



PROBONO

LEGAL AID

Research Project - South East European University

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PREFACE

Pro-bono legal aid can be considered as a way to make lawyers work for the benefit of the society, taking into consideration situations when they do not get the full financial payment that is usual for their profession. It can be considered as a way to increase the solidarity and humanism among people. But above all, it is an important manner to ensure the implementation of the right to access to justice, the right to counsellor and the right to a fair trial as fundamental human rights.

In this modern world where the general impression is that money rules, the principles of equity and justice sometimes are not as implemental as they should be. In poor countries the general principle of rule of law suffers from different problems, and one of this is the lack of possibilities for access to justice for persons who cannot afford to make their legal claim in front of a court due to the high expenses related to the judicial proceedings. From the human rights perspective, the right to access to justice is one of the most important rights of a person; therefore, promoting it becomes a very noble and justified goal. All civilized states have included in their legislation different possibilities for this category of persons in order to give them the opportunity to access the institutions that are meant to provide justice for everyone. The aim of this project was to find out how this is regulated in Macedonia and what more should be done in order to achieve the above mentioned principles. The general understanding is that people are very poorly informed about their rights and the opportunities to use these guaranteed rights. A certain regime of protection offered to poor people to access justice has always existed in Macedonia, and now there is a specific Law on free of charge legal aid, however there are ways to make it better through involving more institutions in this altruistic purpose.

The idea of this project was to provide a thorough analysis of the pro-bono legal aid concept, first of all theoretically, through comparing its implementation in countries that have longer experience in this field. On the other hand, choosing the Bar Association of RM as our partner, we intended to provide a distinguished relation among the theory and practice related to this issue. The experience of NGOs in this regard was also taken into account through engaging practitioners who shared their knowledge considering this issue. The project had its international

dimension through the experience shared by our colleagues from other universities and countries who helped us compare our experience with theirs' as well as with the experience of the international tribunals.

In this regard, as the coordinator of the project, I would like to thank first of all the President of the Board of SEEU, Prof. D-r Dennis Farrington, who was the supervisor of this project, for his continuous support and contribution. I would also like to thank the Research sector of the SEEU, including the Pro-rectors for research issues that have been on duty during these years: Prof. D-r Murtezan Ismaili and Prof. D-r Blerim Reka, as well as the Research Officers: Diturije Ismaili and Albulena Halili who have all shown a great support and help for implementing this project. I would also like to thank the Bar Association of RM, especially the President, Adv. Nenad Janicevic as well as the Vice-president, Adv. Shpend Devaja. This project was implemented as a partnership with the Bar Association of RM that contributed both through financial support as well as through a written contribution for the compilation.

I would also like to thank the contributors who wrote the articles and shared their viewpoints and experiences in this compilation: Zlat Milovanovic PhD, who has also lectured in the Faculty of Law, SEEU, Gentian Zyberi PhD and Ildir Peci PhD from the University of Utrecht who have added an international point of view regarding this topic, Gordan Kalajdziev PhD from the Faculty of Law at UKIM as well as Bekim Kadriu PhD from the State University of Tetova for their valuable and very useful contributions. I would also like to thank the colleagues from the Faculty of law – SEEU: Prof. Dr Ismail Zejneli – Dean of the Law Faculty, Emine Zendeli PhD, Ardit Memeti MA, Arta Selmani MA and Bekim Nuhija MA for their contributions.

I would also like to thank the Finance Office and the Computer Centre of SEEU for their support and help for the implementation of the project.

This project is intended to be understood as a research concerning pro-bono legal aid. However, the results should help us to recommit in struggles and efforts to establish a real clinical legal education system of providing legal aid that would function effectively in the Faculty of Law within our University.

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A NOTE ON PRO BONO WORK IN ENGLISH LAW SCHOOLS

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President of the Board of SEEU

Abstract

This Note is a short introduction to the pro bono work undertaken in English law schools, with a guide to further reading as an aid to establishing something similar in the Republic of Macedonia, having regard to the fact that the legal system is based on different principles.

Introduction

Pro bono publico, usually shortened to *pro bono* means ‘for the public good’, defined in the English Civil Procedure Rules 1998 (as amended) as ‘legal representation provided free of charge’ and is used here in the context of giving free legal advice to people who otherwise cannot afford it. In England, ‘pro bono’ work is promoted by the Free Representation Unit, the Solicitors Pro Bono Group operating through ‘Law Works’, and the Bar’s Pro Bono Unit.

One of the most well-known and useful means of pro-bono aid in England is that given by university law schools, usually through legal advice centres or law clinics, working with practising barristers (that branch of the legal profession which normally appears in court) and other agencies. All law schools which offer this service operate to essentially the same criteria. A good guide to these is the Legal Advice Centre (LAC) Handbook published on the Law Works website. There is a Joint Protocol for Pro Bono Legal Work, which sets standards for the conduct of pro bono advice. The relevant websites are in the Bibliography and the Protocol is in the Appendix to this Note.

University LACs offer students an opportunity to put the theory of law into practice by placing them in a real life setting engaged in a real situation where they have to give advice to clients and use this experience

as the basis for reflection. As well as benefiting clients, the Centres give law students the opportunity to develop their legal skills in a practice context, and thereby to maximise their employment prospects on graduation. So they are seen as one important element of legal education for those who wish to practise law. Apart from the traditional learning of law from constantly updated texts and legislation, including case law in the English legal system, other recent innovations include transactional learning environments (Maharg and Owen, 2007) which are a form of simulation of actual events.

How the system works

Cases are referred by the law clinic or other agencies to an advisory team consisting of an undergraduate (first cycle) law student, a postgraduate law student (who is either a trainee solicitor or a barrister, the two branches of the English legal profession), a member of the academic staff of the law school and, if appropriate, a practising barrister. The intention is that the client receives the same standard of advice, information and, if appropriate, representation expected from a professional lawyer.

The aim of the service is to give relevant and accurate advice, undertake legal research, advise on court procedures, help to complete legal forms, and in some cases, where appropriate professional indemnity insurance cover is in place, offer representation at disciplinary or grievance hearings, courts or tribunals in a number of areas of 'civil' or 'public' law. These areas include problems or disputes about employment, obtaining compensation for criminal injuries, housing issues, wills and probate (inheritance), repossessions of property, tenancies, contractual disputes, accident compensation, family law, child custody disputes, and insolvency/bankruptcy. Often the client will be referred by one of the volunteer Citizens' Advice Bureaux which are established in almost every town and city in England.

There is no charge if the client cannot afford to pursue the matter privately, unless the client is one of the relatively small number of citizens eligible for public legal aid, or has legal expenses insurance, a common 'optional extra' in household insurance policies in the UK. All cases are supervised by professional staff employed by the university, so that the university's professional indemnity insurance policy covers the service if the advice or representation is given negligently. As trainee

lawyers are part of the advisory team, the service is governed by the same professional conduct rules to which practising lawyers are subject all over the world, e.g. the duty of confidentiality; no advice can be given if the client is already being advised by another lawyer.

Cases in practice

Law clinics and university law centres originated in the United States. Legal education in the United Kingdom differs somewhat from its US equivalent because the undergraduate (first cycle) law schools in the United Kingdom tend to focus on legal texts, legislation and reported cases in teaching, while the postgraduate (second cycle) US schools, teaching law with essentially the same foundations, seem more interested in law 'as it happens in the real world.' Therefore, while law clinics in the US are well-developed, similar centres in the UK are relatively new. For this reason, and because most of the cases are resolved privately, it is difficult to find cases reported in the legal press.

As readers will know, the legal system of Scotland is different from that in England, being essentially a hybrid of common and civil law traditions using books of principles and not so reliant on case law. However, cases reported in the Scottish press illustrate the activity common across the UK. Clients are likely to be seeking advice about the human side of the law such as neighbour disputes or consumer complaints. It was reported that Strathclyde University law students 'saved the day' for a bride-to-be who was told her £400 deposit could not be refunded after her wedding dress was made to the wrong measurements. Students taking part in a pilot LAC scheme in Scotland intervened, and the shopkeeper provided a new dress at a reduced price, as well as accessories and help with preparations on the wedding day. The students also acted for a tenant who found there was no money in his bank account because his landlord had mistakenly taken two months' rent instead of one. The money was refunded and he was compensated for the bank charges incurred. And closer to home, the students gave advice on compensation to a university researcher who had months of research wiped from her hard drive by a firm doing work on her computer.

Conclusion

While a relatively recent innovation in legal education in the UK, pro bono work offered by law schools is increasingly an important element of legal education as they illuminate theory by practice as part of an

integrated course. Adopting a pro bono legal advice system with all the necessary safeguards requires careful planning and consideration of important elements of the lawyer-client relationship. Extending it to representation is a later stage. Establishing it also requires close co-operation with the legal profession. If it works, it can provide a useful service to members of the community who cannot afford regular legal advice.

Bibliography

Bar Pro Bono Unit: www.barprobono.org.uk.

Citizens' Advice Bureaux: www.citizensadvice.org.uk

Free Representation Unit: www.freerepresentationunit.org.uk.

Joint Protocol for Pro Bono Legal Work:
http://www.lawworks.org.uk/?id=probono_protocol.

Law Works: www.lawworks.org.uk.

Maharg, P and Owen M (2007) *Simulations, learning and the metaverse: changing cultures in legal education* Journal of Information, Law and Technology 5.

Rule 43, Civil Procedure Rules 1998 as amended by the Civil Procedure (Amendment) Rules 2008 : “pro bono representation” means legal representation provided free of charge.’ The Rules (CPR) have been updated 49 times since 1998 and can be checked on the Ministry of Justice website http://www.justice.gov.uk/civil/procrules_fin/index.htm .

Appendix (©Law Works)

Joint Protocol for Pro Bono Legal Work

At all stages throughout their career many lawyers regard Pro Bono Legal Work as an integral part of being a member of the legal profession, in providing access to justice and meeting unmet legal need. This Protocol has been agreed to set out the core values of such work and to

assist both those who undertake it and their clients. Many lawyers undertake charitable work of many different kinds. However, the purpose of this protocol is to concentrate specifically on the provision by lawyers of their legal skills in the form of Pro Bono Legal Work.

1. What is Pro Bono Legal Work?

- 1.1 When we refer to Pro Bono Legal Work we mean legal advice or representation provided by lawyers to individuals and community groups who cannot afford to pay for that advice or representation and where public funding is not available.
- 1.2 Legal work is Pro Bono Legal Work only if it is free to the client, without payment to the lawyer or law firm (regardless of the outcome) and provided voluntarily either by the lawyer or his or her firm.
- 1.3 Pro Bono Legal Work is always only an adjunct to, and not a substitute for, a proper system of publicly funded legal services

2. How should Pro Bono Legal Work be done?

- 2.1 Pro Bono Legal Work should always be done to a high standard. That means in particular that:
- 2.2 The availability of appropriate publicly funded legal advice or representation should always be considered before a lawyer undertakes Pro Bono Legal Work.
- 2.3 When a lawyer is requested to agree to undertake a piece of Pro Bono Legal Work the lawyer should give his/her decision within a reasonable time.
- 2.4 The terms on which the Pro Bono Legal Work is undertaken including the circumstances in which the relationship may be terminated should be made clear at the outset.
- 2.5 The Pro Bono Legal Work should only be undertaken by a lawyer who is adequately trained, has appropriate skills and experience and, where necessary, is adequately supervised for the work in question.

- 2.6 The lawyer undertaking a piece of Pro Bono Legal Work (and where appropriate his or her supervisor) should have no less than the minimum level of legal expertise and experience as would be required if the particular work in question was paid work.
- 2.7 In no case should the client be misled as to the lawyer's skill or ability to undertake the Pro Bono Legal Work.
- 2.8 Once a lawyer has agreed to undertake a piece of Pro Bono Legal Work the lawyer (and if appropriate his or her firm) must give that work the same priority, attention and care as would apply to paid work.
- 2.9 Pro Bono Legal Work must not be undertaken without appropriate insurance.
- 2.10 A lawyer in doubt or difficulty in relation to a piece of Pro Bono Legal Work should seek advice from a Pro Bono organisation or from the Bar Council, the Law Society or the Institute of Legal Executives.

Ancillary Provisions

1. Relationships between pro bono organisations and lawyers

- 1.1 Where practical, lawyers able to undertake pro bono work are encouraged to do so through a pro bono organisation, through the not-for-profit sector, or through both.
- 1.2 Pro Bono Legal Work will be more effectively delivered through co-ordinating the relationships between lawyers, pro bono organisations, and not-for-profit agencies such as Law Centres and Citizens' Advice Bureaux.
- 1.3 When a lawyer is asked by a pro bono organisation or not-for-profit agency to undertake a particular piece of Pro Bono Legal Work, the lawyer is expected to have proper regard to any prior confirmation given to the pro bono organisation or not-for-profit agency that the lawyer was prepared to undertake Pro Bono Legal Work.

- 1.4 Sets of chambers, law firms and legal departments should, wherever possible, seek to encourage and support the undertaking of appropriate Pro Bono Legal Work by their lawyers, including the undertaking of that work "in-house".

2. The contribution of persons who are not fully qualified, or who are otherwise unable, to do pro bono legal work

- 2.1 Non-lawyer staff within a set of chambers or a firm should be enabled to make the same contribution to the undertaking of a piece of Pro Bono Legal Work as they would for a piece of paid work.
- 2.2 Law students, pupil barristers and trainee solicitors have an important contribution to make to Pro Bono Legal Work. However that contribution must be properly supervised and must be preceded by proper training.
- 2.3 Where suitably qualified and experienced, academic lawyers and employed lawyers are particularly encouraged to consider providing training to others to enable them to undertake Pro Bono Legal Work if they are not able themselves to provide legal advice or representation. The provision of pro bono legal training without charge is an important contribution to Pro Bono Legal Work.

3. Participation in pro bono legal work as a characteristic of being a member of the legal profession

- 3.1 A commitment to the delivery of Pro Bono Legal Work is encouraged throughout a lawyer's professional life, as a student and in practice, through to and including retirement.

RIGHT TO LEGAL ASSISTANCE AND PRO BONO LEGAL WORK

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The right to legal assistance, while defined and applied differently in different legal systems, means that a defendant in a criminal case has the right to be aided by a professional lawyer (a public defender) even if he is unable to hire a lawyer or lacks the personal resources to afford legal representation. This right is essential to a fair trial as it creates equality between the three sides in the process: a prosecutor, a judge, and a defendant who unlike the first two does not have legal education and is confronted by complex legal issues. Some legal systems are based on a jury decision and a jury is not normally composed of legal professionals.

The jurors, even if close in this respect to a defendant, are more numerous and more linked to the community at large, which does not necessarily lead to their fairness.

The International Covenant on Civil and Political Rights (ICCPR) provides certain guarantees that the legal process will be fair under international standards. A defendant on trial is to be tried in his presence, can defend himself in person or through a legal assistant of his choosing and is to have legal representation assigned to him in any case where the interests of justice so require – without his paying if he does not have sufficient means (to pay). (1)

The ICCPR does not express itself in the clearest terms but it is based on the Universal Declaration of Human Rights which is clearer, the Declaration whose 60th anniversary we are celebrating this year! The ICCPR is a convention, now ratified by 164 countries, i.e. a large majority of UN members.

The right to a fair defense and to due process of law was known in ancient times and can be considered today to be one of those “general

principles of law recognized by civilized nations” – even if not always in the same shape or form. (2)

In this short article, we will present the right to legal assistance in several legal systems, with special attention to the lawyers’ work pro bono publico (i.e. for the public good and not for an honorarium). There are basically two approaches to the way in which the legal assistance is provided: a) by the State itself; or b) by the lawyers, individually or through their bar associations, NGOs etc. We will look into both approaches, the first, where the attorneys are employed and remunerated by the State which appoints them to work on specific cases, not charging the defendants –or-the second approach where lawyers in private practice provide their services for free and where even their costs may not be paid. This is the pro bono work of the lawyers. In most legal systems, the two approaches are combined, although each one of them in a different area.

1. Right to counsel in the United States

The right to counsel can be defined as the opportunity for defendants in federal (or state) criminal proceedings to be represented by lawyers, as guaranteed in the VIth amendment to the US Constitution. This right goes back to 1790. Since 1963, it applies to the states’ criminal proceedings on the basis of the XIVth amendment. (3) Originally, the Federal Criminal Act (of 1790) applied this provision to federal capital cases only.

The right to counsel is based on the theory and practice of the due process of law. Criminal trials may be extremely complex, and difficult to understand and follow, without a professional lawyer’s help. The Supreme Court applied the right to counsel to all federal criminal cases in 1938 (in the case of *Johnson v. Zerbst*).

But before that, in 1932, the Supreme Court overturned the Alabama convictions of nine African Americans who had been convicted in a pro forma trial for murder and rape, by a judge who was overtly biased. The court- appointed lawyers had been incompetent and weak. As for the convicted, they were all illiterate and had little if any understanding of the case against them... That was the famous *Powell v. Alabama* case, also known as the first *Scottsboro* case (4). The rule decided by the

Supreme Court was that there should be a state-appointed lawyer in every state capital case if there were “special circumstances” such as, for instance, the illiteracy of the defendants. The trial judges were obligated to appoint competent lawyers! (5)

By this decision, state capital cases were to have the same treatment as a federal capital case, but only if there were certain special circumstances. The point was to apply the same rule to all such cases, under the same conditions.

The final, most important change came in 1963, in the *Gideon v. Wainwright* case (6). In that case, the Supreme Court changed its “special circumstances” doctrine to decide that the right to counsel applied to all state criminal proceedings against indigents. Clarence E. Gideon was not illiterate, he did not lack intelligence, and there were no special circumstances in his case. He studied legal issues by himself, while in jail, and wrote various petitions including one seeking to have a state lawyer appointed. His efforts and public support resulted in the Supreme Court changing the “special circumstances” doctrine and ordering a new trial at which he was to be represented by state-appointed legal counsel. Clarence E. Gideon was freed in the second trial where he had a professional lawyer on his side.

The right to counsel was extended to misdemeanor trials (in which a jail sentence is applicable), in the cases of *Argersinger v. Hamlin* (1972) and *Scott v. Illinois* (1979).

The same right has also been applied to police interrogation and investigations in *Escobedo v. Illinois* (1964), and more significantly in *Miranda v. Arizona* (1966).

The 1960s brought a more general social demand for legal assistance to the poor and a rapid growth in lawyers’ pro bono services. Lawyers have always donated a part of their time to special cases, either as a charitable contribution (help) or a statement of the principles they stood for. From Cicero in Ancient Rome, to Gandhi in South Africa, there are many such cases. In Byzantium, as well as in many countries in the Middle Ages, it was the bishops who performed that function. Today, there is the same idea to help people with no or moderate means who cannot afford a lawyer in societies where lawyers are more than necessary in almost

every field of life. Lawyers perform pro-bono services for a wide varied of reasons, including to continue using their skills after retirement, to continue interaction with the legal profession, to learn about law (while they are still law students), to perform a function of public service (the services not provided by state authorities), or to save people in danger. In 2007, Margaret H. Marshall, Chief Justice of the Supreme Judicial Court of Massachusetts, encouraged lawyers to offer more time and services to the poor and the unfortunate, which, she said “was a lawyer’s highest calling”. As lawyers, she said, we hold the key that opens the courthouse door. Lawyers are helping to eradicate injustices, thus enhancing the legal profession and fortifying democracy. (7)

2. Pro bono and community service in the State of Texas

While the state, at federal or state level, provides lawyers in criminal cases, private lawyers and their bar associations are concentrating on civil law (common law), property, family law, business law and other areas. In fact, there is no area of law where legal assistance would not be needed.

“Providing equal access to justice and quality legal representation to all Texans is central to the State Bar’s mission. The State Bar of Texas (SBOT) promotes pro bono representation and encourages Texan lawyers to support legal services programs by meeting the SBOT Aspirational Standard for Pro Bono” (8).

In Texas, as in the other US states and local communities, it is the bar associations that provide the main effort to create and develop volunteer services to low income and disadvantaged clients.

According to the SBOT Survey, there were 81,601 lawyers in Texas as of December 31, 2007. On average, 58% of those lawyers provided 48.5 hours of pro bono services, i.e. 1.8 – 2.3 million hours a year. (9)

About 29.7% lawyers contributed 54 hours of reduced fee work per year. The Texas lawyers volunteer in the following:

- Pro bono civil law cases;
- As mentors and co-counselors;
- Presenters at law training events and speakers on panels;
- Assistants to pro se litigants;

- Members of local pro bono advisory boards and organizations;
- Disaster relief cases
- Corporate counsels;
- Local legal CLINICS
- Etc.

In Texas, a number of regional organizations have been formed, such as: Volunteer Legal Services of Central Texas, Jefferson County Bar Association, etc.

There are also more specialized sections within the SBOT, such as: The Association of Young Lawyers (up to 38); Veterans' Consortium of Pro Bono Programs; Paralegal Division of SBOT , etc.

Without counting the time spent on pro bono services, about 33.3% of lawyers had made out-of-pocket contributions of an average of \$677 per year.

Law professors are also members of the Bar, representing some one to two percent of the total number. Law students, without being licensed by any bar association, have the right to appear in court on behalf of clients. It is considered to be their training while at the same time a help to the pro bono cause.

One should also mention the extremely important role played by the American Bar Association (ABA), a national leader in the effort to enhance access to the justice system and legal representation.

The ABA has its own Center for Pro Bono Services, which creates, designs and implements programs. ABA also has a standing committee on pro bono and public service. These bodies estimate that 80% of the legal needs of low income citizens go unmet because the pro bono service is insufficient.

The ABA organizes programs for elder or aging members who contribute to the pro bono activities. There are the so-called Elder Law Hotlines, legal assistance developing groups: National Academy of Elder Law Attorneys, long term care Ombudsmen and other programs in which elder attorneys participate. The ABA has also organized an International

Senior Lawyers' Project, which has worked in several international projects like the Law Revision Commission for the District of Brcko in Former Yugoslavia and the proposed creation of a Southern African legal training and regional development center.

ABA organizes yearly conferences for bar leaders, pro bono program managers, legal service staff, etc. Those meetings allow the exchange of experiences among lawyers and bar associations from all the states.

3. A Few International Comparisons

The right to counsel (a lawyer) is found in the U.S. Constitution of 1789 and also in the Constitution of India of 1950. The Constitution of Japan of 1947 states that “No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel. The cause for detention is to be shown in open court in the presence of the person charged and his counsel” (Article 34).

Likewise, the European Convention for the Protection of Human Rights and Fundamental Freedoms of November 4th, 1950 (as amended by Protocol number 11) provides for the right to a fair trial in its Article 6. Under the paragraph 3c, the minimum rights of everyone charged with a criminal offense includes the right “To defend himself in person or through a legal assistant 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”. (10) The same article provides for the guaranteed use of an interpreter where needed. The European Convention is applicable to almost 50 countries in Europe and Asia.

The Charter of Fundamental Rights of the E.U. of December 18, 2000 also provides for legal aid to “those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice” (Article 48, paragraph 2).

