuanian Bar Council according to the legal requirements, which are effective at the moment of the conclusion of the

Agreement, and after the change of which the said taxes are subject to revision in order to secure the Lawyer's monthly fee of 3,000 litas after deduction of all taxes. The fee shall be transferred to the Lawyer's account by the 10th day of every month.

4. VALIDITY OF THE AGREEMENT

4.1. This Agreement shall enter into force on 2 May 2002 and shall be valid until 2 May 2003.

4.2. This Agreement may be terminated on the initiative of either of the parties, with a not less than 30-calendar-day advance notice of another party, if the parties do not agree otherwise.

5. DISPUTE SETTLEMENT ORDER

All disputes arising from this Agreement or related to this Agreement shall be solved by way of negotiations. In the event of failure to reach an agreement by way of negotiations in one month since the beginning of the dispute, it shall be settled in the manner prescribed by laws of the Republic of Lithuania.

6. OTHER PROVISIONS

6.1. Only written amendments and/or supplements of the agreement and those signed by both parties of the agreement shall be in force.

6.2. The agreement is concluded in 2 copies, one copy for each of the Agreement parties.

SIGNATURES OF THE PARTIES:

**Bar Council Decision Confirming
the VVAK Lawyers as a Joint Practice
(No Longer as Solo Practitioners in One Physical Space)**

LITHUANIAN BAR ASSOCIATION

EXTRACT OF THE MINUTES

No.8

Meeting of the Bar Association

DISCUSSED: registration of the Attorney Office

DECIDED:

To register the Public Defender Office of Vilnius, place of location: Kastonu str. 3, Vilnius. To confer on the Public Defender Office of Vilnius the registration code 9400514.

Chairman

Secretary

True

Secretary

20-09-2002

O. Cepulyte

/signature/

/round seal/

Legal Aid in the Netherlands

Application for Assignment in Criminal Case

To: Legal Aid Office
P.O. Box 70503
5201 CD 's-Hertogenbosch

Particulars of legal services provider

Name : _____

Registration number : _____

Address : _____

Postal code and town/city : _____

Telephone : _____

Name of firm : _____

E-mail : _____

1. Particulars of applicant

a. Name and initials:

(if married woman, also state maiden name)

b. Date of birth: _____ (day/month/year)

c. Address:

d. Postal code and town/city:

e. Sex : Man Woman

f. Tax/social security registration number: _____

2. Financial particulars

Comments about:

a. The statement of income and capital:

*Is there a medical expenses insurance contribution that is not specified on the wage slip?

If so, specify amount per month: € _____ (please send specification of the employer)

b. If the applicant or his or her partner carries on an independent profession or business, would you please forward the most recent balance sheet and profit-and-loss account and a copy of the income tax return form.

3. Particulars of case

a. Description of the case:

b. Facts and circumstances of the legal problem that justify assignment of a legal representative (see Section 24, Legal Aid Act):

c. Prosecution Service number(s) :

(send copy summons/notification)

d. Court/other authority :

e. Date of court session :

Are there connected cases within the meaning of Article 21 (1) of the Legal Aid Fees Decree 2000¹⁾

No Yes, specify number²⁾ and give further particulars:

g. Is the applicant claiming the benefit of the “anti-accumulation” provision on the grounds of assignments recently issued to the applicant personally subject to payment of an own contribution?

not applicable previous assignments under number(s):

h. Is the applicant claiming the benefit of the “anti-accumulation” provision on the grounds of assignments recently issued to the partner of the applicant?

If so, specify name and date of birth of partner:

Name: _____

Date of birth: _____

4. Annexes

statement concerning income and financial position, including proof of income

most recent proof of benefit under National Assistance Act (ABW) or Asylum-Seekers Reception Scheme (ROA) and prescribed statement by applicant

(in the case of self-employed person) the most recent balance sheet and profit-and-loss account and copy of the income tax return

other documents, namely:

copy of summons

Date of application:

Signature of legal services provider:

NOTES

1 Article 21 (1), Legal Aid Fees Decree 2000:

Article 21

1. Cases that have been joined, or that are dealt with simultaneously, consecutively, or virtually consecutively at the court session as referred to in Article 18 and for which one legal services provider has been assigned—or for which two or more legal services providers have been assigned provided that they form part of the same partnership and in so far as the cases are related by their very nature—shall be deemed to be connected criminal cases.