The Queen's Bench in Alberta, Canada made the following decision (back in 1990): “Although there is no absolute right to legal counsel the court has an inherent power to appoint counsel where an applicant may be deprived of liberty”. Here, the criteria to be considered are the educational level of the defendant, the ability to present his case, the seriousness of the charge and the ability to pay. (11)

Pro bono services have been established increasingly since the sixties and seventies. Today they exist almost everywhere.

In Quebec, Canada, the Bar Association created a company called Pro Bono Quebec as of October 20, 2008. This “In the light of the problems of accessibility to the system of justice” and the “culture pro bono already existing among the lawyers”. Every law firm or individual lawyer joining Pro Bono Quebec accepts to contribute a certain number of hours of free legal services. The Quebec Bar (le Barreau de Quebec) founded a preparatory committee with participation by representatives of judges and made a decision in September of 2008 to go ahead with the proposed plan. Similar arrangements exist in Ontario, British Columbia and Alberta. The U.S. models have been looked into as well.

The Pro Bono Foundation in Chile was founded in 2000 by a group of young lawyers following the example of other modern developed countries. About 50 law firms and 250 individual lawyers are members. The foundation promotes the idea of pro bono within the national community, law schools, Ministry of Justice and Judicial Powers and other institutions. They have established legal networks among law firms, the College of Lawyers of Chile, criminal lawyers, arbitration specialists, notaries public, etc.

Among the programs of the Pro Bono Foundation are the following: pro bono arbitration, support to victims of violent crimes, intervention in intra-family violence, help to small enterprises, access to public information and social organizations.

France has a specific Law on Judicial Aid (12) and various other legal acts, among which a Decree on Deontology of Lawyers (13). The French courts appoint counsel in application of the right to counsel, similar to other countries.

The Paris Bar, with about 19 676 lawyers, is particularly active in providing pro bono services (14). Parisian lawyers dedicate a part of their time to free consultations in special offices on duty called the “permanences”. Such centers are in the Palace of Justice and in all 20 municipalities (“arrondissements”), the so-called Houses of Justice and Law, organizations such as S.O.S Lawyers, the National League against Cancer, points of access to law, etc. Among other initiatives, one should

mention the point of access of youth to justice, a lawyer to help you, a center for handicapped people, a center for the victims of crimes, etc.

A Solidarity Bus is a moving office of pro bono lawyers going around neighbourhoods and providing legal assistance for free. At the time of tax preparation, there are also voluntary tax preparation centres in the municipalities open to all citizens at no cost to them.

Obviously, it would be of interest to look at other countries, but this is just a brief overview. We should also mention that there is an International Bar Association (IBA) providing information about its pro bono network and other substantive issues such as the rule of law. The IBA's interest is also in the development of law and the administration of justice as well as other innovative approaches on a global level.

A more recent development in the pro bono work of lawyers is in the field of International Law. There is a relatively small number of law firms working internationally i.e., on a regional and universal level. Some of these have offered internships and training to those lawyers who accept to do pro bono work in the field of international arbitration and mediation, peace negotiations, post-conflict constitutional arrangements, peace monitoring, administrative or judicial reforms, and other similar tasks.

This kind of activity provides lawyers with specific tasks outside of their everyday type of work but with the possibility to contribute to the solution of crises in various parts of the world.

Conclusion

There is a clear-cut dichotomy between the area of criminal law and that of civil (common) law. The right to counsel has been a concern of the states for a long time, as a right essential to a fair trial, liberty and security of persons. The right to counsel in other areas has been left to individual lawyers, their organizations, to N.G.O.s and to private initiative in general. Pro bono work in those other areas has grown considerably but not sufficiently. In fact, for a poor and uneducated person, problems with the law exist in many areas. Somebody who is

threatened with losing his or her dwelling needs due process of law no less and no differently than a person who is risks being convicted to a jail sentence.

Though the present solutions in these other areas correspond to the needs of pre-modern, lesser developed societies, they do represent progress. One day, the right to counsel will be extended and applicable to many more situations and legal areas than today. For this to happen, more attention will have to be paid to pro bono lawyers' services, their promotion and growth on national, regional and international levels. Humanism requires solidarity in law as much as in life in general.

End notes

1. The International Covenant on Civil and Political Rights (1966, in force since 1976) Part III, Article 14.
2. The Principle of Audiatur et altera pars (Let's hear the other side) was well established in Roman Law.
3. Quoted from LEWIS, Thomas Tendy (Ed.) U.S. Supreme Court Encyclopedia (Pasadena, CA and Hachensack, NJ: Salem Press, 2007; 3 volumes).
4. Ibidem, pp. 308/9
5. Justice Sutherland wrote the decision.
6. See *Gideon v. Wainwright* 372US335 (March 18, 1963).
7. Her speech in Worcester, published by Worcester Gazette, on July 7, 2007. She also said that legal aid per citizen gets \$1 in the U.S., \$2 in France and \$15 in the U.K. per year from the budget.
8. For information about the Texas Bar, the "Annual Report on Pro Bono for 2007", available at the SBOT web pages.
9. About 50 hours per year is a goal recommended by various bar associations, for instance in the Minnesota Rules of Professional Conduct for Lawyers (1996). See West's Encyclopedia of American Law (Thomson/Gale 2005 Vol. 8 p.117).
10. Quoted from the European Convention (Article 6, Paragraph 3c) This provision corresponds to the provision of the International Covenant quoted under (1) supra. The Charter of Fundamental Rights of the European Union (2000, C 364/01). See Article 48 paragraph 2.

11. Quoted from: MADDEX, Robert L. Encyclopedia of Human Rights (Washington, D.C.; CQ Press, Inc. 2000) p. 70.
12. La Loi 91-647 Sur l'Aide Juridique.
13. Le Decret sur La Deontologie des Avocats 2005-790.
14. Information on the site of the Paris Bar.

POWER AND RESPONSIBILITY: LAWYERS DUTY TO PROVIDE PRO BONO LEGAL AID

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Abstract

This paper starts by reviewing the powerful position of lawyers in the society and argues on moral grounds that they also have a responsibility to provide pro bono legal assistance. To do so, it takes into account the power of the legal profession by shedding some light on the importance of the profession and of lawyers in history in different countries. The idea of power and responsibility among others applies to the moral responsibility of lawyers to help those in need and provide pro bono legal aid. This part serves as a basis for the second part of the analysis, the one on the concept and meaning of pro bono legal assistance.

Based on this premise, the second part reviews the concept of pro bono legal aid starting from its origins in history up to the modern day meaning of the concept. Moreover, it briefly analyzes the interrelation with very important principles of modern democracies such as the rule of law and equality and equal access to justice.

The third part of the paper offers a review of the American Bar Associations requirement for lawyers to provide pro bono legal aid as a pure and noble model for offering pro bono without compensation. There, it seems the moral concept of power and responsibility and the duty of lawyers to provide for pro bono legal aid is best understood and implemented.

The main feature of the approach taken by the legal profession in the United States is the concept by the US American Bar Association

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requiring lawyers to serve a number of working hours as pro bono without any compensation every year.

On the other hand, as there is no requirement for lawyers to provide pro bono legal aid without compensation in R. Macedonia this paper will review the prepared draft Law on Free Legal Aid which if adopted is set to resolve the issue of free legal aid in a very comprehensive way by determining the beneficiaries, service providers, the scope of free legal aid, responsible institutions, procedures and deadlines etc.

The final part of the paper offers a conclusion on the moral responsibility of lawyers to provide pro bono legal aid and suggests the approach taken by the United States Bar Association to be followed as well by the BAR in R. Macedonia consequently complementing the proposed Draft Law on Free Legal Aid.

Introduction

The legal profession has always been one of high esteem and prestige. This is due to two main factors: primarily the importance of the law and the concept of rule of law in the modern day society and second, the media and the movie industry having a long history of portraying lawyers as people of power, importance and wealth.

And as it usually is in life, power and importance are closely related or at least should be related to responsibility. Therefore, we argue that lawyers have a special moral duty to help those in need of legal counsel, those that cannot afford it. And to do so, there is no better and noble way than by providing pro bono legal aid.

The American Bar Association model rules of conduct are a good example how this problem should be treated.

The United States through the American Bar Association have developed a requirement of providing pro bono legal assistance by determining a specific number of hours a lawyer should serve on pro bono basis.

On the other hand, the BAR in R. Macedonia has not yet opted for the option of providing pro bono legal assistance while the State seems to have seriously approached this issue with the preparation of the draft Law on Free Legal Aid.

In this regards, the Government of R. Macedonia has developed a new draft law dealing with legal aid in that should come into force in the near future.

This paper offers a conclusion on the need and the moral responsibility for lawyers to provide pro bono legal assistance as a way to give something back to the society from which they derive their privileges, wealth and power.

1. Legal profession: Power and Responsibility

People from the legal profession have always played an important role in the society and thus making the profession's importance and influence overwhelming.

This statement should not come as a surprise to anyone. A small insight into the professions of some of the most prominent people in history will prove this. For example, overwhelmingly US presidents were lawyers. The list among others includes some of the most influential persons in history such as Thomas Jefferson, John Adams, Abraham Lincoln, Woodrow Wilson, Bill Clinton. The current US president Mr. Barack Obama is also a lawyer as is the case with Nicolas Sarkozy and Vladimir Putin who also studied law.

The legal profession is by far the most represented profession in the United States Senate and the House of Representatives.

In some countries lawyers were even considered royalty. What was royalty in Europe and elsewhere were lawyers in the United States. As stated by de Tocqueville:

“In America there are no nobles or literary men, and the people are apt to mistrust the wealthy; lawyers consequently form the highest political class and the most cultivated portion of society... If I were asked where I place the American aristocracy, I should reply without hesitation that is not among the rich, who are united by no common tie, it occupies the judicial bench of the bar.”¹

In private practice possibilities for income have progressively sky rocketed for lawyers. As we speak there are law firms that look more like multinational multimillionaire companies having thousands of employees. Take for example the distinguished Baker & McKenzie law

¹ Burnham, William, Introduction to the Law and legal system of the United States, third ed., published by West Group 2002, at page:126.

firm employing 3900 lawyers worldwide.² And this is so in the rest of the world as well.

However, let's be clear at the beginning. We are far from suggesting that we, as lawyers are admired by every segment of the society. Neither was this profession always in this position of power.

Even in the US lawyers had grave problems. For example, much of the US colonies were very unfriendly to lawyers. This was the case in the XVII century for example in Pennsylvania where it was said that there are no lawyers since this "it is a happy country" as lawyers were also banned from courts in Virginia, Connecticut etc.³ In New Jersey in the XVIII century there were even mobs rioting against lawyers.⁴

History has also records of lawyers being persecuted, tortured for stressing the value of law as it was the case in communist China during the sixties and seventies of the past century.⁵

And today, each of us knows at least one negative joke on lawyers (including sharks as synonyms for lawyers and bottoms of oceans as geographical indications where lawyers should be).

This entire endeavour ends with the idea that still has a lot of supporters that "lawyers are a necessary evil". So they are a necessity to the society though still considered "evil".

Coming back to our main idea which is not deteriorated by these exceptions of legal history, there is no doubt, today, that the law and the legal profession are at the forefront of every state and society.

Take for example, the idea of rule of law which is a cornerstone of any liberal democracy. And as liberal democracies are the last model of governance and perhaps the end one as Francis Fukuyama suggests in his "End of History" we need to make sure that we understand it and foster it properly.

The concept of rule of law is interrelated with the concept of equality. The law as taught for a long time by natural law school should be just

² Baker & McKenzie webpage at:

<http://www.bakernet.com/BakerNet/Firm+Profile/default.htm> last visited in August 2009.

³ Friedman, M. Lawrence, A History of American Law, Published by Simon and Schuster, 1985. At page 94-95.

⁴ *Ibid.*

⁵ K. Zweigert, H. Kotz, An Introduction to Comparative Law, third Edition, Oxford University Press, 1998. At 293.

and applied in the same manner to everyone regardless of differences. These differences also include access to justice regardless of economic power of each and every citizen.

Therefore, it is the obligation and the duty of the society as a whole to make sure that everyone has equal access to justice. But first and foremost this is the responsibility of lawyers as a specific segment of the society best equipped to provide such assistance for a public good without compensation.

2. Pro bono legal aid, lawyers payback to society

The idea of pro bono legal aid has its roots in relative distant history though its contemporary form and concept is relatively recent. If we go back, we can observe that the creation of the pro bono legal assistance has had a somewhat bumpy road.

Though there is no agreement between scholars on the exact origins, many speak of a sort of partial and rudimentary pro bono legal assistance dating back to Roman law and a more advanced form in the Anglo American legal system that can be traced in the medieval times of the thirteen- to fifteenth century.⁶

For example it is a well known fact that lawyers have occasionally provided legal service free of charge in a non institutionalized way, mostly to friends and family as well as to people in need.

This was more likely considered as charity and the concept or the term “pro bono” was not rendered formally until the 1980s in the profession’s ethical rules in the United States.⁷

The concept and meaning of the “pro bono” as it is the case with many concepts in law derives from the Latin expression “pro bono publico” referring to the meaning of action “for the public good”.

In this regard the Black’s Law Dictionary defines pro bono as “being or involving uncompensated legal services performed especially for the public good.”⁸

⁶ Deborah L. Rhode, Pro Bono in Principle and Practice: Public Service and the Professions, Stanford University Press, Stanford California 2005, pg.4.

⁷ Cummings, Scott L., *Politics of Pro Bono*, 52 UCLA L.Rev.1 (2004-2005), pg.4

⁸ Bryan A. Garner, Editor in Chief, Black’s Law Dictionary, Second Pocket Edition, West Publishing Co., 2001, pg.558.

At the core of the concept of the pro bono legal aid interlines the concept of legal service, uncompensated, for the public good.

It is self evident that the service should be legal in nature thus determining that the service provider should be someone from the legal profession regardless of the fact that lawyers have not always been formally trained and prepared to offer such services.

Here, one has to have in mind that this does not encompass the usual day to day work of lawyers which is based on the fact of getting compensation for the services rendered.

And least but not last the core of the matter relates to the concept of “public good” or “public service”. It means, giving back something to the society from which lawyers derive their benefits.

This service in theory is directed to the public good of the society in general, but in practice, it offers services directly to the most vulnerable parts of our society, particularly the poor that cannot afford legal counsel and in some cases the marginalized and oppressed communities or groups.

Why is pro bono important?

It is probably impossible to find a person living in a normal everyday environment that at least once in his/her lifetime has not been in need of a lawyer. Every day, people may lose their homes, jobs, health care, property and all sort of legal interest and rights only due to the fact that they were too poor to afford legal counsel.

The necessity for legal counsel shows that pro bono legal aid substantially is even more important since it is related to one of the most important principles of humankind: the one on equality and on non discrimination.

Without dwelling on these broader concepts the simple idea behind it is that everyone should have equal access to justice.

If it is clear that 1) equal access to justice is an imperative and 2) it is to be provided to the poor the third logical question should be: who will provide it? The answer to this question in a broader meaning should be simple: the state. The state as the ultimate form of organization of the society being the strongest and most powerful should be responsible for the well been of the society.

This was and still is the case in many countries where states assign part of their national budget for providing pro bono legal aid. While the

allocated budgets sometimes seem high however they do not serve all the ones in need of legal aid.

For example in England, this year is the 61st anniversary of the Legal Aid and Advice Act of 1949. According to the Ministry of Justice only 29% are eligible for publicly-funded advice under the legal aid scheme and though the government spends £2bn of taxpayers' money a year on publicly funded legal advice.⁹ It is not much different in the US where at best round 25 % of the poor can get legal help.¹⁰

Furthermore there is a continuous tendency of decline. Not to mention the last years of world financial crisis and the impact it has had on state funding of pro bono legal aid.

The second important player is the private bar as the most important institution gathering lawyers and having competencies to determine some form of pro bono work. A joint effort between the state and the bar is needed in order to best determine and combine state budget allocation with the bar administration of the legal aid.

As stated well before, lawyers are the most important players in providing pro bono. Regardless of the form and manner the legal aid is given through the professional work of lawyers.

One here can also mention that it is not only possibly for lawyers but also for the lawyers to be: the students in law faculties to provide pro bono legal assistance under certain conditions.

These conditions incorporate the following: the pro bono legal services can be provided by students only under the supervision of a practicing lawyer and students may not receive any compensation neither in income nor credit for their work.¹¹

Various Law Schools today are offering Pro Bono legal aid through various programs in different fields of law such as: family law, criminal law, administrative law etc.

⁹ *The Guardian*, 12 March 2009, Legal aid in 21st-century Britain, last visited in July 2009 at <http://www.guardian.co.uk/money/2009/mar/11/legal-aid-justice-gap>,

¹⁰ Douglas A. Blaze, *Toward Equal Access to Justice, Rethinking the role of law school*. 2:1 Tennessee Journal of Law & policy, pg 66.

¹¹ Merrell, Dina R., *Pro Bono Pro You*, 29 Student Law. 39 (2000-2001), pg.39-40.

3. Us perspective to pro bono legal aid and pro bono legal aid in R. Macedonia

As it is the case with many concepts of law it is a well established method to use comparative analyses in order to draw good and bad practices in various countries. However, due to reasonable constraints for papers of this nature it is not possible to offer a comprehensive comparative analysis.

Therefore we will focus in the idea of pro bono legal aid in the US as a great example where the American Bar Association requires lawyers to provide for at least 50 hours of pro bono aid every year.

The second comparative case will be R. Macedonia primarily based on the new draft proposal of the Law on Free Legal Aid to be enacted which can be complemented greatly if the BAR in the country would introduce pro bono work without compensation similar to the one of the ABA.

3.1. US perspective to pro bono legal aid

Development of pro bono legal aid in the United States was closely linked to the organization of the American Bar Association.

As stated above lawyers have always had a very important and powerful position in the US.

At the forefront of regulating or better said self-regulating the legal ethics of lawyers in the US was the American Bar Association. One of the core issues of the ethical behavior of lawyers among others is also pro bono legal service.

In a number of none obligatory documents the ABA tried to influence the legal profession. First, as of 1908- 1970 it was the Canons of Professional Ethics to be replaced by the Model Code of Professional Responsibility which was replaced in 1983 by the Model Rules of Professional Conduct.¹²

The 1969 Code of Professional Responsibility contained the idea of the duty of lawyers to render services to those unable to pay.¹³

Furthermore, the American Bar Association developed it ABA Model Rule 6.1 on Voluntary Pro Bono Public Service. The rule specifies that every lawyer has the professional responsibility to provide pro bono legal

¹² Burnham, William, Introduction to the Law and legal system of the United States, third ed., published by West Group 2002, at page:161.

¹³ ABA Code of Professional Responsibility, Ethical Consideration 2-25.

services to those unable to pay by rendering at least 50 hours of pro bono legal assistance per year. In doing so the lawyer should:

“(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

- (1) persons of limited means or
 - (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and
- (b) provide any additional services through:
- (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
 - (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
 - (3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.”¹⁴

In its commentary on the provision the American Bar Association explains that rendering a minimum of 50 hours of pro bono legal aid per year is a sort of a bench mark for the country.

However, it is up to the 50 States to decide if they would opt for a higher or a lower number of hours of annual service depending on local needs and conditions. And yet, after many discussions if the rendering of the minimum of 50 hours should be voluntarily or mandatory for lawyers, the rule was left without a sanction, calling on moral and ethics by referring to “professional responsibility”.¹⁵

Furthermore, the commentary specifies that if a lawyer cannot provide pro bono services he can contribute financially to organizations providing

¹⁴ American Bar Association Model Rule 6.1 on voluntary pro bono public service, web page <http://www.abanet.org/legalservices/probono/rule61.html>, last visited August 2009.

¹⁵ Cummins, Scott L., *Politics of Pro Bono*, 52 UCLA L.Rev.1 (2004-2005), pg.33.

pro bono legal assistance and this financial contribution should be equivalent to the hours that he/she did not provide this service.

However, some strong practices requiring for mandatory rendering pro bono legal services were created in some States of the U.S.A.

According to some authors the concept of mandatory pro bono is in itself an oxymoron.¹⁶ There are a number of arguments against mandatory pro bono such as: unconstitutionality of coerced legal services, economic burdens, difficulty in implementation, no personal choice and undesirability of forced charity.¹⁷

It would not be fair if we did not state here also the arguments in favor of establishing mandatory pro bono such as: ethics and morals to serve the public, availability of legal services and danger of leaving someone else like the government to deal with this issue.¹⁸

However, even these mandatory pro bono requirements are not really again mandatory since they do not foresee any consequences for non compliance.¹⁹

To sum up, the idea of the ABA requiring pro bono work from lawyers seems to be an excellent idea to help those that are in need of legal counsel and cannot afford one. It seems like a great model that should serve as an example for the legal profession in other countries as well.

3.2. Pro bono legal aid in R. Macedonia

Republic of Macedonia has not developed a pro bono legal aid concept as the one in the United States developed by the ABA.

Rather than doing this, the solution was fostered through the various legal solutions in a number of laws where persons that cannot afford legal counsel were able to exempt themselves for various fees and charges.

This was covered by the state budget.

The concept of providing legal aid is based on the constitution and the legal system in R. Macedonia. The purpose is to ensure equality of access to justice and the rule of law.

¹⁶ Lardent, Esther F., *Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question*, 49 Md. L. Rev. 78 (1990), pg.79.

¹⁷ Shapiro, David L. *Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U.L Rev. 735 (1980), pg.738

¹⁸ *Ibid.*

¹⁹ Lardent, Esther F., *Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question*, 49 Md. L. Rev. 78 (1990), pg.79.

In this regards, the Constitution of R. Macedonia as a fundamental value of the constitutional order of the country specifies among others: the basic freedoms and rights of the individual and citizen, the rule of law, legal protection of property, humanism, social justice and solidarity.²⁰

Furthermore, the idea of equality is enshrined in article 9 of the Constitution of R. Macedonia stating that:

Citizens of the Republic of Macedonia are equal in their freedoms and rights, regardless of sex, race, color of skin, national and social origin, political and religious beliefs, property and social status. All citizens are equal before the Constitution and law.

Article 50 of the constitution, states that every citizen may invoke the protection of its freedoms and rights before the regular courts as well as the Constitutional Court.

The Draft Law proposal by the Government of R. Macedonia of January 2009 among other basis for introducing free legal assistance, states the obligations that the country has in regards to international law.

This is stipulated there having in mind article 6 of the European Convention for Human Rights requiring that if a person does not have sufficient means to pay for legal assistance, it should be given for free.²¹

And when determining the legal sources based on which the courts deliberate it is stipulated in article 98 of the Constitution that Courts judge on the basis of the Constitution and laws and international agreements ratified in accordance with the Constitution.²²

Furthermore article 8 specifies as a fundamental value of the constitutional order states the basic freedoms and rights of the individual and citizen recognized by international law as well.

The current draft law on free legal assistance prepared by the Government is the most important piece of legislation dealing with free legal assistance. It is consisted of seven chapters and 50 articles dealing with free legal aid in R. Macedonia..

²⁰ Constitution of R. Macedonia, Article 8.

²¹ European Convention for Human Rights, Article 6. This international legal obligation is in itself a domestic legal obligation for the country. This affects the legal system in R. Macedonia because article 118 of the constitution states that international agreements are part of the internal legal order if ratified in accordance with the Constitution and cannot be changed by law. R. Macedonia is a party to the ECHR. Also see the Constitution of R. Macedonia, article 118.

²² Constitution of R. Macedonia, article 98.

The Law aims ensuring equality for all citizens and removing the financial barrier that poor citizens face. The idea is that all the 34 district offices of the Ministry of Justice in the country will be equipped with the necessary human resources to provide legal aid. Moreover, legal aid should also be provided by associations of citizens in the country. Any of these providers will have to be registered and approved by the Ministry of Justice in order to provide such a service.

The free legal aid will be implemented by lawyers or mediators.²³ According to Article 6 of the same proposal the free legal aid will be provided in two different and distinct stages. First, is the “initial” period that means the period prior to the beginning of any procedures at state institutions. Second, is the procedure in a state institution.

This is important to mention as the “initial” legal aid will be provided by the regional and local offices of the Ministry of Justice and authorized associations of citizen while the legal aid in the second, the procedural stage will be given by lawyers and mediators.

The scope of the proposed draft law is that legal aid will be provided for all judicial and administrative procedures if the procedure should resolve an existential issue such as: social or pension insurance, labor, domestic violence, human trafficking etc. The natural person who is not in the position to cover the expenses for legal services and deals with any of the important issues determined by the law applies for free legal aid at the Ministry of Justice. If after reviewing the application free legal aid is granted, then, any of the expenses related to legal assistance will be covered from the day of approving the request.

It seems that the new Draft Law proposed by the Government aims in addressing the issue of free legal aid in a very comprehensive way. It determines the category of persons that will be covered, the scope of the free legal aid, the ones responsible of providing such assistance and determines a specific budget by the state to do so. Moreover, the Law specifies the Ministry of Justice to be the responsible state institution for the implementation and facilitation of the law.

However, in the country there is no requirement on moral grounds for lawyers in R. Macedonia to provide for such services without

²³ Draft Law on Free Legal Aid, Article 4.

compensation. This remains to be dealt primarily by the BAR Association of R. Macedonia if it decides to follow the ABA approach.

Conclusion

Giving pro bono legal aid is essential for any society that strives to ensure the rule of law and equality for all its citizens regardless of their economic differences. It has existed for a long time in history in different forms and it exists today as well.

Lawyers as a special category of our society have a special position and privileges due to the importance of their profession and therefore have a moral duty to provide free legal aid to those that cannot afford it. The State has a responsibility to make sure that everyone has equal access to justice. Different countries have opted for different solutions how to deal with them.

The American Bar Association seems to have a pure pro bono legal aid approach as it requires on moral grounds US lawyer without compensation to work for free a number of hours in order to help the poor that cannot afford legal counsel. This seems to be a very noble and respectable approach that gives an opportunity for lawyers to give back something to the society from which they receive so much with no compensation for the services rendered.

This perhaps should be the duty of the BAR Association in R. Macedonia to look into the possibility for developing such a rule in the future. To sum up, pro bono legal aid is of great importance as it provides for assistance to the poorest members of the society thus solving everyday problems of many individuals.

Moreover, it provides for the implementation of higher principles such as rule of law and equal access to justice.

These principles are not only important for the ones that need legal aid but also to the ones that do not since the society as a whole have an interest in cherishing and upholding these principles.

Therefore, the role of the legal profession is essential. In this regards, the BAR in R. Macedonia should strongly look into the US model and complement the proposed draft Law on Free Legal Aid and provide a real and substantial pro bono legal aid without any compensation as a way to

give back something to the society from which it originates its power, privileges and wealth.

Bibliography

BOOKS

- Deborah L. Rhode, *Pro Bono in Principle and Practice: Public Service and the Professions*, Stanford University Press, Stanford California 2005.
- Burnham, William, *Introduction to the Law and legal system of the United States*, third ed., published by West Group 2002.
- Friedman, M. Lawrence, *A History of American Law*, Published by Simon and Schuster, 1985.
- K. Zweigert, H. Kotz, *An Introduction to Comparative Law*, third Edition, Oxford University Press, 1998.
- Bryan A. Garner, Editor in Chief, *Black's Law Dictionary*, Second Pocket Edition, West Publishing Co., 2001.

ARTICLES

- Cummngs, Scott L., *Politics of Pro Bono*, 52 *UCLA L.Rev.*1 (2004-2005).
- Douglas A. Blaze, *Toward Equal Access to Justice, Rethinking the role of law school*. 2:1 *Tennessee Journal of Law & policy*.
- Merrell, Dina R., *Pro Bono Pro You*, 29 *Student Law*. 39 (2000-2001).
- Lardent, Esther F., *Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question*, 49 *Md. L. Rev.* 78 (1990).
- Shapiro, David L. *Enigma of the Lawyer's Duty to Serve*, 55 *N.Y.U.L Rev.* 735 (1980).
- Lardent, Esther F., *Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question*, 49 *Md. L. Rev.* 78 (1990).

DOCUMENTS

- ABA Code of Professional Responsibility, *Ethical Consideration* 2-25.
- American Bar Association Model Rule 6.1.
- Constitution of R. Macedonia.
- European Convention for Human Rights.
- Draft Law on Free Legal Aid.

NEWSPAPERS

- The Guardian, 12 March 2009, *Legal aid in 21st-century Britain*.

RESEARCH PROJECT

WORLD WIDE WEB

-Baker & McKenzie webpage at:

<http://www.bakernet.com/BakerNet/Firm+Profile/default.htm> last visited
in August 2009.

THE RIGHT TO A DEFENCE ATTORNEY ACCORDING TO THE NEW CODE ON CRIMINAL PROCEDURE – CHALLENGES AND RISKS

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1. Introductory notes: introduction of the adversarial model

The right to a defence attorney is one of the essential rights of the defendant in the criminal procedure. This paper aims to make an initial attempt at marking some of the possible problems in exercising this right according to the concept of the new, reformed criminal procedure contained in the proposed Code of Criminal Procedure (CCP).¹ This Code crafts a radical reform of the criminal procedure and introduces the adversarial model of the criminal procedure, according to which the burden of proof is fully put to the parties in the procedure, whereas the judge shall exercise a passive role in order to become the impartial arbitrator in the dispute resolution process.² According to the adversarial theory, the truth and justice shall be best arrived at if the initiative to find and present the evidence is left to the parties, and the evidence be assessed by an impartial court.³ One of the main concerns in this model is the possibility for the defendant to lack adequate access to the means or expertise.⁴

Therefore, our attention shall be focused on how to ensure a fair trial and equality of arms in a situation of having an entirely different role for the court and the parties in the criminal procedure. Although it is obvious that the adversarial systems are naturally more inclined to provide equality of both parties, this is still only theoretical. The prosecution is

¹ www.sobranie.mk

² See: S. J. SUMMERS, *Fair Trials, The European Criminal Procedural Tradition and the European Court of Human Rights*, Hart Publishing, Oxford and Portland, 2007.

³ See: L. L. FULER, *The Forms and Limits of Adjudication*, 92 *Harvard Law Review*, 1978, 383.

⁴ See: J. McEVAN, *Adversarial and Inquisitorial Proceedings*, vo: R. BULL/ D. CARSON (Eds.), *Handbook of Psychology in Legal Contexts*, Wiley, Chichester, 1995.

really put in a better position for collecting the necessary information and evidence, which is actually one of the reasons for laying down the procedural rights of the defendant. We must not overlook the fact that the defendant is only aided by the defence attorney, unlike the traditional continental systems where the active role of the court in proposing and presenting evidence offers additional guarantees for the defence.⁵

Abandoning the investigatory judge (and the paternalism of the court in general) within this context has its own side effects, above all due to the fact that the investigatory judge had the obligation of collecting the evidence in favour of the defence as well. With regards to said role of an impartial investigator, the investigatory judge still provides more guarantees than the public prosecutor, because albeit the commitment to impartiality, the prosecutor remains to be an authority whose principal task is to prosecute. This means that the defendant in this new situation will practically lose a potential ally for evidence collection to a new judge in the preliminary procedure who shall be a more impartial decision-maker regarding issues pertaining to the basic rights and freedoms. This shall certainly refer to the trial and the procedure as a whole as well, in view of the court's obligation to pay attention to all interests.⁶

The new Code tries to recompense for this "handicap" of the defence by providing some new guarantees and procedural possibilities for the defence, in particular through the obligation of the prosecution authorities to disclose all evidence in favour of the defence and by the possibility of undertaking their own investigation where, in addition to the defence attorney, private investigators and professionals may be involved as experts for the defence. These counterparts of the criminal police and other capacities of the state authorities will, in most cases, not be able to achieve the possibilities of the state provided by all of its resources due to the fact that in many places in the law, the police and prosecution face new, higher standards for the fulfilment of their function in a lawful and professional manner.

⁵ See: C. J. SAFFERLING, *Towards an International Criminal Procedure*, Oxford University Press, Oxford, 2001, 266-7.

⁶ So-called „Fürsorgepflicht“. See: ROXIN, *Strafverfahrensrecht*, 22. Auf., München 1991, 12, 282, 294; M. MAIWALD, *Zur gerechlichen Fürsorgepflicht im Strafprozeß und Ihren Grenzen*, in: *Festschrift für Richard Lange*, Berlin / New York 1976, 745, 764.

The increased workload of the lawyers as attorneys for the defence shall inevitably bear serious financial implications. In particular, the cross examination as a new technique exercised at the main trial will put the defendant who cannot afford a defence attorney in an unfavourable position of being practically unable to defend themselves. Therefore, it seems that we should consider better the consequences of these radical reforms because the recently adopted Law on Free Legal Aid does not resolve this problem. To that end, we should review the possibility of establishing a cost-effective system of public lawyers and the affirmation of the *pro bono* defence.

2. The role of the defence attorney in the new criminal procedure

2.1. The defence attorney in the pre-trial procedure

One must admit that the new concept of the investigation largely reduces the participation of the defence attorney during the investigatory actions taken by the prosecution (Article 296). At first sight, it seems that this becomes detrimental to the interests of the defence, among other due to the fact that the defendant and their attorney are not at all informed of the commencement of an investigatory procedure (except in cases where said person is subject to specific action such as examination, search, etc.) and the possibility to inspect the files of the prosecution at such an early stage of the procedure as was the case in the CCP as up to recently prescribed. However, we should not forget that according to the new CCP, the investigation is deformed to a great degree, thus procedurally marginalizing it in a way because the evidence collected by the prosecution during the investigation are not considered as presented evidence that would be used at the main trial in an unhindered manner and would present the basis for a conviction. Contrary to the recent system, those statements will no longer be considered as evidence *per se* based on which the judgment can be issued. Certain evidence will be presentable before the main trial only as an exception at the so-called evidentiary hearing, which may require the presence of the defence attorney (Article 307 paragraph 9) if the witness is likely not to be questioned at the main trial due to illness or death or if other conditions are fulfilled as determined by the law (312 CCP). Nevertheless, other than at the examination of witnesses, the lawyers will be able to attend other important actions during the investigation as attorneys for the defence, such as at the hearings (Article 191), the

examination of the defendant (Article 71, 206), forensic witnessing and inspection (Article 233).

The new CCP has regulated for the first time the line-up procedure at the police which was up to now reduced under the determination of the identity of a person, which is clearly inadequate. Namely, one thing is to determine the identity of a certain person and it is entirely different whether the witnesses or victim will recognize the suspect as the perpetrator. Considering the importance of this action further in the procedure, Article 278 of the Proposed CCP provides for the attendance of the defence attorney during the line-up as a safeguard for the defence of the defendant.

The reinforced safeguard role of the defence attorneys is also prescribed for any person under arrest and detained at the police (Article 161). The person deprived of liberty may, in private, get counsel from a lawyer at any time, whether night or day. Should such a person not have a lawyer or cannot reach them, the person deprived of liberty may ask to see the list of lawyers on duty which is compiled by the Bar Association of the Republic of Macedonia, following the Croatian example. The novelty is that even during the night (from 20:00 until 08:00 hrs), the person kept at the police will be able to obtain a defence attorney from the list of lawyers on duty. What is interesting for our topic is that, following the example of the UK,⁷ the costs for the lawyer on duty at the time of the over-night detention (but not during the day or for the defence attorney hired by the detainee himself) shall be borne by the state budget regardless of the financial status of the suspect (Article 161 of the Draft CCP). This is certainly an additional burden for the state, but it takes into account the real situation of the person arrested and detained at night.⁸ Finally, last but not least, according to the Italian example, the new Macedonian CCP introduces the very own investigations of the defence (Article 305 to 311). Namely, the CCP provides that the defence attorney undertake certain action for the purpose of finding and collecting

⁷ See: Police and Criminal Evidence Act, Code C sets out the requirements for treatment of suspects (<http://www.homeoffice.gov.uk/publications/police/operational-policing/pace-codes/>).

⁸ See: E. CAPE, J. HODGSON, T. PRAKKEN (Eds.), *Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*, Intersentia, 2007.

evidence in favour of the defence as early as at the commencement of the performance of their duty. In order to collect the necessary information, the defence attorney or the private investigator authorized thereby may talk with persons who may present circumstances useful to the aims of the investigatory actions. The defence attorney will be able to directly present to the public prosecutor and the judge of the preliminary procedure the information and evidence in favour of the person they represent, and what is more important, they will be able to use the collected statements to dispute the ones presented at the main trial.

This novelty shall be a great challenge for the defence. Not only does this require special skills, but it shall also imply greater engagement of the lawyers in general. Therefore, consistent implementation of these legal provisions will probably lead to significant increase of the attorney fees because it will simply imply more working hours to prepare the defence and additional engagement of professional associates and other lawyers, private investigators, experts from various fields, etc.

This type of involvement by the defence was up to recently unknown for the European continent. Anglo-American practice does not recognize such an explicit regulation of the activities of the defence in their procedural codes, due to which the new CCP has made recourse to the provisions of the Italian CCP.

2.2. The defence attorney in the plea bargaining

The possibility for settlement will also become a great challenge for the defence attorneys because, as a new activity, it will require the knowledge of new skills and an increased workload.

The plea bargaining procedure as a novelty in our system whereby the defendant practically renounces from a procedure before the court opens up new risks pertaining to the rights of the defendant which have so far been unknown to our theory and practice. The experience in countries that have also provided such solutions points to the danger of violating the granted guarantees by the prosecutor, misuse of the defendant's confession and, in cases when the settlement is not accepted by the court, from vengeance by the prosecution and the like. Therefore, as a token of precaution, the new CCP provides for the mandatory participation of the defence attorney in the plea bargaining. To us it is not sufficiently clear when exactly the settlement procedure begins so that the defendant can

be assigned a defence attorney if they fail to take one themselves. It seems that this issue was not considered with due care, which is why it will be left to the jurisprudence to decide.

We must also think about what the reward for the defence attorney would be in case of a successfully conducted settlement procedure because we would not want to have a situation of the defence attorney not resolving the criminal case consensually due to the banal reason of not being paid thereof.

2.3. The defence attorney and cross-examination at the trial

Cross examination is, per se, rather a controversial issue and to us it is of the great unknown, thus becoming a sort of a great adventure of the current reform. When referring to cross-examination, we not only imply the stage in the procedure where the witnesses are examined or as a manner in which the attorneys will examine the witnesses of the opposed party, but as a means of implementing the entire system of a purely adversarial procedure where the main role will be played by the parties and the court will be limited to being an impartial decision-maker with regards to the facts and a catalyst and controller of a fair fight between the opposed parties.

The trial shall, according to the new system, commence with the *opening arguments*. The prosecutor shall present them first, followed by the defence attorney or the defendant. The defendant, indeed, for the purpose of complying with the right to remain silent and the presumption of innocence has the right not to present their opening arguments at all. Yet, the opening arguments are important to the cross-examination because the parties can, in their speech, clarify the decisive facts they intend to prove, introduce the evidence they are going to present and establish the legal issues which are going to be subject to the argument.

When presenting evidence at the trial before the court, it will be allowed to hold direct, cross and additional examination. Direct examination is performed by the party summoning the witness as evidence. Cross-examination is performed by the opposing party. Additional examination is performed by the party summoning the witness and the questions posed throughout this examination are limited to the questions posed during the examination by the opposing party.

The new concept insists on having the entire evidentiary material presented at the trial organized as an adversarial hearing. Namely, the influence of the preliminary procedure is neutralized to the maximum, which serves to impose certain “barriers” to the impact of the investigation over the trial. Thus, the president of the panel has restricted access to the material collected in the investigation which is available for the prosecutor. The file submitted to the court contains minutes only regarding the unrepeatable actions, such as the inspections conducted or other actions that cannot be repeated at the hearing. Evidence before the court shall, as a rule, be presented anew, whereas the statements provided in the preliminary procedure may be used only to remind the defendant and to assess the reliability of the statement. They cannot be evidence, *per se*, to base a conviction.

One must neither forget the fact that even the preparation of the trial will now largely depend on the parties who shall themselves propose evidence to be presented before the court. Not only will the court not present evidence *ex officio*, but it may sanction untimely proposal of evidence at the trial.

By restructuring the procedure from inquisitorial into an adversarial one, the trial will seemingly become speedier and fairer. However, in order to operate successfully, this system requires more or less equal parties. As opposed to the prosecution, the criminal procedure requires the active role of the defendant and their attorney. One need not be too smart to see that we shall face serious problems in this respect because in a poor country like our own, large part of the population cannot afford a defence attorney and the state can neither provide sufficient public funds to this aim.

3. Right to free legal assistance as referred to in Article 6 of the European Convention on Human Rights as an important standard of the national legislation

3.1. European standards in the national legislation

Knowing the law and jurisprudence of the European Convention on Human Rights with regards to the issue of legal assistance seems important due to two reasons at least. Firstly, the Convention as an international treaty is legally binding on the Republic of Macedonia and pursuant to Articles 98 and 118 of the Constitution it is a source of

national law within the sense that the courts and the other state authorities directly enforce the international treaties ratified in line with the Constitution of the Republic of Macedonia. Moreover, there is a real possibility of having the decisions of the national judicial and other state authorities be upheld in a procedure before the European Court for Human Rights in Strasbourg. Secondly, but not less important, the provisions of Article 6 of the European Convention pertaining to the right to a defence attorney are explicitly taken over by the Code of Criminal Procedure.

Article 6 (3) (c) ECHR lays down two conditions for free legal assistance: (1) insufficient means and (2) the interests of justice. Within that meaning it seems important to explain what is implied by “the interests of justice”. It can be expected that this phrase be not interpreted as the interest of the defendant, but somewhat as a public interest - some general justice, fairness of the system or even an efficient criminal justice! That one can realistically expect such an interpretation pertaining to the general interest in the fight against crime, justice to the victim, etc., is witnessed by the fact that even in the best known comments on the European Convention on Human Rights we may find interpretations at least partly headed in this direction.⁹

This could be really difficult to fit within the context of the entire Article 6 that guarantees the right to a fair trial, almost exceptionally in terms of procedural fairness, i.e. the guarantee of a fair trial as a protection of the defendant faced with the state prosecution authorities. On the contrary, the sense and aim of Article 6 from the Convention is a guarantee for a fair trial,¹⁰ which imposes obligations on the states to provide the defendant with realistic opportunities to defend themselves from all charges against them.¹¹ Although not explicitly mentioned in the Convention, “equality of arms” is considered as an essential element of the fair trial.

⁹ See: J. E. S. FAWCETT, *The Application of the European Convention on Human Rights*, Clarendon Press, Oxford, 1987; P. van DIJK/ G. J. H. HOOF, *Theory and Practice of the European Convention on Human Rights*, Kluwer, 1998, 473.

¹⁰ See: *Betts v. Brady*, 316 U.S. 445, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942).

¹¹ See: S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford University Press, Oxford, 2005.

3.2. Criteria for the appointment of a defence attorney

The jurisprudence of the European Court on Human Rights refers to several criteria (précising the interests of justice), of which some have now been explicitly taken over in Article 70 of the new CCP. Relevant to the interests of justice test are: a) the complexity of the case; b) the ability of the defendant to understand and present the relevant arguments without assistance; c) severity of the possible penalty.

The first criterion from where the Court parts is the *complexity of the violation* and the *severity of the stipulated penalty*; therefore account should be taken of both the maximum possible penalty and the realistically expected sanction in the specific case. Although the Court shall, as a rule, keep to the specific circumstances of the concrete case, in some of its decisions relevant to this issue it seems that it takes into account more the maximum prescribed penalty, which is rightfully criticized in the literature.¹²

Well-known is the case *Quaranta versus Switzerland*, where the law prescribed a maximum sentence of 3 years, although it was clear from the circumstances of the case that a much lesser sentence would be considered, which really did occur given that the defendant was sentenced to 6 months of imprisonment.¹³ This case is especially important to us because it was this case in particular that presented the occasion to introduce changes in the present CCP in the provision pertaining to free legal assistance for the indigent. Namely, the former solution from the federal CCP (later also taken over in the first Macedonian CCP from 1997) prescribed the possibility for obtaining a defence attorney in such circumstances only for offenses punishable by more than 3 years of imprisonment, and this limit was in 2004 reduced to the period of 1 year of imprisonment.

The next criterion in line of importance and at least seemingly reasonable and easily comprehensible is the *seriousness* of the specific case. It may regard the seriousness of both factual and legal issues, however, the legal issues are more often a reason to believe that a defendant without an attorney will not be able to defend oneself successfully. Within that context, the procedures where the cross-examination system is applied, as

¹² See: TRECHSEL, sup. cit, p. 274.

¹³ See: Quaranta v. Switzerland, Series A, No. 205, 1991.

well as the appeal procedures are usually considered as issues requiring special legal skills.

3.3. Number of defence attorneys

Some authors even put the question as to whether in certain particularly complex cases the defendant could seek and obtain more than one attorney. Truth be told, the French text of the Convention, as one of its original languages, suggests at first sight that only one defence attorney may be granted free of charge (“un avocat d’office”, “un défenseur”). Yet, the singular form is also used for the attorney of choice both in the French and the English text even for the attorney paid by the defendant themselves (“un défenseur de son choix”), and it is widely known that the number of defence attorneys in this context is not limited to one neither in the literature nor in practice.¹⁴ On the other hand, a frequently asked question in this sense is whether, from the European Convention perspective, it is acceptable to limit the number of defence attorneys (in some states to a maximum of three).

What is certain is that it is completely clear from a fairness perspective that the defendant is recommended to have legal assistance from an attorney in any criminal case other than in the lightest cases stipulating monetary fines, etc, which is sought by some authors and encountered in few states. However, limited budgetary possibilities are a realistic hurdle in almost all states, even in the wealthiest ones, and especially in countries like our own where neither the state nor its citizens are particularly wealthy.