2 Apply for an assignment for each applicant and/or for each case, and send a copy of all summonses/notifications.

Application for Assignment in Civil/Administrative Case

To: Legal Aid Office
P.O. Box 70503
5201 CD 's-Hertogenbosch

Particulars of legal services provider

Name : _____

Registration number : _____

Address : _____

Postal code and town/city : _____

Telephone : _____

Name of firm : _____

E-mail : _____

1. Particulars of applicant

a. Name and initials:

(if married woman, also state maiden name)

b. Date of birth:

_____ (day/month/year)

c. Address:

d. Postal code and town/city: _____

e. Sex : Man Woman

f. Tax/social security registration number: _____

2. Financial particulars

Comments about:

a. The statement of income and capital: _____

*Is there a medical expenses insurance contribution that is not specified on the wage slip?

If so, specify amount per month: € _____ (please send specification of the employer)

b. If the application concerns a divorce, is maintenance already actually paid and received?

No

Yes, for children € _____ net per month € _____

gross per month € _____

for partner € _____ net per month € _____

gross per month € _____

c. If the applicant or his or her partner carries on an independent profession or business, would you please forward the most recent balance sheet and profit-and-

loss account and a copy of the income tax return form.

Particulars of case

plaintiff

defendant

a. Description of the nature of the case and the area of law to which it relates:

b. Facts and circumstances of the legal problem that justify assignment of a legal representative (see Section 24, Legal Aid Act):

c. Interest:

If it concerns a claim that can be valued in cash, also state below the amount and the disputed part:

€ _____

d. Counter-party: _____

e. Type of legal aid: proceedings advice not yet known

f. Court or other authority:

g. If (for the time being) only advice, specify the nature and estimated length of the work: _____

h. Is the applicant claiming the benefit of the “anti-accumulation” provision on the grounds of assignments recently issued to the applicant personally subject to payment of an own contribution?

not applicable previous assignments under number(s):

i. Is the applicant claiming the benefit of the “anti-accumulation” provision on the grounds of assignments recently issued to the partner of the applicant?

If so, specify name and date of birth of partner:

Name: _____

Date of birth: _____

Are one or more clients assisted by you or an office colleague in this case?

No Yes (specify any assignment numbers and/names of other clients)

Are you also acting in this case for the partner or other members of the applicant's family?

No Yes

Can the legal aid costs be recovered from third parties?

No Yes, explanation:

Do you wish to have a provisional assignment on account of a “substantial financial interest”?

No Yes, explanation:

Annexes

statement concerning income and financial position, including proof of income

most recent proof of benefit under National Assistance Act (ABW) or Asylum-Seekers Reception Scheme (ROA) and prescribed statement by applicant

(in the case of self-employed person) the most recent balance sheet and profit-and-loss account and copy of the income tax return

other documents, namely:

Procedure to Apply for Legal Aid Certificate

NETHERLANDS

A client is free to contact any lawyer who is registered with one of the five (regional) Legal Aid Boards. Alternatively, a client may approach a Legal Advice and Assistance Centre. Such centers are situated in every large Dutch town.

Step 1: The client approaches the lawyer of his or her choice or a Legal Advice and Assistance Centre.

Step 1a: If the client approaches a Legal Advice and Assistance Centre, he or she is entitled to half an hour's free advice, or three and a half hours' advice for 13.50 euros. If the case takes more time to process, it is dealt with in the manner indicated from step 2 on.

Step 2: The client explains his or her problem, and the lawyer estimates whether or not the client has a case. The lawyer also checks whether he or she is permitted to deal with this type of case, given the substantive criteria applied by the Legal Aid Boards (tests of the lawyers' expertise in specific areas of law).

Step 3: The lawyer informs the client about the means test that the client has to pass. To this end, the client has to fill out a form providing information

about his or her personal circumstances (whether or not he or she is cohabiting) and financial means (income, capital, and liabilities), on the basis of which it is decided whether the client is entitled to legal aid. The client has to sign the form in order to validate it.

Step 4: The client hands the validated form to the lawyer.