3.4. Choice of an attorney

Another question related with the expenses is whether the defendant can choose the attorney appointed thereto in line of duty. Namely, as freedom of choice of a defence attorney paid by the defendant themselves is explicitly recognized as an important guarantee for the defendant, slightly different criteria apply for defence attorneys paid by the state. In most states it is usual for the paying authorities to determine the attorney of their own choice or according to a pattern. Our people say: “Half a loaf is better than no bread” This position was held for a long time by the

¹⁴ See: TRECHSEL, sup. cit, p. 271.

Commission and the Court in Strasbourg in a sense that the defendant cannot select the attorney appointed *ex officio* nor should he be consulted thereof.¹⁵ The positions in the comments and the recent jurisprudence have been divided so that the will of the defendants be more validated, according to the example of some European countries.¹⁶ All in all, although the defendant cannot be said to be completely free to choose an attorney *ex officio*, there is no justification why he shouldn't be at least consulted with regards to this issue.

However, in terms of the costs to the system as a whole, the freedom to be able to influence the choice of an attorney *ex officio* may reduce the "pressure" on the defendants to find an attorney themselves, but at their own expense. This would automatically imply great burden that even the wealthiest of states could not easily afford.

The financial reasons are the ones leading to the type of defence attorneys appointed *ex officio*, those being beginners or professionals who are not so good (or at least well-known) because in most states, sometimes including our own, they are not paid on a regular basis. These are some of the reasons for the generally shared problem of insufficient motivation of attorneys *ex officio*. The European Court penalizes such practices insisting that the defendant is guaranteed a defence and not a defence attorney,¹⁷ therefore the presiding judges are expected to keep account of whether the defence attorneys do their job conscientiously. In accordance with the decisions of the Court in Strasbourg, in our country (on demand of the defendant or upon their own initiative) the president of the court may dismiss the attorney appointed *ex officio* if s/he performs malpractice.

A new attorney is appointed at the place of the dismissed one and the Bar Association is informed of the dismissal (Article 68 paragraph 4 CCP, Article 77 paragraph 4 of the Bill).

¹⁵ In legal aid cases defendants do not have an unqualified right to a lawyer of their choice. See: *Croissant v Germany*, 25 September 1992.

¹⁶ See Art 142 of the German CCP (StPO).

¹⁷ Merely allocating a lawyer to the defendant if that lawyer is manifestly unable to provide effective representation does not satisfy the conditions of the right (*Artico v Italy* (13 May 1980) and also *Sannino v. Italy* (27 April 2006), paras 47-53). (See also the recent judgments in the cases *Melnik v. Ukraine* (28 March 2006), paras 79-81).

3.5. Free of charge

With regards to the issue of “free-of-charge” of the services of the appointed defence attorney, we must ask ourselves whether the compensation to the lawyer from the budget is permanent and the defendant can no longer worry about it or s/he will be asked to indemnify the expenses in the future if s/he gets a conviction or improvement of their financial standing. The jurisprudence of the European Court on Human Rights in Strasbourg makes a distinction between the costs for the defence attorney and the costs for an interpreter (Article 6 paragraph 3 item e of the European Convention) by finding that the latter will never be chargeable upon the defendant. Thus, in one case versus Germany, the Commission found that Article 6 of the European Convention would not be violated if this debt is charged in the event of improvement of the economic situation of the defendant to the extent rendering the free legal assistance not justified any more,¹⁸ whereas the Court left this issue open in the *Croissant* case.¹⁹

The CCP is not fully clear regarding this issue. Namely, money for defence of the indigent (beyond cases where defence is compulsory) seem to be awarded once and for all (from the Budget of RM), whereas the material situation is assessed at the time when deciding on the request (Article 75) regardless whether the defendant will be convicted or their material standing improved, etc. On the other hand, the costs for the appointed defence attorney to the indigent who have met the conditions for the so-called compulsory defence are temporarily paid *in advance* from the budget of the authority conducting the criminal procedure and are later charged to the persons who are obliged to compensate them (Article 102 paragraph 4). However, if paying the reward and the indispensable expenses would lead to question the sustenance of the defendant or the person they are obliged to maintain, the reward and the indispensable expenses of the attorney will be paid from the Budget of the Republic of Macedonia (Article 107 paragraph 1).

It can be seen from the jurisprudence of the European Court on Human Rights that no clear distinction is made between cases of compulsory defence (to which we can relate the issue of exemption from expenses at the end of the procedure) and the issues of free legal assistance for the

¹⁸ See: TRECHSEL, sup. cit.

¹⁹ *Croissant v Germany*, 25 September 1992.

indigent beyond cases providing for a compulsory defence. This is understandable from the perspective of an international instrument guaranteeing only the minimum standards for the defence and cannot cover all subtleties and differences of the national legal systems. It seems a little odd that precisely in the Anglo-Saxon procedures, specifically in England and the USA, the defendant who does not wish an attorney defends oneself at the hearing because those states do not recognize the principle of compulsory defense, even in procedures related with the most serious criminal offenses. Such decisions seem inappropriate in terms of the aforementioned increased need of participation of lawyers as defence attorneys in the adversarial procedures, but it derives from the individualistic philosophy which is the basis for this system of criminal judiciary. The function of this defence attorney is to assist the defendant with advice when the defendant asks for one. It is interesting to note that the institute of compulsory defense was, nevertheless, retained by most European countries having replaced the inquisitorial procedure by an adversarial one. Thus, liberalism typical for adversarial systems is in a way combined with the societal positions that the defendant should be assisted in their defence in criminal procedures. What should be of our concern here is, on the contrary, the inconsistency of the provisions of our Code of Criminal Procedure and the inconsistency between them and the provisions of the Law on Free Legal Assistance, adopted recently.²⁰

Namely, here we witness a mixture of the two basic requisites for free legal assistance, being the economic and legal one. Actually, in economic terms, the jurisprudence of the European Court on Human Rights in Strasbourg has very little and imprecise indications, which is a little odd considering the fact that this Court has itself a long practice of granting free legal aid to applicants who cannot afford it themselves. With regards to this issue, the Strasbourg authorities rely firstly on the rules of the national legislation for granting free legal assistance in national judicial proceedings. The European Court on Human Rights rarely finds that the defendant truly had sufficient means to hire an attorney themselves, although the burden of proof regarding this issue is instilled upon the defendant. All things considered, the national authorities have significant freedom to assess whether the defendant has or does not have sufficient means to pay for an attorney themselves. However, their decision must be supported by one serious case research and must be explained.

²⁰ Службен весник на РМ, 161/ 2009.

3.6. *New standards in the national legislation*

In view of the fact how this issue is regulated in the Law on Free Legal Assistance, it can be expected that our jurisprudence will be faced with the task of deciding whether the criminal procedures will continue to restore to the former standards or they will suitably and analogously apply the criteria for free legal assistance of this *lex specialis*.

One thing is certain: the law enforcement must comply with the law and jurisprudence of the European Convention on Human Rights.²¹

The Law on Free Legal Assistance introduces great confusion regarding its application in the criminal proceedings. With regards to criminal cases, it is solely said that “free legal assistance does not refer to cases of compulsory defence as prescribed by the CCP and the Law on Juvenile Justice” (Article 7 of this Law), which - as we saw – does not have much to do with the issue whether the defendant will have their attorney free of charge (which should be the subject of this law in particular). It is not clear whether this means that the criteria for poverty and “interests of justice” differ in criminal cases and shall not be subject of the Law on

Free Legal Assistance, especially in view of the fact that the Law in its Article 12 paragraph 4 establishes criteria for when sustenance is considered to be jeopardized, to which the CCP also refers (Article 107). We must not forget that the concept of poverty in the criminal procedure is relative and depends on the specific needs and services required in the specific case.

The relativity of the concept in that sense means that the defendant does not have to be without a dime,²² nor should it be assessed independently from the case according to their material situation, as suggested in the Law on Free Legal Assistance!

²¹ For the Article 14 of the Covenant on Civil and Political Rights see: M. NOWAK, U.N. Covenant on Civil and Political Rights: Ccpr Commentary, 2nd Ed., Kehl/Arlington, 2005.

²² See: Report of the Attorney General’s Committee on Poverty and the Administration of Federal Criminal Justice 5-11 (1963), Y. KAMISHAR/ W. LaFAVE/ J. H. ISRAEL, Basic Criminal Procedure, West, St. Paul, Minn., 1986, pp. 69-70.

3.7. Since when does the suspect have the right to an attorney?

We saw that in the criminal procedure the need for an attorney is very important (“critical”) at even much earlier stages of the procedure,²³ therefore the Proposal for the new CCP does not require an indictment to be brought in order for the right to a free attorney to be exercised!

Much attention is put to this issue in the US theory and jurisprudence, whereas it is considered that the defendant must obtain an attorney in all "critical stages" of the criminal prosecutions against them. That does not mean that the defendant must have an attorney at all stages since the instigation of the prosecution against them, but it requires that the defendant be provided assistance from an attorney only in what can be considered as “critical points/stages” of the procedure, and those are the ones where their substantial rights may be affected in the absence of an attorney.²⁴ Such are the following: Subjection of the suspect to some identification procedures; examination by the police or the public prosecution where there are attempts at drawing a confession or another incriminating statement from the defendant; first appearance or arraignment before a court whereas some action (or omission to act) may be used against the defendant; preliminary hearing; trial and sentencing. There is no reason why this logic and practice be not followed by our courts as well.²⁵

Due to these reasons, the conditions for compulsory defence as referred to in Article 74 paragraph 3 should not be interpreted in a way that persons charged with serious offenses punishable by 10 years of imprisonment or graver sentences should not be able to refer to Article 75 to obtain a defense attorney at the expense of the state even before an indictment is brought. The application of the criterion fairness for the defence or “the interests of justice”, as stipulated in the European Convention, should be interpreted by the Court in a flexible manner and appropriately to the criticality of the assistance from a defence attorney on a case-by-case basis and at every "critical" stage of the procedure.

²³ See: KAMISHAR/ LaFAVE/ ISRAEL, sup. cit., pp. 100-102; J. H. ISRAEL /W. LaFAVE, Criminal Procedure – Constitutional Limitations, West, St. Paul, Minn., 2001, pp. 339-370.

²⁴ See: ISRAEL /LaFAVE, sup. cit., p. 346 ff.

²⁵ Ibid.

4. Closing considerations

4.1. For an efficient system of free legal assistance in the criminal proceedings

The right to a defence attorney and the other guarantees for fair trial operate as an essential element of the procedures which are nowadays used to determine guilt for a criminal offense. On one hand they are important as a counterpoise of the pragmatic interests of the prosecution authorities for a greater efficiency in the fight against crime and corruption that strive to convict the defendants with as little effort and cost as possible. On the other hand, the rights of the defence are also a prerequisite for the functioning of the criminal procedure designed as a fight of opposing parties and a basic prerequisite for “equality of arms”.

The right to a defence attorney and the standards ensuring the fairness are indispensable protection of the vulnerable interests of the defendants. In the adversarial procedure streamlined as a fight between the parties before the court, the defence attorneys are not only an obstacle to reaching an easy conviction of the defendants, but they also form an integral part of the system and a prerequisite for its fair and lawful operation. Hence, those who wonder why the state, which is directly represented by the public prosecution office in the criminal procedure, would pay for defence attorneys to make their work harder are not right!

Therefore, the state will have to think more seriously as to how to provide an efficient system of legal assistance in a better and more efficient manner. The necessary costs for an efficient system of legal assistance are certainly one serious problem for young democracies with weak economies,²⁶ but that cannot be a reason to release them from their obligations. The pressure to promote the situation at this plan is intensifying especially now, in the process of their integration to the European Union. Possible solutions worth discussing are, above all, the introduction of public prosecutors in the cities and a greater engagement of the *pro bono* lawyers.

²⁶ See: R. SMITH, Minimum standards for the procedural rights of the accused in criminal proceedings, Background note for conference at Friedrich Ebert Stiftung, Berlin, 14 November 2006 (www.fes-forumberlin.de/Bundespolitik/pdf/6_11_14_smith.pdf).

4.2. Private defence lawyers Vs public defender

Although the accused who cannot afford to hire their own attorney have a right to have counsel appointed at public expense in most countries, the mechanisms for providing counsel differ. In most states, the state or courts offer a program in which a lawyer will be assigned to the accused at no cost as long as he can document that he is of lower income and if the crime carries with it the potential for imprisonment.²⁷ An *ex officio* system of assigning private counsel at state expense typically yields underpaid lawyers, deficient representation and sub-standard justice. All too often, the outcomes of criminal proceedings hinge arbitrarily on defendants' finances.

Most European systems rely on private defense lawyers. Similar system for providing lawyers to the indigent is used in smaller communities in the US, but most larger cities have established the public defender. According to some writers, representation by a public defender has advantages for the accused because lawyers working in the public defender's office tend to be experienced in criminal matters.²⁸ As the public defender's office is an organized system for providing defense attorneys, it is up to the bureaucracy rather than the judge to decide which particular attorney would represent the defendant.²⁹

4.3. Pro bono publico

One of the possible getaways of the financial problems related with the provisioning of legal assistance for the indigent is their representation by one of the private lawyers on a *pro bono* basis. Pro bono is a key source of legal assistance for the disadvantaged in the absence of an adequately

²⁷ The state pays the lawyer either an hourly fee or fixed fee depending upon the crime charged and the time spent.

²⁸ Legal aid agencies hire lawyers who specialize in providing legal aid, who work exclusively for government run legal aid agencies and cannot seeking potential clients or solicit other business.

²⁹ As his case proceeded through the system, the defendant would usually be represented not by a single attorney, but by different attorneys. Most likely, in Europe only one counsel will represent the accused, but his appointment will come rather late—after the official charge had been filed. Unlike in United States, the defendant has no right to have an attorney appointed in the pre-trial procedure. See: F. FEENEY/J. HERRMANN, *One Case Two Systems*, Transnational Publishers, 2005, pp. 374-375.

funded legal aid system.³⁰ Most of the Western democracies have a well-developed tradition for providing legal assistance free of charge or at reduced fees not only for the indigent, but for wider audiences, certain non-governmental organizations, citizens' associations or individuals such as friends, relatives, their own employees, etc.

Although legal practice has long been supportive of the pro bono representation, its commitment in practice is far below their rhetorical level. The USA have witnessed great debates with regards to this issue for a long time now,³¹ where the Code of Conduct of the Bar Chamber recommends the granting of free legal services to the people who cannot afford a lawyer and are presented as a sort of an obligation of each lawyer.³² Today, the lawyers and law practice in general are believed to have the moral obligation to provide legal services to the destitute.³³

The duty of the lawyers for *pro bono* work arises from the need to represent people and organizations that cannot afford it themselves.³⁴ Access to legal service is indisputably one important social interest because lack of professional assistance will not only jeopardize the individual interests of the citizens, but also the common interest of the society for ensuring equality, procedural fairness and social justice. That it concerns doubtless social values is actually not even arguable. What is debatable is why the lawyers should be the ones demonstrating mercifulness and good will for charity.

Some people believe that every type of charity work is actually useful to the service providers themselves and it contributes to the reduction of stress, depression, etc. with all volunteers, thus having a positive impact on their physical and mental health. In broader terms, volunteering of lawyers also enhances the image and overall reputation of law practice as

³⁰ See: J. Anderson / G. Renouf, Legal Services 'for the public good', *Alternative Law Journal*, Vol. 28, No. 1, Feb. 2003, p. 13.

³¹ See: ABA Commission on Professionalism, "... In the Spirit of Public Service": A Blueprint for the Rekindling of Lawyer Professionalism, 1986).

³² Lawyers in the United States are recommended under ABA ethical rules to contribute at least fifty hours of pro bono service per year. See: D. L. RHODE/ D. LUBAN, *Legal Ethics*, Fourth Ed., Foundation Press, New York, 2004, pp. 882-883.

³³ See: T. D'ALEMBERTE, *Tributaries of Justice: The Full Access*, *Florida Bar Journal*, April 1999, p. 1.

³⁴ See: D. L. RHODE, in : D. L. RHODE/ D. LUBAN, *Ethics*, Fourth Ed., Foundation Press, New York, 2004, p. 884.

a group as a whole. Therefore no wonder that research conducted with lawyers demonstrate that they themselves believe legal practice should provide *pro bono* services.³⁵ Still, most lawyers are concurrently opposed to the establishment of a duty within that context. The most common objection in that sense is that it is not fair to expect the greatest burden be borne by law practice itself because if it truly concerns a social need, the society as a whole should share the load.

One of the most frequently referred to arguments in favour of the aforementioned as to why the lawyers are expected to take the load is that the lawyer's occupation has a certain monopoly over the legal assistance provisioning, making it fair for this privilege to bear the appropriate obligations. This is particularly a strong argument in countries like Macedonia, the USA and others where the lawyers enjoy an exclusive right to provide legal services. On the other hand, it is broadly known that it concerns fairly expensive services, hence it is logical for the system deficiency arising from the reality of the deficient not having the means to pay for this type of services, among others, to be compensated by the lawyer occupation itself. On the contrary, it seems quite reasonable to expect the lawyers give something back for their privileged status. And while most people agree with this argumentation, the main debate remains to whether this engagement should stay at a moral obligation level or it should be furthered to prescribe at least a minimum amount of hours for *pro bono* work. Arguments against the legal obligation state that there is open contradiction when the obligatory nature of voluntary work would be stipulated at all, some even go as far as to characterize this as a form of slavery, even latent fascism. Others believe that this obligation will result in incomplete services that will be eventually harmful for the clients.³⁶

It is also visible that even the international standards emphasize this obligation to be a separate obligation of the lawyer's occupation in addition to being the obligation of the state.³⁷ The Code on Law Practice

³⁵ Ibid.

³⁶ Ibid.

³⁷ According to the *Basic Principles on the Role of Lawyers* „Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of

does not say anything with regards to this issue, whereas explicit provisions pertaining thereto are to be found in the *Code of professional conduct of lawyers, their professional associates and legal apprentices of the Bar Association of the Republic of Macedonia*. "If it concerns a client of poor material situation, the lawyer must adjust their fees to the payment possibilities of the client, in other words reduce their fees even below the minimum permissible rates for legal services and from the totally indigent clients request no compensation whatsoever, by constantly taking into account the ancient ethical principle of the lawyers: no one, due to their impossibility to pay the lawyer's fee, should be left without lawyer's and good legal assistance."

We must note the effort of the Bar Association of the Republic of Macedonia to set up their own contribution in the free legal assistance based on the *pro bono* activities of the lawyers, which is only indicative of an affirmative *pro bono* policy and certain commitment by the leadership of the Bar Association in this project.³⁸ It would be positive to follow some of the examples of the foreign bar chambers for prescribing at least a recommended minimum hourly period of *pro bono* activities for all lawyers.

The complex issue pertaining to the lawyers' fees in certain US states and in Italy is resolved in a way that the court appoints defence attorneys who are not only obliged to provide legal assistance in the specific case, but to also do it free of charge, *pro bono*. Some authors consider this method of resolving the problem as undesirable, in view of the fact that it puts the lawyers under a financial load, and it also bears some ethical dilemmas because they do not have to worry for the defendants always receiving the necessary protection and assistance without receiving any compensation thereof, sometimes not even compensation of the expenses.³⁹

lawyers shall cooperate in the organization and provision of services, facilities and other resources".

³⁸ Мора да се признае дека на проектот му недостига видливост. На интернет страницата на Адвокатската комора нема информации за достапноста на бесплатни услуги (www.mba.org.mk).

³⁹ See: J. HERRMANN, *Modeli reforme glavne rasprave u kaznenom postupku u Istočnoj Europi, uporednopravna perspektiva*, Hrvatski ljetopis za kazneno pravo i praksu, Vol. 4, Br. 1, 1997, p. 270.

4.4. Concern of the court

A possible exit to this problem is sometimes the court's activation in cases when the defendant cannot defend oneself properly. Precisely in the states having the most consistent adversarial systems (England, USA and Italy) it is allowed for the judge to take action in favour of the defendant in cases when the defendant defends oneself: they inform the defendant that s/he has the right to cross examine the witnesses, propose evidence, they assist them in putting questions, and at their own initiative exclude from the evidentiary material the unlawful evidence of the prosecution. Swedish judges act similarly, as well as judges in other European countries who have accepted the adversarial criminal procedure.

According to professor Hermann, this does not mean that in similar cases the “wheel goes back” for the judges to initiate investigation of the facts and the evidentiary initiative because they help the defendant, on the contrary, these activities remain the task of the prosecution.⁴⁰

4.5. Additional financial support

The commitment of state funds on a massive scale is essential in all modern legal aid programmes.⁴¹ Although majority of the financial resources for legal aid programs must be provided by the governments, the rest of the funds can be provided by donations from other parties, funds raised by lawyers and other donations and grants.

However, “the government is primarily responsible for providing criminal legal aid fund to legal aid agencies and as a result, criminal defence has practically become a state payment function, helping to ensure the access to adequate fund for legal aid.”⁴²

⁴⁰ Ibid.

⁴¹ If the poor are to get the services of lawyers, it is the obligation of the state to provide the money. See: M. CAPPELLETI/ B. GARTH, *Access to justice: Emerging issues and perspectives* V. III, DOTT A GIUFFRÈ EDITORE-Milan, p. 393.

⁴² See: Z. Yuhong, *A Brief Comparative Analysis of Criminal Legal Aid in Canada and China*, ([www.icclr.law.ubc.ca/china_ccprcp/files/Presentations and Publications/35 Canadian Criminal Legal Aid System_English.pdf](http://www.icclr.law.ubc.ca/china_ccprcp/files/Presentations%20and%20Publications/35%20Canadian%20Criminal%20Legal%20Aid%20System_English.pdf))

Conclusion

The new model of criminal procedure urges not only expansion of government financial and political backing for legal aid in criminal cases, but also requires the development of reliable models for assuring consistently effective legal services.

Adequate measures must also be undertaken for the improvement of the quality of legal aid afforded to indigent defendants; and to promote the development of skilled criminal defense advocates.

INTERNATIONAL PRO BONO LEGAL AID: CURRENT CHALLENGES AND PROSPECTS

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Abstract

This article focuses on international pro bono legal aid as a growing global movement. A brief *tour de horizon* is given into the kind of work and actors which are leading the way in organizing and offering pro bono legal advice. Noticeably, there are two components to this movement, on the one hand a concerted effort to establish *pro bono* legal practices in as many domestic jurisdictions as possible, and on the other hand a growing community of lawyers providing *pro bono* assistance in the international law field. An effort is made to address briefly the challenges and prospects concerning that process.

Finally, a number of concluding remarks are given. Pro bono legal aid is a necessary tool which should receive more attention and support in legal circles and beyond. However, compared to the domestic sphere where pro bono legal aid has become part of the legal tradition and in certain States a mandatory requirement for practicing law, at the international level this service is still in the process of development.

1. Introduction

Pro bono publico, usually shortened to pro bono, is a Latin term meaning ‘for the public good’, that is being or involving uncompensated legal services performed especially for the public good.¹ Generally when the

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term *pro bono* is used, it is in reference to legal services provided by a legal practitioner, advisor, or legal firm at no cost or for a substantially reduced fee. Legal services are usually offered at no cost for the client, and clients are usually those without the means to retain counsel, or with causes so specialized that qualified counsel is difficult to find without prohibitive expense. In the last two or three decades *pro bono* legal aid has been transformed and has taken an important place in legal practice, both domestic and international. As pointed out by Deborah Rhode, the rationale for *pro bono* work rests on two central claims; the first involves the value to society of addressing unmet legal needs, and the second involves the value to lawyers, individually and collectively, to such charitable contributions as a commitment to justice.² *Pro bono* work eventually serves both the interest of the society and of the legal profession

The American Bar Association (ABA) has provided strong leadership in the institutionalization of this form of legal assistance for the poor and underrepresented clients in the United States. Its 1993 revisions to the Model Rules on Public Service, stated that each lawyer ‘should aspire to render at least (50) hours of *pro bono* publico legal services per year,’ a ‘substantial majority’ of which should be targeted to ‘persons of limited means’ or ‘organizations’ that advocate on their behalf. Moreover, the ABA’s Ethics 2000 Commission, established in 1997, further amended the ethics rules, indicating that ‘every lawyer has a professional responsibility to provide legal services to those unable to pay.’³

In the last decade *pro bono* legal assistance has taken on the character of an emerging international movement, where different institutions and actors are engaged in improving both qualitatively and quantitatively this kind of assistance focusing mainly on developing countries or current international legal issues. The International Bar Association (IBA) operates a dedicated website and blog for this aim.⁴ A number of other

¹ In Garner A., Bryan (Ed.), *Black’s Law Dictionary*, St. Paul, Minnesota: West Group, 1999, pp. 1220-1221.

² Rhode, L. Deborah, *Access to Justice*, Oxford University Press (New York, 2004), p. 146.

³ See *inter alia* ABA’s official website at: <http://www.abanet.org/cpr/e2k/e2k-rule61.html> (last accessed on 15 November 2009).

⁴ See IBA’s dedicated website at: <http://www.internationalprobono.com> and the blog at: <http://intprobono.blogspot.com> (last accessed on 15 November 2009).

organizations and institutions do the same. It is easy to discern two parallel developments. First, there is a concerted effort to establish *pro bono* legal practices in as many domestic jurisdictions as possible. And, second, there is a growing community of lawyers providing *pro bono* assistance in the international law field not only on areas such as environment, human rights, immigration, and rule of law, but also on arms control and conflict resolution, and business and trade.⁵

This article looks first at the international pro bono providers and emerging movement. It provides a brief overview of the latest developments in this field. It will then focus on steps and activities which are being undertaken to promote and eventually establish some kind of institutional framework for pro bono legal assistance. In turn, an effort is made to address briefly eventual challenges and prospects for the pro bono legal aid movement. Increasing access to justice is crucial for any democratic society and at the international level a helpful and necessary tool for the peaceful resolution of disputes. It goes without saying that receiving qualified legal aid is very important for indigent clients, public interest litigation, and the just and peaceful resolution of international disputes.

2. Pro Bono Legal Aid at the International Level

This section will provide a brief *tour de horizon* into the work being done and the different actors leading the way in international pro bono legal advice, as well as some suggestions and recommendations concerning the ongoing process of institutionalization of pro bono work. At present there are two inter-related initiatives at work, both of which take place at an international level. The first one aims at extending pro bono legal services in countries that do not have such a tradition. The second initiative, carried out by different actors, includes providing pro bono legal aid to those who need it the most. Much of the latter pro bono legal aid focuses on promoting and strengthening the rule of law worldwide.

What is international pro bono legal work? That means the provision, free of charge for time spent, of legal services, advice, training and

⁵ See *inter alia* the 'Directory of Pro Bono Opportunities in International Law', of May 2004, prepared by Georgetown University Law Center, available at: <http://www.law.georgetown.edu/graduate/documents/InternationalDCProBono.pdf> (last accessed on 15 November 2009).

support to clients who cannot afford to retain counsel. International pro bono legal work can take many forms, including advocacy training, judicial assistance, and lectures on key areas of law and legal development. International pro bono legal work is frequently carried out for three purposes: first, to improve access to justice; second, to build capacity and capability in foreign legal systems; and third, to help meet unmet legal need.⁶ There are two inter-related components to such legal aid, the first of which aims at contributing to systemic improvements to other countries' legal systems and the second of which aims at providing access to justice to certain persons or categories of persons.

A number of actors and institutions are involved in organizing or offering pro bono legal aid. These entities include bar associations, private and public interest law firms, legal clinics operated by law schools, foundations, and other non-governmental organizations. The Pro Bono Declaration of the IBA of October 2008 encapsulates the underlying rationale behind the pro bono legal aid movement.⁷ The IBA declaration emphasizes that access to justice for all is essential to liberty, fairness, dignity, progress, development and the Rule of Law.

However, it is striking that the term *pro bono* is used only once in the 2008 Report of the Commission on the 'Legal Empowerment of the Poor',⁸ and no mention of it is made at all in the 2009 Report of the Secretary-General entitled 'Legal empowerment of the poor and eradication of poverty'⁹. While it is naïve to think that pro bono legal aid provides the solution to the legal empowerment of the poor and the eradication of poverty, it certainly can be a useful tool in improving

⁶ See UK Attorney General's Pro Bono Declaration, 3 March 2009, available at: http://www.internationalprobono.com/declarations/item.1254-UK_Attorney_Generals_Pro_Bono_Declaration (last accessed on 15 November 2009).

⁷ See Pro Bono Declaration of the International Bar Association, October 2008, available at: <http://www.internationalprobono.com/declarations> (last accessed on 15 November 2009).

⁸ Namely on p. 48 of Volume I of the Report of the Commission, available at: <http://www.undp.org/legalempowerment/reports/concept2action.html> (last accessed on 15 November 2009).

⁹ See Report of the Secretary-General entitled 'Legal empowerment of the poor and eradication of poverty', UN.Doc. A/64/133 of 13 July 2009, available at: <http://www.unhcr.org/refworld/docid/4a9e2c150.html> (last accessed on 15 November 2009).

access to justice as a modest first step towards achieving these much larger aims.

2.1. Examples of International Pro Bono Legal Aid Actors

Since it is difficult to track down all of the initiatives in this field that have flourished in recent times, our focus remains with three organizations and their pro bono programs, namely the International Pro Bono Program of the International Bar Association (IBA), the Global Pro Bono Program of the Public Interest Law Institute (PILI),¹⁰ and the Public International Law Practice Program of the Public International Law and Policy Group (PILPG)¹¹. PILPG, making use of law student research and advice, provides legal assistance to states and sub-state entities on a diverse array of legal matters, including human rights, minority rights, environmental protection, treaty interpretation, state succession, compliance with UN resolutions, the legality of the use of force, international adjudication, state recognition, economic embargos, territorial negotiations, global warming, and access to shared natural resources.¹² In recent years an increasing number of law firms or individual lawyers also offer pro bono legal aid in international criminal proceedings taking place before international courts and tribunals.¹³

Large international law firms have in recent years taken up an increasing number of pro bono projects. As Steinitz notes, the trend of international mega law firms undertaking *pro bono* representations of this type and scope should be understood and analyzed as part of an even larger

¹⁰ PILI is an international organization that advances human rights around the world by stimulating public interest advocacy and developing the institutions necessary to sustain it. For more information see http://pili.org/index.php?option=com_content&view=article&id=433&Itemid=187 (last accessed on 15 November 2009).

¹¹ PILPG, a 2005 Nobel Peace Prize nominee, operates as a global *pro bono* law firm providing free legal assistance to states and governments involved in conflicts. PILPG's primary practice areas are Peace Negotiations, Post Conflict Constitutions, and War Crimes Prosecution. For more information see <http://www.publicinternationallaw.org> (last accessed on 15 November 2009).

¹² See PILPG website at: <http://www.publicinternationallaw.org/areas> (last accessed on 15 November 2009).

¹³ For more information in this regard see *inter alia* http://www.nrc.nl/international/article2405205.ece/Top_lawyers_give_Karadzic_unpa_id_legal_advice (last accessed on 15 November 2009).

phenomenon – that of the growing and changing nature of the “corporate responsibility” movement.¹⁴ The Law Firm Pro Bono Challenge, launched in 1993 by the ABA-sponsored Law Firm Pro Bono Project, raised the stakes by calling on big firms to contribute 3 to 5 percent of their billable hours to pro bono and publicizing which firms succeeded in doing so and which failed.¹⁵ The United Nations Global Compact Initiative is also worthy of mention, since among other reasons, concepts of ‘corporate citizenship’ and ‘social corporate responsibility’,¹⁶ developed under this program provide the background to such work being undertaken by global law firms. As acknowledged by the Global

Compact, common goals, such as building markets, combating corruption, safeguarding the environment and ensuring social inclusion, have resulted in unprecedented partnerships and openness among business, government, civil society, labour and the United Nations.¹⁷ It goes without saying that it is in the interest of these law firms as well to work towards achieving those common goals.

2.2. Promoting and Strengthening the Pro Bono Movement

While pro bono legal aid is a common activity for legal professionals in many countries, only a few countries try to regulate this activity in any meaningful manner and even fewer have made the giving of such aid a requirement for lawyers to be able to practice law within a certain jurisdiction. Nevertheless, there are a number of initiatives that aim at introducing such practices and regulating this activity at the domestic

¹⁴ Steinitz, Maya, *Internationalized pro bono and a new global role for lawyers in the 21st century: lessons from nation-building in Southern Sudan*, Yale Human Rights and Development Law Journal, January 2009.

¹⁵ Cummings, L. Scott, *Access to Justice in the New Millennium Achieving the Promise of Pro Bono*, Human Rights: Journal of the Section of Individual Rights & Responsibilities, Vol. 32, Issue 3, 2005, pp. 6-10.

¹⁶ See ‘Corporate Social Responsibility: A view from the Law Society’, International Unit, September 2002, available at: <http://www.lawsociety.org.uk/documents/downloads/corporate%20social%20responsibility.pdf> (last accessed on 15 November 2009). This report/study provides a number of reasons in favor and against law firms adopting a corporate social responsibility policy. The Law Society is the professional body for 104,000 solicitors in England and Wales.

¹⁷ See the overview of the United Nations Global Compact Initiative at: <http://www.unglobalcompact.org/AboutTheGC> (last accessed on 15 November 2009).

level. The growth of emerging democracies based on the rule of law, the heightened international consensus regarding fundamental legal and human rights, and the globalization of law practice among large law firms and corporations have led to efforts to explore and establish a pro bono legal tradition in many nations.¹⁸ The Public Interest Law Institute (PILI) Pro Bono Program aims to institutionalize pro bono practice by law firms and individual practitioners in order to leverage private sector resources for the good of all. Its activity intends to bridge the gap between lawyers seeking opportunities to provide free legal help and those who need it.¹⁹

To enable long-lasting connections between pro bono practitioners and NGOs around the world, PILI has successfully created a number of clearinghouses that match up lawyers with NGOs that have legal challenges. Such clearinghouses have been created in Hungary, Russia, China and PILI assists other sister clearinghouses developing in other European countries, such as Poland, the Czech Republic, and Slovenia. The Cyrus Vance Center Global Clearinghouse, based in New York, also bears mention here. This clearinghouse matches community-based organizations, not-for-profit institutions, and groups of attorneys working on a voluntary basis on behalf of the poor and marginalized with attorneys who provide free legal assistance and it refers projects within four categories: Amicus Network, Analytical Legal Research, Public Interest Law Reform and Technical Assistance.²⁰ The Center assists also foreign organizations interested in obtaining pro bono legal assistance in any of these four categories and law firms interested in international pro bono projects.

Besides initiatives coming from bar associations or law firms, lawyers themselves have spurred the introduction and institutionalization of pro bono legal work.²¹ However, it is striking that this practice is largely

¹⁸ See <http://www.probonoinst.org/globalist.php> (last accessed on 15 November 2009).

¹⁹ For more information see http://pili.org/index.php?option=com_content&view=article&id=433&Itemid=187 (last accessed on 15 November 2009).

²⁰ More information on the Cyrus Vance Center Global Clearinghouse available at: <http://www.abcny.org/VanceCenter/GlobalClearinghouse.htm> (last accessed on 15 November 2009).

²¹ See for example Coen E. Drion, *De advocaat tussen professie en profijt* [The lawyer between profession and profit, GZ], *Nederlandse Juristen Blad*, No. 38, 2006, pp. 2167.

overlooked or even ignored in many European countries. That is somewhat unfortunate because doing pro bono work serves a number of aims which are beneficial to the legal profession itself. Thus, pro bono work allows legal practitioners to connect and serve the needs of the marginalized part of the society. Such work is a learning experience in itself through practice and legal research into unique legal scenarios.

The opening in European countries of legal clinics operated by law schools might be helpful to the process of embedding a culture of pro bono legal aid, since arguably law students from their views of the legal profession and their professional identity during law school. While there are a number of impeding factors,²² the benefits of having such programs in terms of legal education and entrenching a culture of providing pro bono legal aid cannot be overemphasized.²³ Among other opportunities, cases before the European Court of Human Rights (ECtHR) would provide an excellent opportunity for such legal clinics to combine teaching, research, practice and public interest litigation.²⁴ Evidently, while that could provide interesting and challenging work for legal

See also 'Code Bevordering Effectieve Toegang tot de Rechtsbedeling' [Code for Promotion of Effective Access to the Administration of Justice] or the Code of Drion at: http://www.nrc.nl/multimedia/archive/00216/Code_commerciele_ad_216691a.pdf (last accessed on 15 November 2009).

²² A number of reasons have been advanced against the introduction of clinical legal education, ranging from clinics being too costly, too "new" to be adopted by their faculties or their government agencies with oversight of legal education, to opposition from the bar because of strict rules of admission to the bar and ethical standards forbidding non-lawyers from practicing law, and, perhaps most basically, because a clinic might take bread from the table of the practicing bar. See Richard J. Wilson, *Western Europe: Last Holdout in the Worldwide Acceptance of Clinical Legal Education*, German Law Journal, Vol. 10, 2009, p. 360.

²³ Wilson, J. Richard, *Western Europe: Last Holdout in the Worldwide Acceptance of Clinical Legal Education*, German Law Journal, Vol. 10, 2009, pp. 359-382. See also the Report of the Association of American Law Schools Commission on Pro Bono and Public Service Opportunities, *Learning to Serve: The Findings and Proposals of the AALS Commission on Pro Bono and Public Service Opportunities*, October 1999, available at: <http://www.aals.org/probono/report2.html#schools> (last accessed on 15 November 2009).

²⁴ For more information on the overall number of pending cases and those per respondent State see pp. 127-128 of the 2008 Annual Report of the European Court of Human Rights, available at: <http://www.echr.coe.int/echr/en/header/reports+and+statistics/reports/annual+reports> (last accessed on 15 November 2009).

clinics, efficiency is a necessary part of law practice, but not necessarily a value for this form of legal education, which aims to teach students to be lawyers. Hence, this suggestion is aside from the ongoing discussion of legal reforms and other measures necessary to be taken on the part of the States member to the Statute of the Court to cope with its increasing caseload.

2.3. Examples of Pro Bono Legal Aid at an International Level

A number of examples will be provided in this section in order to highlight the kind of international pro bono legal work which is taking place at present. A lot of international pro bono legal work goes to promoting and strengthening the rule of law²⁵ and to human rights protection. PILPG advisers have provided legal counsel for more than a dozen countries on the legal aspects of peace negotiations and constitution drafting, as well as for 15 countries in Europe, Asia, and Africa concerning the protection of human rights, self-determination, and the prosecution of war crimes.²⁶

Recently, this organization opened a field office in Dar Es Salaam, Tanzania to advise Tanzanian government officials and policymakers on strengthening Tanzania's existing human rights framework. By working in partnership with the Commission for Human Rights and Good Governance, along with other senior Tanzanian policymakers and government officials, PILPG provides legal assistance to implement national laws that promote human rights in accordance with international legal standards.

It bears mentioning that international pro bono legal work is presently being done by a number of legal clinics. Thus, to name a few examples, the International Human Rights Law Clinic at American University has been involved in ground-breaking issues such as the first case to raise the issue of the risk of female genital cutting in Africa as a basis for political asylum in the U.S.; the arrest of Augusto Pinochet in London and his possible transfer to Spain for trial, along with other military officers in both Chile and Argentina during the dirty wars there; and most recently, involvement in an array of cases and issues arising from the detentions of

²⁵ Check the online database of entities engaged in rule of law work throughout the world at: <http://www.roldirectory.org> (last accessed on 15 November 2009).

²⁶ Miya Nazzaro, *Giving Peace a Legal Chance*, Legal Times, Vol. XXVIII, No. 32, 2005.

so-called enemy combatants at Guantanamo Bay, Cuba.²⁷ Oxford University has its own pro bono program and guidelines.²⁸ The Oxford Pro Bono Publico (OPBP) is a group of law post-graduate and Law Faculty members dedicated to the practice of public interest law on a pro bono basis.²⁹ Specifically, the function of the OPBP is to assist in the preparation of research briefs, expert opinions, amicus curiae and policy submissions, generally under the direction of practicing solicitors and barristers who are themselves acting on a pro bono basis.³⁰ Very recently Utrecht University started its own clinical legal program, namely the Utrecht Law School Clinical Program on Conflict, Human Rights and International Justice (“UUCP”). It aims to provide high-quality legal aid to a number of important international legal institutions.

An interesting regional initiative worth mentioning is the Pro Bono Declaration for the Americas developed by participants at the 2005 Strategy Summit convened by the Cyrus R. Vance Center for International Justice at the Association of the Bar of the City of New York. That declaration is a statement of principle and a plan of action for expanding the commitment of lawyers to provide legal services to the poor and underprivileged in the Americas.³¹ Eventually, this regional initiative could be followed in Europe and other continents.

3. Challenges and prospects

Not surprisingly the phenomenon of international pro bono legal aid raises many questions. As often the case, the first challenge is agreeing on a proper definition of international pro bono legal aid. What makes pro bono legal aid international in nature? Is it the fact that the beneficiary and the client come from different countries? Is it that it involves the solution of an international dispute or is otherwise used in

²⁷ See Richard J. Wilson, *Western Europe: Last Holdout in the Worldwide Acceptance of Clinical Legal Education*, German Law Journal, Vol. 10, 2009, p. 380.

²⁸ See Oxford Pro Bono Publico (OPBP) Guidelines at: <http://www.law.ox.ac.uk/opbp/OPBPConstitution.pdf> (last accessed on 15 November 2009).

²⁹ For more information on this issue see: <http://www.law.ox.ac.uk/opbp/index.shtml> (last accessed on 15 November 2009).

³⁰ For previous projects carried out by the OPBP see: <http://www.law.ox.ac.uk/opbp/projects.shtml> (last accessed on 15 November 2009).

³¹ For the text of the Declaration see <http://www.nycbar.org/VanceCenter/text.pdf> (last accessed on 15 November 2009).

international legal proceedings? From an ethical perspective one wonders whether the pushing of a self-serving agenda through certain projects be described or seen as international pro bono work? Should the focus of such work be on providing legal aid to low-income individuals, or on public interest litigation for the promotion and protection of group human rights? An objection which is often raised at the domestic level, but which is equally valid at an international level would be the following: if access to justice and the rule of law are deeply held values in a democratic society, should not then the whole society bear its cost, and not shift the burden of such a public obligation to the legal profession? Or to put it in other words, should fulfillment of such essential needs for a society become incumbent upon pro bono responsibilities of some good Samaritans?

What are some of the main challenges facing a proper organization of international pro bono legal aid? Selection of projects seems to be one of them. It is essential for such projects to be something which the legal community or the civil society are interested in. Domestic stakeholders must be involved in the design and evolution of such projects otherwise there will be a lack of necessary follow up. Usually there is a policy demand for local ownership, which is seen as one of the factors determining the success or failure of a project. However, there is an ongoing discussion on whether local ownership is the best suited framework for such work.³² Connected with this is the issue of that of access to such legal aid itself. That means information on such opportunities should be made available to those who need it and the public at large. That poses some difficulties already, given most of the information is available on the internet and internet access is not so widespread across continents.

For international pro bono legal aid to grow, there is need for a substantial increase in funding and support by legal professionals themselves and further development of best practices through

³² For criticism see *inter alia* Reich, Hannah, "Local Ownership" in *Conflict Transformation Projects: Partnership, Participation or Patronage?*, Berghof Research Center for Constructive Conflict Management, Berghof Occasional Paper No. 27, September 2006, available at: <http://www.berghof-center.org/uploads/download/boc27e.pdf> (last accessed on 15 November 2009).

professional organizations.³³ Those practices might include the adoption of a formal pro bono policy by the relevant bar association; the establishment of a pro bono coordinator to develop opportunities, to match service providers and clients, and to insure adequate training, supervision and performance for persons concerned; introduction of a fund to be administered by the relevant national bar association which can be used to stimulate and realize international pro bono legal aid projects. In relation to the last point it should be mentioned that while the legal aid might be pro bono, there are other related expenses which might need to be covered through external funding. There is a role to play also for law schools through their own legal clinics or other programs. Appropriate practices in this regard would include institutional support from the law school, adequate funding, and structures for insuring appropriate supervision and quality control.³⁴

Another important and delicate issue raised by this practice is ensuring a measure of accountability. That necessitates at least a number of commonly accepted ground rules and oversight mechanisms. While at the domestic level there are certain procedures in place to ensure that, at the international level the situation is different. Ensuring accountability should take into account and build upon existing domestic mechanisms, while striving to eventually reach a level of harmonization at an international level. Preferably that would need to be expressed in the form of some generally accepted guidelines. The International Bar Association and other similar organizations and interested actors could play a role in the process of drafting and disseminating these guidelines. Oversight and monitoring of the implementation of such guidelines would remain weak, in case of lack of an international mechanism to this aim. Evidently, at present domestic mechanisms offer the only possible venue in this regard.

A major challenge is the regulation or institutionalization of international *pro bono* legal aid in order to maximize the use of resources and increase the benefits. A better system of collection and exchange of data with regard to international pro bono legal aid could help develop appropriate strategies for improvement. Better data are necessary concerning

³³ Rhode, L. Deborah, *Access to Justice*, Oxford University Press (New York, 2004), pp. 180-181.

³⁴ *Ibid.*, p. 181.

objective outcomes, client perceptions, and community impact.³⁵ A translation of that information into a program of action could potentially transform the current state of affairs, namely largely ‘accidental’ distribution to a desirable and needed ‘deliberate’ and coherent international pro bono legal aid agenda. Knowledge retention and management are other issues inherently connected with the institutionalization of pro bono legal aid which needs special attention. Generally speaking, pro bono lawyers do not typically invest heavily in gaining substantive expertise, getting to know the broader public interest field, or understanding the long-range goals of client groups.³⁶ That might be slightly different with regard to international pro bono legal aid, since as seen by the examples mentioned above the providers of such aid are generally aware of the needs and have substantial expertise in their field of activity.