Step 5: The lawyer lodges a legal aid application with the Legal Aid Board. In addition, the lawyer has to explain to the board what kind of services he or she will provide to the client (i.e., assistance with legal proceedings, or merely the provision of advice).

Step 6: The application is then assessed by the Legal Aid Board, which examines the type of problem and its legal grounds. In addition, if the client qualifies for legal aid both on substantive grounds and in accordance with the financial criteria, the Legal Aid Board computes the financial contribution the client has to pay under the statutory scheme.

Step 7: Leaving aside eventual correspondence between the board and the lawyer in order to clarify the lawyer's case, the decision taken by the board is

forwarded to both the lawyer and the client. If legal aid is granted, the lawyer can proceed with the case as soon as the client has paid his or her own contribution. If the client applies for a second time within a period of twenty-six weeks, he or she is entitled to a reduction of the amount that must be paid (this is also true under the statutory scheme). If the application for legal aid is not granted by the board, the client and the lawyer can appeal.

Step 8: Once the case is over, the lawyer sends both the original decision (see step 7) and an invoice to the board. On the back of the form, the lawyer stipulates the kind of services he or she has actually provided and the amount of time spent. If applicable, the lawyer must also indicate the type of legal authority to which the case has been presented and submit documents relevant to the proceedings (e.g., a court

judgment).

Step 9: Once the invoice has been completed, the board determines the lawyer's fee according to a statutory scale. In fact, a lawyer is able to calculate beforehand how much he or she will receive under the scheme, less the client's own contribution. If a lawyer complies with some extra-quality standard set by the board, he or she will receive an extra allowance on top of the normal fee. The lawyer receives a copy of the calculation, against which he or she may appeal.

Step 10: The lawyer is paid by the board, which subtracts the amount from the quarterly advance paid by the board. The amount of the advance paid to the lawyer is based on the number of legal aid certificates issued by the board in the previous year. (It is also possible for a lawyer to arrange to be paid once a month, but in this event he or she

Table: Income and contributions, since 1 January 2003 (in euros)

Net income per month	Client's contribution	Net income per month
single	since 1 January 2003	married or single with child(ren)
000–805*	64	0000–1,130*
805–867	102	1,131–1,218
868–915	150	1,219–1,286
916–951	197	1,287–1,338
952–997	243	1,339–1,404
998–1,040	284	1,405–1,465
1,041–1,079	328	1,466–1,521
1,080–1,123	371	1,522–1,584
1,124–1,170	417	1,585–1,650
1,171–1,212	454	1,651–1,711
1,213–1,254	504	1,712–1,770
1,255–1,471	551	1,771–2,067

* No contribution is owed in criminal cases

does not receive an advance.)

Capital:

single: less than 6,370 euros

married or single with child(ren): less than 9,100 euros

For the purpose of calculating capital, the first 65,344 euros of the equity in an owner-occupied home (i.e., the value of the home less the outstanding mortgage) is not counted as capital.

**If you do not enter an amount,
do not cross out the boxes but
leave them open!**

Particulars of monthly income

	<u>of applicant</u>	<u>of your partner</u>
12. Net earned income	€ _____	€ _____
13. Net income from pension and/or state pension (AOW)	€ _____	€ _____
14. Maintenance received from partner or ex-partner	€ _____	€ _____
15. Child maintenance received	€ _____	€ _____
16. Net income from benefits	€ _____	€ _____
17. Amount received from voluntary (private) medical expenses insurance	€ _____	€ _____
18. Other income (e.g., additional earnings)	€ _____	€ _____
19. Are you self- employed with your own occupation or business		

no yes

If yes, please refer to the explanatory notes to find out which documents you should send with the application

Particulars of capital

20. Money in a bank or giro account, savings and cash total	€ _____
21. Securities	€ _____

If you have a joint household, you should add up the amounts of your assets and property and of your partner.

Property

Owner-occupied
Home

Other property

22. Years of purchase _____
23. Purchase price € _____ € _____
24. Present unoccupied value € _____ € _____
25. Amount of mortgage yet to be repaid € _____ € _____

Other capital

26. Accumulated capital in a savings, investment and/or endowment mortgage € _____ € _____
27. Single-premium or annuity policies: purchase price € _____ Date of Purchase: _____
28. Other assets € _____ Type: _____
- € _____ Type: _____

If you have a joint household, add up the expenses of yourself and the person with whom you run the household.