Appropriate funding for international pro bono legal aid projects is certainly a major sticking point. While legal aid itself can be pro bono, clearly there are related expenses which need to be covered. Agreement that law firms should dedicate 3-5 percent of their billable hours to pro bono legal work, or contribute the same amount to funds administered for that purpose, would be a very good start. However, that is unlikely to happen on a global scale any time soon. That means that there are few resources available to press the interests of marginalized social groups, who are left to depend heavily on volunteer efforts to fulfill part of their legal needs. It bears mentioning that the American Bar Association, the Law Society, and other bar associations put more attention and are active in providing such aid at an international level, whereas other legal professionals’ organizations pay little to no attention to this area.

International pro bono legal aid is a niche for legal professionals and in financial terms a growth industry. It is a topic which brings together issues of access to justice, human rights’ protection and the strengthening of the rule of law. Questions about the effectiveness and value of international pro bono legal aid as a model for addressing the issues mentioned above cannot be easily and definitely answered. Neither was it the scope of this modest article. It is important, however, that the

³⁵ *Ibid.*, p. 192.

³⁶ Cummings, L. Scott, *Access to Justice in the New Millennium Achieving the Promise of Pro Bono*, Human Rights: Journal of the Section of Individual Rights & Responsibilities, Summer 2005, Vol. 32, Issue 3.

advantages of international pro bono legal aid receive proper attention not only from legal professionals' organizations but also by the civil society at large. The systemic challenges that pro bono work poses should be studied and addressed carefully. Failure to confront the limitations of international pro bono legal aid could risk elevating professional interests over concerns of global justice, thereby promoting the false image of equal access to justice without turning that aim into reality.

Concluding remarks

It should not be forgotten that in practice, pro bono has never been only about what is good for the public; it has also been about what is good for lawyers.³⁷ That is equally true at the international level. Engaging in international pro bono legal aid is also about enhancing reputation, creating contacts, career advancement and learning through doing. It should be mentioned that legal clinics provide an excellent vehicle for giving students practical experience, develop a professional identity, and entrench a culture of doing pro bono work. European countries in general and those of Western Balkans in particular should certainly pay more attention to this form of legal education.

Evidently, international pro bono legal aid has grown in quantity and quality and its visibility and appeal have considerably increased in the last decades. Part of that legal aid has proved significant in strengthening the rule of law and supporting the consolidation of democratic institutions in different countries. Notably, the emergence and growth of international pro bono legal aid emphasizes the need to carefully and critically reflect on our commitment both individually and as a legal profession to the rule of law.³⁸ Occasionally, such aid has even resulted in improved access to international justice, since it has allowed States or other actors to solve their disputes through judicial, arbitration or mediation mechanisms.³⁹ The economic value of international pro bono

³⁷ Rhode, L. Deborah, *Rethinking the Public in Lawyers' Public Service: Pro Bono, Strategic Philanthropy, and the Bottom Line*, *Fordham Law Review*, Vol. 77, 2009, p. 1435.

³⁸ Judge Krieger, S. Marcia, *A Twenty-First Century Ethos for the Legal Profession: Why Bother?*, *Denver University Law Review*, Vol. 86, No. 3, 2009, pp. 865-899.

³⁹ An example is the Abeyi Arbitration before the Permanent Court of Arbitration where PILPG assisted in the arbitration process between the Government of Sudan and

legal aid projects amounts to millions of dollars per year. As a phenomenon it seemingly appears to a by product of globalization, including the process of the globalization of the law.

While international pro bono legal aid has taken the form of an emerging global movement, with a number of key focus areas such as the rule of law and human rights protection, a lot remains to be done concerning its organization in a coherent manner with commonly accepted rules and aims. It goes without saying that an increase in the volume of international pro bono legal aid should not be assured at the expense of effective legal advice. Particular attention should be paid to this latter issue, especially since many of the clients are not able to evaluate or challenge the quality of such aid. Projects of this kind should strive to have established priorities and external assessment procedures, so as to evaluate both their progress and impact.

Bibliography

BOOKS

R. Granfield and L. Mather (eds.), *Private Lawyers and the Public Interest: The Evolving Role of Pro Bono in the Legal Profession*, Oxford University Press, 2009.

ARTICLES

Margaret Camilleri, *Pro Bono: How does it work?* *Legaldate*, 2002, Vol. 14, Issue 1, pp. 5-8.

Scott L. Cummings, *The Politics of Pro Bono*, *52 UCLA Law Review* 2004, pp. 1-149.

Cummings, Scott L., *Access to Justice in the New Millennium Achieving the Promise of Pro Bono*, *Human Rights: Journal of the Section of Individual Rights & Responsibilities*, Summer 2005, Vol. 32, Issue 3

James A. Goldston, *Public Interest Litigation in Central and Eastern Europe: Roots, Prospects, and Challenges*, *Human Rights Quarterly*, Vol. 28, 2006, pp. 492–527.

the Sudan People's Liberation Movement. For more information see: http://www.pca-cpa.org/showpage.asp?pag_id=1306 (last accessed on 15 November 2009).

Maya Steinitz, Internationalized pro bono and a new global role for lawyers in the 21st century: lessons from nation-building in Southern Sudan, *Yale Human Rights and Development Law Journal*, January 2009.

Judge Marcia S. Krieger, A Twenty-First Century Ethos for the Legal Profession: Why Bother?, *Denver University Law Review*, Vol. 86, No. 3, 2009, pp. 865-899.

J. Martin and S. Daniels, Legal Services for the Poor: Supply, Self Interest, and Institutionalizing Pro Bono, in R. Sandefur, ed., *Access to Justice*, Elsevier Press, 2009.

J. Martin and S. Daniels, Pro Bono, Not Just a Professional Responsibility, in L. Fox, ed., *Raise the Bar: Real World Solutions for a Troubled Profession*, ABA Publishing, 2007.

Deborah L. Rhode, Rethinking the Public in Lawyers' Public Service: Pro Bono, Strategic Philanthropy, and the Bottom Line, *Fordham Law Review*, Vol. 77, 2009, pp. 1435-1452

Wilson, J. Richard, Western Europe: Last Holdout in the Worldwide Acceptance of Clinical Legal Education, *German Law Journal*, Vol. 10, 2009, pp. 359-382

INTERNET RESOURCES

Pro Bono Institute: <http://www.probonoinst.org/globalist.php>

American Bar Association Pro Bono Homepage:

<http://www.abanet.org/legalservices/probono>

American Bar Association Volunteer Opportunities in International Pro Bono:

<http://www.abanet.org/legalservices/probono/international.html>

Chart of Law School Pro Bono Programs:

http://www.abanet.org/legalservices/probono/lawschools/pb_programs_c hart.html

ABA Online Publications on Pro Bono:

http://www.abanet.org/legalservices/probono/nav_publications.shtml

A Handbook on American Law School Pro Bono Programs:

<http://www.aals.org/probono/probono.pdf>

Report of the Association of American Law Schools Commission on Pro Bono and Public Service Opportunities, Learning to Serve: The Findings and Proposals of the AALS Commission on Pro Bono and Public Service Opportunities, October 1999:

<http://www.aals.org/probono/report.html>

Georgetown University Law Center - Directory of Pro Bono Opportunities in International Law:

<http://www.law.georgetown.edu/graduate/documents/InternationalDCPro Bono.pdf>

Oxford Pro Bono Publico (OPBP):

<http://www.law.ox.ac.uk/opbp/index.shtml>

The Public International Law & Policy Group (PILPG):

<http://www.publicinternationallaw.org>

LexisNexis Pro Bono Initiative:

<http://law.lexisnexis.com/webcenters/RuleofLawResourceCenter/LexisNexis-Rule-of-Law-Pro-Bono-Access/Pro-Bono-Program/LexisNexis-Pro-Bono-Initiative>

Public Interest Law Institute (PILI) Global Pro Bono: <http://pili.org>

RESEARCH PROJECT

International Bar Association (IBA) International Pro Bono:

<http://www.internationalprobono.com>

Lex Mundi Pro Bono Foundation:

<http://www.lexmundiprobono.org/lexmundiprobono/Default.asp>

Advocates for International Development: <http://www.a4id.org>

PRO-BONO LEGAL AID UNDER THE EUROPEAN CONVENTION FOR HUMAN RIGHTS

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Abstract

This contribution discusses the right to free legal assistance under article 6 of the European Convention for Human Rights. Although the focus is on the right of a person charged with a criminal offence to have access to legal aid, some attention is also paid to free legal aid in civil cases as well. The European Court of Human Rights has recognised the right to legal aid in civil proceedings only as a precondition to the right to access a court. The right of a person charged with a criminal offence to have access to free legal assistance is subject to two conditions: the lack of sufficient means to pay and the requirements stemming from the interest of justice. Moreover, this right should not be illusory, but practical and effective. The will of the accused in choosing his own legal aid lawyer of refusing to have the services of such a lawyer should be in principle respected.

1. General remarks

The classic notion of pro-bono legal aid entails the provision of legal assistance free of charge. The purest form of pro-bono legal aid implies that the professional lawyers do not get any remuneration for the assistance provided. Nevertheless, many countries have established legal aid schemes intended to assist citizens without sufficient financial means to pay for the necessary legal advice in legal litigations. Under these schemes citizens are provided with free legal advice while the lawyers who participate in these schemes in principle are paid by the State.² This

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² It should be noted that not all the States have subsidies in place in order to pay the lawyers who participate in legal aid schemes. A number of complaints have been

form of legal aid may also be defined as pro-bono legal aid as far as the applicants in legal litigations are concerned.

Within the Council of Europe such schemes are often established by Member States in order to comply with the fair trial requirements of article 6 of the European Convention for Human Rights (hereinafter ECHR). Especially article 6 (3)(c) ECHR requires that everyone charged with a criminal offence has the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interest of justice so require. As it will be evident below, the European Court of Human Rights (hereinafter the Court) has decided that also in civil cases indigent persons should be able under certain conditions to receive free legal advice.

As it is the case with other rights guaranteed by the ECHR the right to free legal assistance should not be illusionary, but practical and effective. The right of a person charged with a criminal offence to have access to free legal assistance is subject to two conditions: the lack of sufficient means to pay and the requirements stemming from the interest of justice. The Court has developed a considerable body of case law where these criteria are further elaborated. This contribution is a modest attempt to analyse the case law of the Court on free legal aid. It does not seek to give an exhaustive overview of the Court's decisions. The goal is to discuss the most celebrated cases and to point out some controversial topics.

This paper focuses on the right of persons charged with criminal offence to have free legal assistance. However, for the sake of completeness in paragraph 2 some attention will be paid to the right of the defendants in civil cases to have access to legal aid.³ The right to free legal assistance

brought before the European Court of Human Rights (hereinafter the Court) from lawyers in Belgium, Germany and Austria alleging that their obligation to provide legal assistance without payment amounts to forced or compulsory labour and therefore the respective countries have violated article 4(2) or article 4(3) of the European Convention for Human Rights (hereinafter ECHR). Both the Commission and the Court did not find a violation of article 4 ECHR because the obligation to provide free legal assistance was part of their civil obligations as lawyers and they had consented to the normal conditions of the exercise of their profession. See *Van der Musselle v. Belgium* HUDOC (1983), paras. 32-37; *Appl. 4653/70, X v. Federal Republic of Germany*, Yearbook XVII (1974), p. 148 (172); *Gussenbauer v. Austria*, Yearbook XV (1972), p. 588 (562).

³ The Court does not seem to make any distinction between terms 'free legal assistance' and 'legal aid'. Therefore these terms are used alternatively in this paper.

in criminal cases will be discussed in paragraph 3. In this paragraph I will first give a general overview on the application of article 6 (3) (c) in criminal cases. However the focus will be in the pre-trial phase, since it seems that the case law of the Court is not clear on this topic. I will then discuss the two conditions to which the right to free legal access is subject to, namely: the lack of sufficient means to pay and the requirements stemming from the interests of justice. Paragraph 3 will conclude with a discussion of the requirements of a practical and effective legal aid.

Closely related to a practical and effective legal aid are the topics of respecting the accused's choice of a legal aid lawyer and the power of national courts to appoint a legal aid lawyer against the will of the accused. These topics will be discussed in paragraph 4, where I will illustrate the discussion with some developments in the Dutch literature and case-law. Finally, conclusions will be drawn in paragraph 5.

2. Legal aid in civil cases

The right to legal aid in civil proceedings is not a self-standing right. The Court has recognised the right to legal aid in civil proceedings only as a precondition to the right to access to court. Although not expressly mentioned in article 6 (1) ECHR, the Court held in the *Golder*⁴ case that article 6 guarantees the right of access to a court. In that case, a convicted prisoner did not get permission from the Home Secretary to consult a solicitor in order to start civil proceedings in libel against a prison officer. The Court held that the refusal amounted to a breach of article 6 (1) ECHR because that article does not only grant procedural guarantees once the proceedings in court have started, but also 'first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court'.⁵ Such a right is a universally recognised principle of law and it is inherent in the wording of article 6 ECHR which guarantees that everyone has the right to bring a civil claim before an independent and impartial court or tribunal established by law.⁶ It goes without saying that the right to have access to a court also applies to criminal cases where the accused is entitled to have the charge against him determined by a court.⁷

⁴ *Golder v. UK*, (1975) 1 EHRR 524.

⁵ *Ibid.*, at paras. 35-36.

⁶ *Ibid.*

⁷ *Deweere v. Belgium*, HUDOC (1980).

The ruling in the Golder case implies that the right of access to a court should be effective. This may entail a positive obligation for the State to provide the litigants with free legal assistance as it was decided in the Airey⁸ case which concerned a wife who wanted to bring proceedings in the Irish High Court for an order of judicial separation. She was indigent and was refused legal aid. The Irish Government sought to distinguish this case from the Golder case on the grounds that the alleged lack of access to a court was not the result of any deliberate impediment on the part of the Government. Accordingly, the Irish authorities could not be held responsible under the Convention for Mrs. Airey's personal circumstances. The Court recognised the difference between the facts of the two cases and it held that the State may not be compelled to provide free legal assistance for every dispute relating to a civil right.⁹ Such an obligation would also sit ill with the fact that express mention of a right to free legal assistance is made only in article 6 (3) ECHR which deals with criminal cases.¹⁰ However, article 6 (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.¹¹ This is certainly the case if national law requires legal representation in certain cases, or when the procedure or the facts of the case are complex.¹²

The criteria for the right to legal aid in civil proceedings were further elaborated in the Steel and Morris¹³ case. In that case, the applicants had criticised McDonald's, the fast food chain, on environmental and social grounds in the context of a London Greenpeace campaign. McDonald's successfully brought an action for defamation against the applicants. The applicants lodged a complaint at the Court alleging that their right to have access to a court was infringed because the United Kingdom had refused to provide them with legal aid. The Court held that the need for legal aid in civil cases must be determined by reference to the facts of each case and 'will depend inter alia upon the importance of what is at stake for the applicants in the proceedings, the complexity of the relevant law and procedure and the applicants capacity to represent him or herself

⁸ Airey v. Ireland, HUDOC (1979).

⁹ Ibid., at para. 26.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Steel and Morris v. UK, HUDOC (2005)

effectively.’¹⁴ The applicant’s claim was upheld by the Court which held that there had been a violation of article 6 (1) ECHR for the following reasons. First, the applicants were indigent and McDonald’s claimed £100.000 damages. Therefore, financially there was a lot at stake for the applicants. Second, this was a voluminous case with 300 days of court hearings, from which 100 were on legal arguments. The facts and the law of the case were thus complicated. Third, although the applicants had some pro-bono help from lawyers and to a certain extent were capable to represent themselves, there was a clear disparity between the respective levels of legal assistance enjoyed by the applicants and McDonald’s, which gave rise to unfairness.¹⁵

It should also be noted here that States are free to choose the means to provide legal aid in order to ensure a fair hearing. “Legal aid schemes” is one possibility, but not necessarily the only one.¹⁶ Other possibilities may include ex gratia legal aid,¹⁷ or simplification of the proceedings.¹⁸

3. Legal aid in criminal cases

3.1. General

The right of a person charged with a criminal offence 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 interest of justice so require, is guaranteed in article 6 (3) (c) ECHR. The ratio of this article is to ensure that the determination of a criminal charge against a person ‘will not take place without an adequate representation of the case for the defence’.¹⁹ Article 6 (3) (c) applies to persons who are subject to a criminal charge.²⁰ This means that a person might be entitled to have access to a lawyer not only in proceedings which are characterised as criminal by national law, but also in proceedings which

¹⁴ Ibid., at para. 61.

¹⁵ Ibid., at para. 69.

¹⁶ A v. UK, HUDOC (2002), para. 98.

¹⁷ Andronicou and Costandinou v. Cyprus, HUDOC (1997), para. 491.

¹⁸ Airey v. Ireland, HUDOC (1979), para. 26.

¹⁹ Pakelli v. FRG, HUDOC (1983), para. 84 Com Rep.

²⁰ For the meaning of the term ‘criminal charge’ see Peçi Idlir, Sounds of Silence: A research into the relationship between administrative supervision, criminal investigation and the nemo-tenetur principle (Nijmegen, 2006), pp. 36-44.

may be labelled as administrative or disciplinary by national law but which in fact fall under the Engel²¹ criteria and therefore should be considered as criminal for the purposes of the Convention.²² Article 6 (3) (c) ECHR applies also to the pre-trial stage of the criminal proceedings ‘if and insofar as the fairness of the trial is likely to be seriously prejudiced’²³ by a refusal on the part of the authorities to grant the accused access to a lawyer.

However, it is not entirely clear from which moment and under which conditions a person charged with a criminal offence should have access to a lawyer during the pre-trial proceedings. It is even less clear whether and when suspects or accused persons which are in pre-trial detention should be granted free legal assistance. In Murray²⁴ the applicant was a terrorist suspect and was denied access to a lawyer the first forty-eight hours after his arrest under emergency legislation. During this period he was interrogated, but exercised his right to remain silent. Under the national legislation, adverse inferences were drawn from his silence during the police interrogation. The Court held that to ‘deny access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defence may well be irretrievably prejudiced, is – whatever the justification for such denial – incompatible with the rights of the accused under article 6’.²⁵ In Salduz²⁶ the applicant who was 17 years old was arrested during a demonstration of the PKK. He was interrogated by the anti-terrorist unit of the police in absence of the presence of a lawyer. He made a confession during this interrogation.

One day later he was interrogated by an investigating judge where he withdraw the confession made one day earlier and he also alleged that the

²¹ Engel and others v. the Netherlands, HUDOC (1976).

²² In Engel and others v. the Netherlands, the Court held that administrative or disciplinary proceedings may be characterized as criminal for the purposes of the Convention depending on the nature of the offence and the degree and the severity of the penalty that the person concerned risks incurring. These criteria were further elaborated in Öztürk v. FRG, HUDOC (1984). See for a detailed discussion of these criteria Peçi İdlir, Sounds of Silence: A research into the relationship between administrative supervision, criminal investigation and the nemo-tenetur principle (Nijmegen, 2006), pp. 37-42.

²³ Imbrioscia v. Switzerland, HUDOC (1993), para. 36.

²⁴ Murray v. the United Kingdom, HUDOC (1996).

²⁵ Ibid., para. 66.

²⁶ Salduz v. Turkey, HUDOC (2008).

confession was made under compulsion. Only after the interrogation by the investigating judge was he allowed to have access to a lawyer. He was convicted to four and a half years imprisonment and the trial judge based the conviction on the statements that Salduz made during the first police interrogation. The Court found a violation of article 6 (3) (c) because ‘ Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restrictions (...) must not unduly prejudice the rights of the accused under article 6’.²⁷ The rights of the accused will be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are later used in trial against the accused.²⁸ The position taken by the Court in Salduz was confirmed in Panovits²⁹ where the applicant, 17 years old at the time of his arrest, was suspected of murder and robbery. He and his father was invited to visit a police station for interrogation.

At the police station the applicant was taken to a separate room for questioning. He admitted his involvement in the crime, but later on he stated that the confession was not voluntary. The applicant was not warned about the possibility to choose the lawyer or to request the appointment of a lawyer. While the applicant was being questioned, his father (i.e guardian at the moment) was told that he would better find a lawyer for his son. However his father refused to do so. The applicant was convicted with 20 years imprisonment and the conviction was mainly based on his confession at the first interrogation without having access to a lawyer.

The Court held that there was a breach of article 6 ECHR. The passive approach on the part of the authorities to furnish the applicant with information to enable him to access legal representation was an obstacle to the effective exercise of his rights guaranteed by article 6 (3) (c) ECHR. These ‘obstacles to the effective exercise of the rights of the defence could have been overcome if the domestic authorities, being conscious of the difficulties for the applicant, had actively ensured that he understood that he could request the assignment of a lawyer free of charge if necessary’.³⁰ In Quaranta³¹ it was held that article 6 (3) (c) does

²⁷ Ibid., para. 55.

²⁸ Ibid.

²⁹ Panovits v. Cyprus, HUDOC (2008).

³⁰ Ibid., para. 72.

³¹ Quaranta v. Switzerland, HUDOC (1991).

not only require that the accused has the assistance of a legal aid lawyer during the trial, but also in connection with his appearance before an investigating judge during the pre-trial phase. In the recent case of *Pischalnikov*³² the Court summarized its case law on the topic. It reiterated that ‘although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of fair trial’.³³

The Court seems to draw attention to the fact that persons charged with a criminal offence are often placed in a vulnerable position when they are in police custody. Their vulnerability is amplified by the fact that criminal proceedings tend to be very complex in the pre-trial phase and that vulnerability ‘can only be properly compensated for by the assistance of a lawyer whose task is, among other things, to help to ensure respect of the right of an accused not to incriminate himself’.³⁴ No violation of article 6 (3) (c) was found in *Yurttas*³⁵ where the applicant was denied access to a lawyer and no legal aid lawyer was appointed upon his request during the pre-trial investigation. Important in this case was the fact that the incriminating statements that the accused made to the investigating judge were not used against him in the trial proceedings.

It goes without saying that article 6 (3) (c) applies to the trial phase. It also applies to the appeal proceedings depending on the special features of the appeal proceedings concerned and the role they play in the case as a whole.³⁶ Access to a legal aid lawyer in the appeal proceedings will not remedy the denial to such a lawyer in the trial proceedings if the appellate court does not have jurisdiction to fully consider the case on the facts and law.³⁷

3.2. Conditions for legal aid

As it was mentioned above in paragraph 1 of this paper, the right of a person charged with a criminal offence to have access to legal aid is subject to two conditions. First, the accused must not have ‘sufficient

³² *Pischalnikov v. Russia*, HUDOC (2009).

³³ *Ibid.*, para. 66.

³⁴ *Ibid.*, at para. 69.

³⁵ *Yurttas v. Turkey*, HUDOC (2004).

³⁶ *Meftah and Others v. France*, HUDOC (2002), para. 41.

³⁷ *Quaranta v. Switzerland*, HUDOC (1991).

means' to pay for legal assistance. The term 'sufficient means' is not defined in the Convention and the Court has given no indication on the level or kind of means that might be taken into account when deciding whether to grant access to free legal assistance. However, in *Pakelli*³⁸ the Court formulated a test as to the burden of proof. It is for the accused to prove that he does not have sufficient means. Nevertheless, the proof need not be 'beyond all doubt'. Some indications that the accused does not have the means to pay are sufficient. Mr. Pakelli had presented the Commission certain certificates of income at the time that he was convicted and he was granted free legal aid to present the case in Strasbourg.

The Court admitted that the data presented by the applicant was not sufficient to prove beyond all doubt that he was indigent at the relevant time, but that was not necessary. The Court took also into account the fact that the applicant had offered to the national authorities to prove his lack of means. In absence to any indications to the contrary this led the Court to regard the first of the two conditions contained in article 6 (3) (c) as satisfied.³⁹ Although not expressly decided by the Court, it seems that an accused person may be compelled to pay the costs of any free legal representation upon conviction. This line of reasoning was adopted by the Commission in the *Croissant*⁴⁰ case. The Commission held that article 6 (3) (c) does not prohibit a contracting party to require an accused to pay the costs of any free legal representation upon conviction.

However, a precondition to this is that the accused must have the necessary means to pay the costs at the time when he is convicted. This line of reasoning by the Commission seems to support the view that the term 'free' in the context of free legal assistance is not incompatible with the mere temporary exemption from costs, namely an exemption only as long as the accused does not have sufficient means to pay the costs incurred through legal assistance. Therefore, the wording 'has not sufficient means to pay' does not only refer to the moment when the court decides whether free legal assistance should be provided. It is relevant also at the time when the question is decided whether and to what extend the defendant has to pay the costs of the proceedings.

³⁸ *Pakelli v. RFG*, HUDOC (1983).

³⁹ *Ibid.*, at para. 34.

⁴⁰ *Croissant v. Germany*, HUDOC (1992).

The second condition concerns the interests of justice. The accused must be granted free legal assistance only 'where the interests of justice so require'. The Court has developed a number of criteria when deciding whether the interests of justice require that the accused has access to legal aid. The seriousness of the offence and the penalty that the applicant risks incurring have proved to be two important factors in this respect.⁴¹ In cases where the deprivation of liberty is at stake, the interests of justice will in principle require that the accused has access to free legal assistance.⁴² In the abovementioned Quaranta case, the applicant was charged with drugs offences and he risked three years imprisonment.

That fact alone was enough for the Court to hold that the interests of justice required that legal aid should have been provided.⁴³ If the procedure is simple and the maximum penalty risked is not imprisonment but a small fine, the interests of justice will in principle not require legal aid.⁴⁴ In contrast, complicated cases, in law or facts, will most probably require free legal assistance.⁴⁵ The capacity of a particular accused to present his case and to defend himself plays also an important role in determining whether the interests of justice require legal aid.⁴⁶ Closely related to this factor is the role that a lawyer can play in certain proceedings.

In Artico⁴⁷ the applicant who was indigent was given free legal aid in proceedings before the Italian Court of Cassation. His lawyer however, never acted for the applicant and when the applicant requested the appointment of another lawyer, that request was denied. De facto the applicant was forced to lodge an appeal before the Court of Cassation by himself.

The Court held that only a lawyer could have countered the pleadings of the Public Prosecutor by causing the Court of Cassation to hold a public

⁴¹ See for example *Twalib v. Greece*, HUDOC (1998).

⁴² *Benham v. UK*, HUDOC (1998), para. 61. The applicant risked in this case a three months' imprisonment for not paying a community charge.

⁴³ *Quaranta v. Switzerland*, HUDOC (1991), para. 33.

⁴⁴ *Gutfreund v. France*, HUDOC (2003), para. 39. It is not entirely clear whether a heavy fine without imprisonment will justify free Legal assistance.

⁴⁵ This seems to be the suggestion stemming from the above *Gutfreund* case.

⁴⁶ See for example the *Quaranta* case above.

⁴⁷ *Artico v. Italy*, HUDOC (1980).

hearing where the defence could have replied to the Public Prosecutor's arguments against the appeal.⁴⁸

3.3 Practical and effective legal aid

In the leading case of *Artico*, the Court held that access to legal aid should not be illusory but 'practical and effective'.⁴⁹ As noticed above, the officially appointed lawyer of the applicant never acted for him and therefore he asked for the appointment of another lawyer, a request which was denied. The Italian Government argued that it could not be held responsible for a breach of article 6 (3) (c) because it had already appointed a lawyer to the applicant free of charge. The Court disagreed and held that the right guaranteed in article 6 (3) (c) implied 'assistance' and not a mere 'nomination'. Therefore, by simply nominating a lawyer to the applicant, the Italian Government did not fulfil its obligations under article 6 (3) (c) ECHR.

It should however immediately be noticed that the state cannot be held responsible for every shortcomings of defence lawyers. This 'follows from the independence of the legal profession of the state that the conduct of the defence is essentially a matter between the defendant and his counsel, whether the counsel be appointed under legal aid scheme or be privately financed'.⁵⁰ The ratio of this approach is that the defence lawyer is not a state organ which can be placed under direct responsibility for its breaches of the Convention. The test that is applied in this context is that the state is obliged to react and intervene – either through its courts or other competent organs – only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to its attention.⁵¹

An example of such a manifest failure of the legal aid defence lawyer to provide effective representation is the case where the lawyer fails to comply with formal but crucial procedural requirements. This happened in *Czekalla*⁵² where the legal aid counsel for the defence had failed to

⁴⁸ *Ibid.*, at para. 35.

⁴⁹ *Ibid.*, at para. 33.

⁵⁰ *Kamasinski v. Austria*, HUDOC (1989), para. 65.

⁵¹ *Ibid.*

⁵² *Czekalla v. Portugal*, HUDOC (2002).

include submissions in her pleadings. The result thereof was that the Supreme Court dismissed the accused's appeal.

The Court held that the failure on the part of the legal aid defence lawyer was a failure to comply with a simple and purely formal rule. It was therefore a manifest failure which called for a positive action on the part of the state authorities.⁵³ A positive measure on the part of the Supreme Court would have been to invite the lawyer to make submissions out of time, instead of declaring the appeal of the accused inadmissible.⁵⁴

The formal or procedural errors as described above should be distinguished from the defects in argumentation or injudicious line of defence. It is very unlikely that the state will be held liable for such professional errors of the defence counsel even if the lawyer is officially appointed by the state under a legal aid scheme.⁵⁵

4. Legal aid against the will of the accused

One of the most controversial topics in the field of free legal assistance in criminal cases is whether the state must respect the accused's choice of a legal aid lawyer. In *Lagerblom*⁵⁶ the Court held that when appointing a legal aid lawyer 'the courts must certainly have regard to the accused's wishes, but these can be overridden when there are relevant and sufficient reasons for holding that this is necessary in the interests of justice'.⁵⁷ It is not very clear when the interests of justice require that the wish of the accused be overridden. One consideration may be the costs. Establishing and keeping in place a legal aid scheme is an expensive operation for the state.

Another consideration may be the efficiency of the trial and the expedience of the proceedings. It would be unacceptable and not efficient to respect every wish of the accused for the choice of a legal aid lawyer, especially when it is manifest that the accused is trying to delay the trial with his insistence on the choice of a lawyer. However, it seems that the starting point in the opinion of the Court is that the accused's wishes should be respected unless there are compelling reasons for the contrary.

⁵³ *Ibid.*, at para. 60.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Lagerblom v. Sweden*, HUDOC (2003).

⁵⁷ *Ibid.*, at para. 54.

Even more controversial is the question whether a legal aid lawyer may be compelled to defend an accused who has clearly rejected his services. The Court of Appeal in Leeuwarden, the Netherlands, had to deal with such a situation in the case of Willem van E. He was accused of murder and homicide of two prostitutes. During the trial in the District Court of Groningen, the accused was assisted by four lawyers. During the appeal proceedings he had already changed two lawyers and wanted to appoint a third one. The change of lawyers seemed to be a tactic to delay the proceedings. In a given moment the Court of Appeal decided not to wait for the accused to appoint a third lawyer. According to article 41 of the Dutch Criminal Code of Procedure, the court appointed a legal aid lawyer. In an oral hearing the accused stated that he did not want to use the services of the appointed lawyer and that he was still searching for a lawyer of his own choice. The preceding judge in the case decided that the hearing would go on another date and ordered the appointed legal aid lawyer to be present in case the accused did not have a lawyer of his own choice by that time. Should the accused have no lawyer of his own choice and still refuse the services of the appointed legal aid lawyer, then he would have had to defend himself in person. However, this curious situation did not evolved further because the accused succeeded in finding a lawyer of his own choice and the appeal proceedings went on normally after that.

The above sketched situation did give rise to some discussion in the Dutch literature.⁵⁸ The discussion concentrated in the ethical dilemmas for the legal aid lawyer and the practical and efficient exercise of the right of a person charged with a criminal offence to have a case defended by a lawyer or to defend himself in person.

The core of the problem is the relationship between the lawyer and the accused; a relationship which should be build upon mutual trust. If that trust is lacking on the part of the accused, as it was the case in the abovementioned situation, then the legal aid lawyer is placed in a difficult ethical position and it is impossible for him to properly perform

⁵⁸ See for example, Myjer, Egbert, In en rond de rechtbijstand, (Nieuwsbrief Strafrecht, 2003), pp. 918-921; Spronken, Taru, Over efficiency en dwangverdediging in Duyx, D. Pieter and van Zebben, P.Derk Jan (red.), Via Straatsburg (Nijmegen, 2004), pp. 109-121.

his duties.⁵⁹ The Dutch Code of Conduct for Lawyers and the Code of Conduct for Lawyers in the European Union stipulate that a lawyer may not operate against the will of the client.⁶⁰ Moreover, it seems useless to compel a legal aid lawyer to be present at the trial of a client who has clearly refused to cooperate with him. Such a presence will give rise to a 'fake' fair trial since the lawyer will not be able to practically and effectively defend his client.⁶¹ The same goes for the accused. In addition to this, it was mentioned above that the Court held in the Lagerblom⁶² case that the accused's wishes should be respected unless there are compelling reasons for the contrary. In that case the Court held that there was not a violation of article 6 (3) (c) ECHR because the applicant did not argue that he did not trust his appointed legal aid lawyer. Lagerblom asked for a replacement of his legal aid lawyer not because he did not trust the lawyer, but because his lawyer could not communicate in Finnish with him. In this sense, it could be argued that in respecting the accused's wish special attention should be paid to the mutual trust that exists between the accused and the appointed legal aid lawyer.⁶³

Last but not least, the accused has a right to free legal aid and not an obligation. He cannot be compelled to actively participate in a pending prosecution against him.⁶⁴ Moreover, article 6 (3) (c) ECHR also recognises the right of the accused to defend himself in person. For these reasons it seems right to argue that in cases where the accused has genuine reasons not to trust the appointed legal aid counsel, his wish to have another lawyer appointed should be respected. It seems even more right to argue that an accused who has made it clear that he does not wish to be represented by a counsel at all should not be compelled to do so.

⁵⁹ Spronken, Taru, *Over efficiency en dwangverdediging in Duyx, D. Pieter and van Zebben*, P.Derk Jan (red.), Via Straatsburg (Nijmegen, 2004), p. 121.

⁶⁰ Rule 9(1)(2) of the Dutch Code of Conduct 1992 and article 3.1.1. of the Code of Conduct for Lawyers in the European Union 2002. See also *ibid.*, p. 112 and 121.

⁶¹ Spronken, Taru, *Over efficiency en dwangverdediging in Duyx, D. Pieter and van Zebben*, P.Derk Jan (red.), Via Straatsburg (Nijmegen, 2004), p. 114.

⁶² Lagerblom v. Sweden, HUDOC (2003).

⁶³ Spronken, Taru, *Over efficiency en dwangverdediging in Duyx, D. Pieter and van Zebben*, P.Derk Jan (red.), Via Straatsburg (Nijmegen, 2004), p. 113.

⁶⁴ Corigliano v. Italy, HUDOC (1982).

This is of course subject to some exceptions which may apply in cases where an accused is a person of an unsound mind or where the national law contains an obligation to have legal representation.⁶⁵

Concluding observations

This contribution has sought to discuss the right to free legal assistance under article 6 ECHR. Although article 6 ECHR contains an express right to free legal assistance only in criminal cases, the Court has decided that litigants in civil proceedings may also be entitled to legal aid if certain conditions are met. Contracting parties may sometimes be obliged to grant legal aid to indigent litigants in civil proceedings when such assistance is indispensable for an effective exercise of their right to access to a court. The complexity of the case and a requirement in national law to have legal representation in certain cases play a decisive role in this respect.

The right of a person charged with a criminal offence to have legal aid is guaranteed in article 6 (3) (c) ECHR. This article applies to all phases of criminal proceedings. It also applies to those administrative or disciplinary proceedings which satisfy the Engel criteria and therefore are considered as criminal for the purposes of the Convention. The right of the accused to have access to a lawyer in the pre-trial phase of the proceedings is not absolute. However, it is not entirely clear what are those factors which may put limits to this right. The Court seems to be concerned with the vulnerability of persons under police custody and with the respect of their right to remain silent and not to incriminate themselves. In this context the task of a lawyer is to compensate for that vulnerability and to ensure that the right to silence and the privilege against self-incrimination is respected.

Although the Court has stated in different occasions that access to a legal aid lawyer should be granted if that is needed, it is nevertheless never stated in clear terms when free legal assistance is exactly needed. Does the vulnerability of the persons held in police custody during the pre-trial phase mean that such a person should have a legal aid lawyer if he cannot find one himself or should that person on the top of that be unable to pay for the costs of a lawyer of his own choice? The case law of the Court

⁶⁵ Generally speaking such an obligation exist with respect to proceedings before the Supreme Court or Court of Cassation as the case might be.

leaves such questions open. However, one might argue that the very fact that a person is held in police custody and thus deprived of his physical liberty to freely search for a lawyer of his own choice should be enough for the authorities to be obliged to appoint him a legal aid lawyer if he cannot find a lawyer himself under the conditions that he is placed to. The deprivation of physical liberty is exactly one of the components of the vulnerability that the Court is concerned about. Therefore, the test of insufficient means should thus not be applied in such cases. This line of reasoning seems to be supported by the ratio of the provisions of the Dutch Criminal Code of Procedure which deal with the appointment of legal aid counsel for persons held in custody.⁶⁶

As a rule the right of a person charged with a criminal offence to have access to free legal assistance is subject to the condition that he does not have sufficient means to pay for the legal assistance. The above argument regarding legal aid for persons held in police custody should be seen as an exception to this rule. The Convention does not contain any definition of the term 'sufficient means'. However, the Court held that it is for the accused to show that he does not have sufficient means to pay. He does not have to prove that beyond all doubts. Another condition to which the right to legal aid is subject to is the interests of justice. In cases of serious offences where the accused risks imprisonment, the interests of justice require that he has access to legal aid. Also the complexity of the case and the capacity of the accused to effectively present his case play an important role in determining whether the interests of justice require that the accused be granted legal aid.

The right to free legal assistance should not be illusory but practical and effective. However the state cannot be held responsible for every shortcomings of a legal aid lawyer. The state is obliged to react and intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to its attention. Practical and effective right to legal aid also means that the state has not yet complied with its obligation to provide free legal assistance by simply nominating a lawyer. The state should also ensure that the defendant is also assisted by the appointed lawyer.

In principle the state should respect the accused's choice for a legal aid lawyer. However, the wish of the accused may be overridden if there are

⁶⁶ See *Strafvordering, Tekst & Commentaar*, art. 41 aant. 2, 3 and art. 42 aant. 1.

sufficient reasons for holding that this is necessary in the interests of justice. Such reasons may include efficiency or expedience issues. Ethical issues for the lawyer and problems with the practical and effective exercise of the right to free legal aid or to defend oneself in person may arise when a legal aid lawyer is appointed against the will of the accused. This will be especially the case if the accused has clearly stated that he refuses to cooperate with a legal aid lawyer appointed to him.

However, when it comes to analysing the case law of the Court, one should always bear in mind that at the end of the day everything depends on the particular circumstances of a case. The right to legal aid is no exception in this respect.

List of cases before the European Court of Human Rights

Gussenbauer v. Austria (1972)

X v. Federal Republic of Germany (1974)

Golder v. UK (1975)

Engel and others v. the Netherlands (1976)

Airey v. Ireland (1979)

Artico v. Italy (1980)

Deweert v. Belgium (1980)

Corigliano v. Italy (1982)

Van der Musselle v. Belgium (1983)

Pakelli v. FRG (1983)

Öztürk v. FRG (1984)

Kamasinski v. Austria (1989)

Quaranta v. Switzerland (1991)

Croissant v. Germany (1992)

Imbrioscia v. Switzerland (1993)

Murray v. the United Kingdom (1996)

Andronicou and Costandinou v. Cyprus (1997)

Benham v. UK (1998)

Twalib v. Greece (1998)

A v. UK (2002)

Czekalla v. Portugal (2002)

Meftah and Others v. France (2002)

Gutfreund v. France (2003)

Lagerblom v. Sweden (2003)

Yurttas v. Turkey (2004)

Steel and Morris v. UK (2005)

Sladuz v. Turkey (2008)

Panovits v. Cyprus (2008)

Pischalnikov v. Russia (2009)

Bibliography

Myjer, Egbert, In en rond de rechtbijstand, (Nieuwsbrief Strafrecht, 2003)

Peçi Idir, Sounds of Silence: A research into the relationship between administrative supervision, criminal investigation and the nemo-tenetur principle (Nijmegen, 2006)

Spronken, Taru, Over efficiency en dwangverdediging in Duyx, D. Pieter and van Zebben, P.Derk Jan (red.), Via Straatsburg (Nijmegen, 2004), pp. 109-121.

PRO-BONO LEGAL AID IN THE DIVORCE PROCESS

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Abstract

Divorce is a legal institute of family law which allows the settlement of the marriage effectively. The reasons are different, beginning from divorces that are settled with agreement of the spouses, fictive divorces, as well as divorces like the only alternative of curing the disordered relationships between the spouses. But, the divorce procedures burden the parties materially, and as a result some spouses are prevented to resolve the marriage particularly in situations when the separation is inalienable. For overcoming of these material difficulties for initiating and development of the court procedure for divorce, the institute of pro-bono legal help plays special role. In that respect, in this work we will present:

- The importance and the role of the pro-bono legal help in the procedure of divorce – the offer for legal services pro-bono by attorney who will protect the interest of the party in the trial for the settlement of the marriage in situations when the spouse relationships are disordered till point that joint life is unbearable but even in situations when for the divorce there exists agreement of the spouses,
- Legal consequences of the divorce at the former spouses and at the children,
- Protection of the high interests of the children that carry the consequences of this unwanted part of their life – the separation of the parents.

In our state the offering of the pro-bono legal help is a new institute that finds expression in the courts practice very little or not at all, particularly in the field of family dispute:

The settlement of the marriage, giving alimony to the children and the spouse that are not secured materially, settlement of disputes related to

care and education of the children, settlement of disputes related to proving or disproving paternity or maternity etc.

The pro-bono services for settlement of marriages with divorce in the most cases are given by the non-governmental organizations that promote giving pro-bono legal aid in form of advices through telephone, e-mail, and in rare cases court advocacy by the attorneys engaged by NGO.

The Republic of Macedonia does not have any Law on pro-bono legal aid, but in the Parliament of R. of M. there is discussion about draft Law of this kind of legal aid which should be adopted because it has considerable importance for the functioning of the legal system and for the persons that have need aid and legal advices, but don't have enough resources to pay those services. Inalienable role for realizing of these reforms of the legal profession has the Chamber of attorneys of R. of M., which should have special list of attorneys that will appear as defenders of the party seeker of this aid.

Keywords: Settlement of marriage with divorce, reasons for divorce, pro-bono legal help, legal consequences of the divorce, protection of the highest interest of the children whose parents are divorcing.

Introduction

Marriage is important institute of the family law, and presents relationship of the continuous and joint life between husband and wife, already in some countries also the relationship between two persons of same sex (in countries that have legalized marriage between persons of same sex). All national legislations give definition about the institution of marriage – Marriage is living community among husband and wife regulated by law in which are realized the interests of the spouses, family and society.

The relationship between the spouses is established with free will of the husband and wife to join marriage, in equality among them, mutual respect and help (article 6 of the Law on Family of R. of Macedonia Official Gazette of RM no. 157/2008, hereinafter LF). The equality of the spouse including during joining marriage, during the marriage as well as in its dissolution is guaranteed with the most important international document – The Universal Declaration of Human Rights (article 16,

paragraph 1).

As I emphasized above that marriage is continuous relationship but not permanent because the same can be resolved (with the death of one of the spouse, with pronouncement of one missing spouse as dead, with cancellation of the marriage and with its dissolution).

In this project we will base only on the separation of the marriage with the institute of divorce, focusing on the pro-bono legal help which should guarantee and offer the party with weak financial state which aim is to separate from the marriage whose continuation has become unbearable. Hereupon, persons that will prove weak financial state should be enabled effective legal approach in order to realize their guaranteed rights.

1. Divorce

Above all other preconditions, marriage should be based on love, respect, equality and mutual help, but in case of disequilibrium and disrespect of these principles the joint life can become unbearable for its successful continuation. Hereupon, the divorce is consequence of misunderstanding and permanent disagreements between the partners.

The divorce is ancient institution, composing phenomenon and indivisible part of marriage. Voltaire has said that divorce is born couple of weeks after the marriage. Meaning, when marriage is born, is born the divorce.¹ Others call it nuclear option in the marriage relationships.² As institution of the family law and part of the unstable marriage relationships, the divorce dates back to roman law, but, statistical data's give one overview of increase rate of divorces during the period of transition and economical independence of the partners. The oath "till death parts us" has remained only one expression written on paper, because its true meaning has begun to fade.

In case when joint life is not the only alternative to continue further, the majority of the spouses prepare to face the challenge of independent and separate life. All this is as a result of the surpassing problems that are part of their marriage, having the right of joint decision-making that whether they will end it with the institution of divorce.

¹ Gani Oruci, Family Law, Pristina, 1994, page89

² A few words about Divorce, can be found on :

<http://diggerjones.worldpress.com/2006/12/06/a-few-words-about-divorce/>

In cases of mutual agreement of the spouses, the court that will process the procedure of divorce will have much easier to bring verdict for their separation. Legal instrument for initiating of the procedure for divorce other than mutual agreement (proposal) of the spouse³ also is the request of one of the spouse, with the instrument of suit brought by one of the spouses. In accordance with article 237 of the Law on Family after the acceptance of the suit for divorce or the proposal for divorce with mutual agreement, before the submission of the suit to the indicted proceeding for reconciliation is held.

The proceeding for reconciliation will not be held in these cases:

1. If one of the spouses is not capable of reasoning,
2. If one or both of the spouses live abroad,
3. If the address of one of the spouses is unknown more than 6 (six) months,
4. If after the submission of the countersuit, regardless when it is submitted, the attempt for reconciliation of the spouses has been unsuccessful.