**Particulars of fixed monthly
expenditure**

29. Premium for private medical expenses insurance and supplementary contribution € _____

30. Amount of maintenance paid for ex-partner € _____

31. Amount of maintenance paid for children € _____

32. Special expenditures € _____

Specify the special expenditures here

The applicant (the undersigned) declares:

that all particulars have been provided fully and truthfully; that he/she is aware that the particulars will be included in the client records of the Legal Aid Board; that he/she is aware that the Board can obtain information from various authorities (including the tax authorities) in order to check the particulars; that he/she is aware that the provision of incorrect particulars or the concealment of information may result in cancellation of the assignment of a lawyer or in criminal prosecution.

You must submit this application to the town hall or office of the sub-municipality in your own place of residence. If you do not know exactly where you should be, telephone your local council beforehand.

You must bring along original papers/documents to support all amounts filled in.

Consult the instructions for completion in order to see what papers/documents you need to show.

The declaration below must be completed by the municipality.

1. The particulars concerning the person of the applicant have been checked by reference to the population register/municipal personal records database.
- 2 (a) The particulars concerning income, capital and expenditure of the applicant and his or her partner have been verified by reference to original papers/documents produced to me.
- 2 (b) The particulars concerning income, capital and expenditure of the applicant and his or her partner have been verified by reference to original papers/documents produced to me, with the exception of the following particulars:
3. I have deleted any boxes not completed.

Remarks

Date

Mayor of

For the Mayor

Signature

Space for municipal stamp

This declaration has been completed in accordance with the <Legal Aid Act>

* *Onleesbaar*

INSTRUCTIONS FOR COMPLETION OF
THE STATEMENT OF INCOME AND
CAPITAL
(VIV)

A word at the outset

Before completing the form read the notes carefully. In this way you can avoid making unnecessary mistakes. No deletions may be made on the form. If you do not complete a box, you must leave it empty.

You are in receipt of social security benefit

If you are in receipt of benefit or other provisions under the Asylum-Seekers Benefits Scheme (RVA) and have no other income, you do not require a statement of income and capital. However, you must in such cases sign a statement that you live exclusively from your benefit.

You must also submit your last original benefit slip together with the statement. This is in principle sufficient. Sometimes the Legal Aid Board may require further particulars.

You can find more information on this subject and a model statement in the enclosed brochure.

Documentary evidence

You must be able to prove all amounts which you specify. At the end of these explanatory notes you will find a list of documents/papers which the municipality needs. The Legal Aid Board can request you for further particulars or proof.

These instructions for completion follow the numbering of the questions on the form.

A. Tax/social security registration number

You will find your tax/social security registration number on your pay slip or benefit slip. If you do not know your number, you may request it from the tax authorities.

Questions 1-11

Personal particulars of applicant an

Partner: In answer to these questions you complete the personal particulars of yourself and any partner you may have. Most of the questions are self-explanatory. A few of the terms are briefly explained below.

Name

Here you enter your name as shown in the population register. If you are or have been married, you should enter your own name here (your maiden name). In some countries only one name is used, e.g. the

name of the husband as, for example, in Turkey. In that case you enter that name.

Address

Here you enter the address where you actually live. You should do this even if it is not the address at which you are registered in the municipal records.

Joint household

You have a joint household if you live with another person who is not your relative. You are therefore both living at the same address. It does not make any difference whether you are married.

Single

You are, of course, single if you do not have a joint household with someone else. But you are also regarded as single by law if you live with relatives of the first or second degree of consanguinity (parents, children, brothers or sisters).

Living with children under the age of 18

You should tick this box only if you will

have one or more minor children who live in your household and for whom you receive child allowance. N.B. you must also indicate whether you have a joint household or are single.

Particulars of partner

If you have a joint household you should also complete questions 9-11.

If you have a joint household you should also complete questions 9-11.

Questions 12-19

Particulars of monthly income

You need NOT mention the following income:

- one-off gratuities or bonuses paid by your employer (e.g. an end-of-year bonus);
- study allowances which you receive for a minor child;
- holiday allowances;
- rent subsidy;
- child allowance;
- income from capital (interest);
- benefits which you receive under the Owner-Occupied Homes Financial Support Order (e.g. if you have bought with the help of a subsidy);

- benefits which you receive under the Home-Related Subsidies Decree (e.g. for a listed building);
- allowances paid under the National Standardisation Decree (i.e. special benefits for people on minimum income);
- special-purpose allowances (e.g. for special living expenses such as dietary costs, medical facilities and medical aids).

N.B. If you have a joint household with your partner, you must specify the particulars of your partner's income separately.

12. Net earned income (employment)

If you are in gainful employment you enter your net monthly income (wage/salary) here. An income paid for periods of four weeks should be converted to a monthly income. If you have varying income, for example as a result of overtime, you should submit your pay slips for the last three months. Your net income is shown on your pay slip. Regular gross allowances such as holiday allowances are counted as salary. If you do not have a fixed monthly income, you should convert your annual income into monthly amounts. In that case you take your total income for

the year preceding the date on which you complete the form and divide this amount by 12.

13. State old age pension (AOW) and/or other pension

Enter only net monthly amounts.

14. Maintenance received from partner/ex-partner

Usually you receive a monthly amount. If this is the case, enter this amount here. Certain costs may also be paid directly to third parties. Your partner/ex-partner may, for example, pay insurance premiums, tax assessments, interest on debts or mortgage installments. You should take the total of these amounts over a year and divide it by 12. In determining your financial means the Legal Aid Board will convert this income into net income.

15. Child maintenance received

Here you should enter the amount which you receive monthly. If certain costs are also paid on a regular basis for your children by your partner or ex-partner, you should take the total of the amounts over a year and divide it by 12.

16. Net benefit income

The benefits referred to here are benefits under, for example, the WW, RWW, WAO, AAW etc. You should also complete this box if you are in receipt of benefits under the ABW or RWW, in addition to your income. If your only source of income is ABW benefit, you need not complete this form.

17. Contribution towards premium for voluntary (private) medical expenses insurance

If you receive a fixed contribution towards the premium for your medical expenses insurance from your employer or another institution, you should enter the amount here. You must convert this amount to a monthly amount.

18. Other income (e.g. additional earnings)

Here you should enter income which you receive in addition to earnings from your 'ordinary' job or benefit. If the income is not received on a regular basis you must convert it to a monthly amount. You can enter the gross amount and the Legal Aid Board will calculate the net figures. In the case of income from the letting of residential or non-residential property, you should specify the amount which remains after deduction of costs. The Legal Aid

Board also takes account of the amount of the general levy discount for tax purposes which is not set off against, for example, salary or benefit. You can enter here the amount applicable to you and/or your partner (if any).

19. Are you self-employed with your own occupation or business?

If so, you must submit the following particulars to the Legal Aid Board with the request for assignment of a legal representative:

- the most recent financial statements of your business, i.e. the balance sheet and profit and loss account, including explanatory notes, together with the income tax/social security return and assessment;
- the most recent wealth tax return and assessment. On the basis of these documents the Legal Aid Board determines your income.

Questions 20-28

Particulars of capital

What must you treat as capital?

Whether you are eligible for legal aid depends not only on your income and that of your partner but also on your (joint) capital. For this purpose capital is

taken to mean both money and goods, for example savings, property (such as a house) or shares. If you are cohabiting, you should add your capital to that of your partner.

20. Bank and giro account, savings and cash

Here you should enter the total amount which is in these accounts and/or which you hold in cash.

21. Securities

If you own securities (shares, bonds etc.) you can request the bank to provide a statement of the total value.

Questions 22-25

Property

If you are the owner of property (real estate) you should enter the amounts here. In the first column you should enter the particulars of the home which you yourself occupy and in the next column the particulars of any other property. This may be a different home (e.g. a second home owned by you or by the person with whom you live) or a holiday home.

22 and 23. Year of purchase and purchase price

You can find the information about the

year of purchase and the purchase price in the notarial deed or other proof of purchase.

24. Present unoccupied value

Here you should enter the amount at which the property is valued in accordance with the most recent decision under the Property Valuation Act (WOZ).

25. Amount of mortgage yet to be repaid

Each year your mortgage company supplies a statement of the amount of the mortgage yet to be repaid. You should enter the specified residual amount of your mortgage here. If you have taken out other loans to finance a property in addition to or instead of a mortgage, you should also specify the residual amount of these loans.