If the spouses have minor children or children on whom the parental right is practiced, the attempt for reconciliation of the spouses will be realized by the Center for social work. In cases of paragraph 3 of this article the court in timeline of 8 (eight) days will inform in written form the center for social work related to the data's when the procedure of divorce is initiated, the main reason why divorce is asked and the data's for the children. The center for social work is obliged in time of 3 (three) months from the acceptance of the written notice to end with the session for reconciliation of the spouses. If the spouses have no children or children on whom the parental right is continued, the proceeding of reconciliation the spouses will proceed the court but only if it does not considers that it

³ The marriage can be divorced with the consent of both spouses. If the spouses have joint minor children or adult children to whom is continued the parental right, it is needed to submit agreement for the manner of the exercise of the rights and duties of parents and for the alimony and education of the children. The court will bring a verdict for divorce after the joint acceptance of the spouses if it is confirmed that their acceptance is free, serious and determined (article 39 from LF).

is better that the proceeding for reconciliation to take place in the center for social work.

In the Republic of Macedonia according to the statistical data's of the State statistical office, the number of divorces in the last 6-7 years continuously is rising. In the year 2003 are registered 14.402 marriages and has had 1.405 divorces; in the year 2004 – 14.073 marriages and 1.645 divorces; in the year 2005 – 14.500 marriages and 1.552 divorces; in the year 2006 – 14.908 marriages and 1.475 divorces; in the year 2007 – 15.490 marriages and 1.417 divorces. Meanwhile according to the latest statistical data's (16.06.2009) during the year 2008, there is decreasing in the number of marriages and the number of divorces. In comparison to 2007, the marriages in the year 2008 has decreased for 5.1% meaning there were 14.695 marriages.

During the year 2008 most marriages took place in august (13.1%), meanwhile fewer marriages took place in April (4.8%). The average age during the first marriage is 24.7 for woman and 27.7 for man. Statistics give results that the number of divorces in the year 2008 (1.209) is 14.7% lower than in 2007. As for the months, more divorces are registered in the month of December (11.4%), fewer in august (2.5%)⁴.

2. Reasons for divorce

The divorce is legal as well as social and mainly is caused, when between both partners the feeling is broken, the intimacy, communication and certainly that the relationship does not function any more, including a general stress to all the members. The divorce is a situation of great stress for all the members and families that live this and occur as a bit change in the life of the individual, whom is needed a longer time to recuperate and adapt with it.⁵

The divorce of a marriage is caused by the reasons that the spouses decide to separate and these reasons the court takes as base during the proceeding in the court.

⁴ The data's have been obtained by the statistical office of R of M, Skopje, 16.06.2009, no. 2.1.9.17

⁵ The divorce and its consequences, the article can be found on:
<http://www.cdodite.com/20080425132058/divorci-dhe-pasojat-e-tij.html>

During the last years has occurred a new phenomenon of “fictive divorces” of marriages, where spouses frame the reasons for separation giving different reasons. One of the most common reason is the bad economical situation and the need of going in the western world, that why this drives many couples (in majority of the cases women) to allow the separation of the marriage in order for the spouse, to be free to join new marriage. All this has the aim the acquisition of the citizenship of the state from where he can secure the family economically.

The judicial practice has registered a great number of concrete actions that occur as reasons for disorder of the marital relationships: continuous disagreements between spouses; the big difference in age between husband and wife; disagreements of one of the spouses with the family of the other spouse; different religious affiliation between the partners; continuous suspicion of jealousy; hard insults pointed at each other; frequent fights and physical attacks between partners; the abuse of alcohol by one of the spouses; complete impotence or frigidity; the absence of the ability to birth of the woman; living separately of one of the spouses, as well as other reasons.⁶

Hereupon, the spouses are those to decide which of the reasons whether they take as base for their separation. Every case of divorce is different of one and other, basing on the problems and the different character of the individuals, as well as the approach and the way of their living in a marriage community. However, all the reasons that are taken as a reason for the separation of marriage bring common life unbearable.

This reason is foreseen in the Law on family of Republic of Macedonia (article 40 LF). Meanwhile, various problems make life unbearable that lead to the actions of one or both spouses, such as: uncontrolled jealousy, contradictions and conflicts in every action of each other, abuse and harassment, physical and psychological violence, breach of loyalty of the spouses⁷, enormous costs that undermine the family property, etc. Thus,

⁶ Mimoza Bakievska, Brakot kako institucija vo Republika Makedonija, Bitola 2007, page.44

⁷ Loyalty is a mutual commitment, physical and spiritual, of one spouse to another and to the family that they have established, a comprehensive sincerity that lies between them on the coexistence, on managing the process of fulfilling the needs of the children of the family and to anything that belongs to marriage, family and spouses themselves. Thus, fidelity coincides with “internal harmony of the spouses” and in

the Law of Family of Republic of Macedonia, the reasons for divorcing a marriage is categorized in three groups: the common consent of the spouses to divorce the marriage (article 39 paragraph 1 of LF), if spouses relationships are exacerbated to the extent that common life has become unbearable (article 40 of LF), and if so actual marital relations have ceased to function more than one year (article 41 of LF).

As for the effective dysfunction of the marriage, are taken into account those actions which burden the communication and the fulfillment of the family duties in joint manner. The separation in terms of distance of the spouses with the aim of further education, specialization in the profession of one of them, but for which they did agree – cannot be considered factual break spouses relations. In those situations the marriage community does not stop to function, already spouses continue to fulfill the rights and obligations that derive from the marriage.⁸

Despite this in cases when spouses don't change the location of their living, so that they live in the same apartment, under the same "roof", meanwhile do not communicate and do not fulfill the rights and obligations that are part of the institution of marriage – in this case it is about the so called "dead marriage" to which an factual break has come in the marriage relations.⁹ Many data show the result that in our country in a considerable percent marriages are being separated (from 1-3 coexistence).

The young that join in marriage in nowadays for instance to before, give more priority to modern way of living, the equality between the partners in marriage, do not respect the cult of the authority towards the older, taking different attitudes from their parents.¹⁰

Hereupon, every de-equilibrium of the actions that influence negatively in the joint family life can be cause that the marriage separate, which as reason of the spouses the court takes as ground. When the marriage community is in critical phase that can result in separation, it is needed and useful that spouses together firstly to turn to the Center for social work respectively in the sector for family advices (spouses) or to use the service of mediators.

general, the "stability of the family nucleus, and the interest of the children" – Arta Mandro-Bilalli, Vjollca Muchaj, Tefta Zaka, Arjana Fullani, R Drejta Familiare, Tirana, 2006, page 238-239

⁸ Liljana Spirovich, Semejno Pravo, Skopje, 2004, page 133-134

⁹ Po aty

¹⁰ Mimoza Bakievska, Prestanok na brakot so razvod vo Bitola, Bitola, 2007, page 9

Meanwhile, in situations when there exist conflict between the spouses, the legal services, especially the Chamber of Lawyers should have the list of attorneys that will offer professional advices and services in the sphere of the divorces and especially these services to be given pro-bono for the couples that have not the material possibility to pay them. Giving legal aid pro-bono to persons with social problems is part of the traditional obligations and attorneys honor¹¹ so those kinds of advices should be offered by every attorney when the party is directed for legal help. Based in the Codex for professional ethics of attorneys since the acceptance of the subject, the attorney should inform the party with the sum of expenses and the height of the award for representation i.e. performance of public authorities.

If the word is about party with weak material situation the calculation should be adapted with the material opportunities in order for it to be affordable, i.e. the award to be calculated under the minimal sum for the attorneys work, meanwhile from poor parties not to ask for compensation, taking into account continuously the old ethical principle of the attorneys: “in improbability for payment of the services of the attorney, no one to not remain without qualitative legal aid by attorney.”¹²

3. The pro bono legal aid in the R. Macedonia

The Constitution of the Republic of Macedonia proclaims the equality of all the citizens in their rights and freedoms regardless of sex, race, color of skin, national and social origin, political and religious conviction, property and social position (article 9 of the Constitution of the R. of M.).

This constitutional principle allows that the citizens in equal manner to have access to the system of the state institutions. For the citizens the principle of having the equal opportunity does not mean only the guaranty of the rights in the sphere of the material rights, but the citizen should be in such a position to be aware of his rights and the same to be able to realize.¹³ The pro-bono legal

¹¹ The index on the legal profession can be also found on:

www.albanet.org/rol/publications/kosovo_lpri_04_2007_alb.pdf

¹² Item 8 of the Codex on professional ethics of the attorneys, professional coworkers of the attorneys and the apprentices of the Chamber of Attorneys of the Republic of Macedonia

¹³ Law Proposal for pro-bono legal aid, January 2009, page 3

aid, to the party that will prove bad economical situation, is guaranteed also with the Convention for the protection of human rights and fundamental freedoms – article 6 paragraph 3 item c (“to defend by himself or to be helped by a defender elected by him, if he does not have the enough funds to award the defender, to be allowed pro-bono legal aid when this is requested by the legal interests).

As in the other dispute procedures as well as in procedures for resolving the marriage disputes, the party that will prove the difficult material situation, is released of payment of the procedural fees. The Law on Civil Procedure foresees legal provisions that from which procedural fees the party is released (article 163-169 and the Law on Civil procedure, Official Gazette of R. of M. no. 79/05). Those procedural expenses include: release of payment of taxes and release from offering advance of expenditures for witnesses, experts, for court viewing and pronouncing (paragraph 2, article 163 of the LCP).

The court tax for disputes of divorce of marriage is 60.000 denars (article 2 of the Law on amending the law for court taxes, Official Gazette of R. of M. no. 20/1995). This value, compared with the economic level in our country, presents a material burden and makes impossible the majority to initiate the procedure of divorce, especially persons with low income or without any income, so, persons registered in the office for social protection which take social aid or persons that don't use these aids.

When the party is fully released to pay the procedure expenses, the court of first instance with which its request will announce to represent an authorized (representative), if such an action is necessary because of the protection of the party's rights. The party to who is appointed authorized person is released from paying the expenses and the services of the appointed authorized person (paragraph 2, article 165 LCP). Based on the Tariff for awards and compensations of the expenses of the work of the attorney, the attorney is obliged to give pro-bono legal aid which according to the law can be released from paying the procedural expenditures (poor law) – article 6.¹⁴ Parties that have proven economical difficulties are being released from praying the fee for the procedure of divorce.

¹⁴ The tariff for awards and compensation for the work of the attorney, Official Gazette of R. of M. no. 153/2008

Regardless of the existence of such provisions, the situation in practice is different, parties that prove their difficult economical situation are released from paying court taxes but they pay expenditures related to their representation in the court procedure, meanwhile one of the main objectives of this institute is that the person to be able to have the right of legal representation in the procedure of divorce. So, because of the non implementation of these legal provisions with the argumentation that the courts do not have enough financial funding, and because of the need for broader inclusion of this institute (pro-bono legal aid) it is estimated that the provisions of the Law on civil procedure that are related to releasing from the procedural expenditures, dos not secure in sufficient way the right guarantied with the constitution.¹⁵

In the R. of Macedonia the pro-bono legal aid is new legal institute, which will begin to be implemented with the adoption of the Law on pro-bono legal aid. The campaign about realizing of this right should be organized by the Government of R. of M. in cooperation with the Ministry of Justice. These organs should prepare instructions to inform the citizens related to their rights and legal remedies. Persons that have problem in marriage, and that have decided to separate it with divorce, meanwhile don't have funding to initiate and develop the court procedure should know that: Which category of persons can realize this right, when can they realize, how can they realize, where can they address, and who can offer this kind of legal aid.

Important role, even priority one related to the efficient implementation of this institute has also the Chamber of Attorneys of R. of M., which should prepare a list of attorneys that will offer pro-bono representation in the procedure of divorce. So the party seeker of this aid, should firstly consult of how and where to address the request, meanwhile, for the continuation of the procedure to consult with the representative that will be appointed.

Before the initiation of the procedure, anyhow should exist a concrete office where all citizens can address and take detailed information's. Information's and legal advices for the realization of the legal aid can give also the law faculties that have organized legal clinics, especially programs for clinics for legal help in matters of family disputes, kind of project that are overseen by professionals. Representation in court can offer only professional subjects such as attorneys which have

¹⁵ Law proposal for pro-bono legal aid, January 2009, page 2

professional experience of representing parties in the procedure of divorce based on the national and international family legislation.

The request for pro-bono legal aid is presented personally by the seeker to the regional sector of the Ministry of Justice. The request can be also submitted by postal office by completing a form set by the Minister (article 19, paragraph 1 of the Law proposal for pro-bono legal aid). The subject that should offer this service, according to the Law proposal for pro-bono legal aid are: civil associations¹⁶ (give the respective legal aid)¹⁷, the attorneys for giving this legal aid registered in the Ministry of Justice, and the mediators which are as well registered as subject for offering pro-bono legal aid. A copy of the registry of attorneys the Ministry of Justice should send to the Chamber of Attorneys, meanwhile a copy of the registry of mediators is sent to the Chamber of mediators (article 27, paragraph 2 of the Law proposal for pro-bono legal aid).

So, the Ministry of Justice from the beginning of 2010 will approve the exercise of the pro-bono legal aid in accordance with the criteria and the set procedures based on the particular law, which will enter soon in procedure in the Government. ‘The aim of the law is to secure equal treatment of the citizens towards the institutions for aid, the realization and enabling of effective legal aid in accordance with the principles for equal treatment in the law’, has stressed in one press conference the vice minister of Justice, while presenting the law proposal for pro-bono legal aid. In order to get pro-bono legal aid the state property of the persons that need this aid should not exceed the amount of five average gross salaries in the respective month, meaning the value of the wealth should not reach or exceed the amount of 147.930 denars or 2450 euro.¹⁸

¹⁶ There are authorized citizens associations registered in the registry of the citizens associations for legal aid; they should have at least one (1) employed graduated lawyer that has passed the jurisprudence exam; to have secured space that fulfills the minimum technical criteria for the exercise of the activity; during the consultation, have a contract for the provisions of liability for possible damages to the height of lowest policy/amount of insurance. (article 17 of Law proposal for pro-bono legal aid)

¹⁷ The preliminary legal assistance means: legal advices for the usage of the right on legal aid; general legal information’s; legal aid for completing of the requests directed to the administrative organs.

(article 6 item 1 paragraph 1 of the Law proposal for pro-bono legal aid).

¹⁸

http://www.investko.com/index.php?option=com_content&view=article&id=27:2009-04-02-07-52-36&catid=10:0409-&Itemid=19

Those persons should be part of users of social aid, with the right of disability addition that does not realize other incomes, with lowest pension income that live in family community with two or more persons that are supported by other, as well as parent or parent tutor with one or more adolescent children, which have the right of children addition, displaces person.

The pro-bono legal aid will be realized as preliminary and as legal aid at all the court procedures. Preliminary legal aid will give authorized persons in the regional sector of the Ministry of Justice and the authorized civil associations, meanwhile in the other part in the court procedure the aid will be realized by attorneys and mediators. With this kind of legal aid will be covered the expenses of the procedure that have occurred after the day of adoption of the request for its separation.¹⁹

The pro-bono legal services for the dissolution of the marriage with divorce in the most cases is given by the nongovernmental organizations that promote pro-bono legal aid in form of advices through telephone, e-mail, court tax release for the women that don't have social security and those that don't have economic ability and rare cases court representation by the attorneys engaged by the NGO's.

The party personally fills the request for pro-bono legal aid.²⁰ Usually, those organizations promote the offering of those services in cases when the party directs them with their family problems because of physical and mental violence exercised by the partner. In many cases (almost in every cases) the victim of family violence are women.

¹⁹ The news was published in MIA Macedonian Information Agency, on 7 august 2009, <http://www.mia.com.mk/default.aspx?mId=32&vId=66684562&lId=3&title=MAQEDO NI+-+JURISPRUDENC%c3%8b>

²⁰ Present a form of formulary that uses the Center for the rights of women – Shelter Centre- In the formulary it is written the personal data's of the seeker of the legal aid (name and surname, address, ID number, phone number), the party should answer with YES or NO on the question whether it agrees that QMDF to carry the activities on behalf of her, for example review of the subject by the competent organ, submit ion of documents in the relevant organs/institutions, contact with her attorney (if she has one) etc; as well as parties signature. In the end of the request is the clause: QMDF declares that all the data's related to the issue of the party will be secret.

Because of non access to the media, a vast number of women in the rural areas do not know about the opportunity of submitting the case of violence till the competent organs, even less the opportunity of giving end to the marriage community with divorce. I again stress the activities of the nongovernmental organizations, particularly, the organizations that protect the dignity of the women and her role in the family and society.

Those organizations have their defined importance in giving legal and social services. They develop strategies of women protection in all life spheres as in society so in family, that why they develop different projects in the urban and rural areas by informing the women in order where to address and how to act in situations when their guaranteed rights are violated.

Pro-bono legal aid in shape of informing the citizens for their rights offers the Association of young lawyers of Macedonia through open telephone line which is free.²¹

In the R. of M. the data's about the procedure of divorce can be taken only by the state organs, by the lawyer and the mediators, unfortunately there is lack of other sources of information. In the European states especially in USA exist different sources of that make it easier for the citizens to have access to the needed information's about divorcing the marriage, starting with the electronic sources (finding attorneys that realize divorces, mediators, information's about alimentation, the legislation where are given the rights and obligations for the spouses that are divorcing as well as the duration of the procedure, the form and the content of the contract or agreement for divorce, the data's for preparing and presenting in the court, the organizing of a forum where can be posed questions, which answers are given by professionals in the field of divorce, the rights of the children whose parents are divorcing, information's about grandparents related to their rights toward their grandchildren, and many detailed data's needed for the spouses). The establishment of these contacts makes it possible for the parties legal and psycho – social support.

Having in mind the level of education of our population, the informing about this institute should be done in more clearer and simple way and not burdened with formalities.

²¹ The interested citizens can phone on the free contact telephone : 0800 44 222.

The distribution of the brochures with instructions about using of this legal aid in cases spouses and family problems can be taken as first step.

4. Legal consequences of divorce for the spouses and children

Spouses are the ones who must bear the consequences of the termination of their marriage through divorce, preventing its reflection to the children. However, legally such a thing is not possible. Children are affected by the divorce, because they are forced to live with one parent.

The divorce, to the spouses has consequences on: surname, heritage, allocation the common property²², alimony (providing the subsistence for the materially uninsured spouse), the issue of housing, payment of procedural costs, the issue of compensation to any possible damage, etc. When spouses have common children, then the professional staff of the Center for social work leads the procedure for reconciliation of the spouses.

If the session for reconciliation of the spouses is unsuccessful then a professional team of the Center for Social Work provides opinion and proposal for protection, education of children, and based on facts and professional data, the court in the main session decides for education, food and preservation of the children.

The spouses may with mutual agreement resolve the issue of severance of children. If there is no agreement between them regarding the care of the children then, the ex officio court decides about the preservation, education and children subsistence. The children can continue to live with one parent further, or if there are two or more children - some with one and other with another parent, while if the preservation and education of children from their parents is an contrary to their interest, then children remain under the care of the body of custody.

Although the children are shared to one parent, through divorce cannot be terminated the parental relationship, the family relationship between the children and parents continue to exist after the separation. The couples

²² The joint property of spouses acquired during marriage, will not be divided during divorcing procedure, but for it is developed specific procedure (contested-if there is disagreement (contest) for its division) and no contested (if the spouses have agreed how to share the wealth acquired jointly).

who have children and who have decided to live separately must continue to bring joint decisions regarding the subsistence and education of the child. Divorce in most cases doesn't affect negatively to the children who live separately from one parent, compared with the dispute and the ongoing argues that couples may have. Although separated from children, couples continue to be their parents, beside their miss coordination about other life issues, but for each decision they should have as priority the interests of the children. The personal consequences of divorce should affect directly to former spouses, but no way to the children, because they are not guilty at all for the living situation served by their parents.

Although the divorce is most painful alternative for the children, for some specific in situations represents the only choice for marriage where dominates the quarrel beside the mutual understanding, love and respect. The children, who go through phase separation of parents, must be convinced that they continue to have parental love and that such a separation is done in order to enhance more peaceful life that their parents failed to enable them by being married.

In some cases children are the motivation and the only reason for closing the eyes in front of the disagreements. Some couples sacrifice their "happiness" and continue to live in the absence of mutual love. All this sacrifice is to provide happiness for their children by not letting them to experience the most painful part - separation from them.

Conclusion

The importance of the legal aid is indisputable, but in advance should be prepared the conditions for its application by state authorities. The pro-bono legal aid in RM will have difficulties to be implemented as result of various reasons.

I think that by the state bodies still are not created conditions for effective implementation of this important institution for our population with so low socio- economic level. Instead, due to the difficult economic situation facing many families, this mechanism is more than necessary. Its misuse is possible; there exists the risk that the legal aid is offered to

persons who will not meet the legal requirements, by denying the data necessary for providing of this help²³.

Therefore the Ministry of Justice as the competent body for approving the request must guarantee equal treatment and absolute respect of this legal right for persons that due to their financial difficulties they violate the right of access to the judiciary bodies.

It is expected this institution to be more used by the part of society which has a secondary or higher education. That is because they will be able to know how to be informed and where to address their needs. Meanwhile, for the rest of society I would mention the issue of impact of mentality. Older generations are still driven by patience and 'preservation' of family dignity. They cannot justify the divorce despite continues disagreements and disputes.

Patience and hope for a better life makes them dependent by the other partner. There crucial role plays even the material dependence, particularly of women so as the low level of access to legal protection of their rights.

At the end I will emphasize the importance of the institution of divorce, looking from the prisms of the resolving of family problems. Although I don't agree the family to be separated, especially if that family has children, but I think that actions that lead to the injury of a healthy family life should not be tolerated.

However, children initially are disillusioned by their parents and have no hope for a happy family life, but when became aware they justify their actions. However, the interest of children should be a priority prior to the personal interest of former spouses.

²³ According to the Draft law for free legal assistance, if the applicant proves that the use of free legal assistance, in order to get this assistance has submitted incorrect information in this case with adopted decision will not be permitted the use of this right, and the applicant loses the right to submit a new application within six (6) months from the date of adopted decision. If during the use of the right of legal assistance, is proved that the user has submitted incorrect information in order to realize the right for free legal assistance, the Ministry with decision will stop the further use of this right and in within eight (8) days will request return of paid funds. If within the deadline, the party doesn't return the funds, the Ministry of Justice will initiate proceedings before the competent court for return of those paid funds (Article 25, al.3, 4)

Bibliography

- Bakievska, M. The termination of the marriage with divorce in Bitola, Bitola, 2007
- Bakievska, M. The marriage as institution in Republic of Macedonia, Bitola 2007
- Mandro-Bilalli, A; Mechaj, V; Zeka, T; Fullani, A. Family Law, Tirana, 2006
- Oruchi, G. Family Law, Pristina, 1994
- Spirovich, L, Family Law, Skopje, 2004
- Codex for professional ethics of attorneys, professional coworkers of the attorneys and the apprentices in the Chamber of attorneys of Republic of Macedonia
- The