Questions 26-28

Other capital

26. Accumulated capital in savings mortgage, investment mortgage and/or endowment mortgage

The statement which you receive from your mortgage company of your mortgage payments shows the amount of equity which you have accumulated or

saved. You should enter this amount. If necessary, you can ask your mortgage company to supply a written statement.

27. Single-premium or annuity policies

Here you should enter the purchase price and the purchase date.

28. Other capital

Various other possessions are also regarded by law as capital. You can enter these in reply to this question. Examples are: - claims against another person (for example if you have lent money); mortgage claims; money to which you are entitled from an inheritance.

The Legal Aid Board decides from case to case whether the possessions you enter should be treated as capital.

Questions 29-34

Particulars of fixed monthly expenditure

Not only your income and capital are important but also a number of items of fixed expenditure. The aim is, after all, to determine your financial means, in other words what you can afford. What expenditure you should enter here is self-

explanatory. If you have a joint household, you should add your fixed expenditure to that of your partner. Living expenses do not count for this purpose.

29. Premium for private medical expenses insurance and supplementary contribution for compulsory health insurance cover;

If you are privately insured, you should enter the total amount you pay each month. This is the premium for your whole family. If you are compulsorily insured, you should enter only the contributions you are required to make yourself (i.e. not the contribution deducted at source by your employer).

30. Maintenance paid for partner or ex-partner

This is a monthly amount. If you pay certain amounts regularly to third parties for your partner or ex-partner, you should convert this amount to a monthly figure.

31. Maintenance paid for children

See the notes on question 30.

32. Special expenditure

Here you have the space to specify any special expenditure. The expenditure should be out of the ordinary and great-

ly reduce your financial means. An example would be a contribution which the municipality recovers from you under the National Assistance Act (Algemene Bijstandswet).

You must send any recent proofs of payment. The Legal Aid Board determines whether the expenditure you have specified will be taken into account.

Signature

After you have checked whether you have answered the questions fully and correctly, you should sign and date the form.

Please note

If you do not complete the statement of income and capital in full or if you complete it incorrectly, this will delay the application for which you need the statement. Incomplete or incorrect entries may also mean that your application is refused or an assignment is cancelled. If the incorrect or incomplete entry is deliberate, this may result in criminal prosecution.

Documentary evidence

You must bring with you to the municipality the most recent, original items of proof of all data which you have entered

on the form. The following are examples of documentary evidence:

- proof of payment of benefit or pension scheme;
- proof of receipt or daily statements showing income other than that referred to above;
- daily bank and/or giro statements;
- daily savings account/book statements;
- a proof of ownership of securities issued by a bank; statement of the outstanding debt on a mortgage of your own property and a statement of accumulated capital under a savings or endowment mortgage; property tax assessment;
- proof of payment of maintenance for your ex-partner and children or proof of receipt of maintenance from your ex-partner;
- proof of contributions towards the living expenses of your ex-partner and children, other than those expenses referred to above;
- proof of payment of expenses for voluntary medical expenses insurance or proof of payment of the nominal premium under the Exceptional Medical Expenses Act (AWBZ) for the health insurance fund; a decision to recover national assistance and a proof of payment;
- proof of payment of special expenses.

After the municipality has checked everything, you will receive back your original documentary evidence.

Legal aid

If you need the statement of income and capital in connection with a request for assignment of a lawyer or other legal representative, you must submit to the Legal Aid Board not only the statement but also copies of proof of income.

Validity of statement

The statement of income and capital is valid only if the form has been checked and stamped by the municipality.

Your statement of income and capital is valid for a period of six months from the date on which it is stamped by the municipality. However, if your circumstances change during this period you must request a new statement.

PUBLIC INTEREST LAW INITIATIVE

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The Public Interest Law Initiative (PILI) is a center for learning and innovation that advances human rights principles through assisting in the development of a public interest law infrastructure. 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:

- **Access to Justice**

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. PILI's activities aim to broaden the availability of legal aid, improve the quality of legal aid representation, pro-

mote alternative legal aid delivery models, and strengthen civil legal aid mechanisms.

- **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.

- **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 the Open Society Justice Initiative, PILI administers 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.

INTERIGHTS

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'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.

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.

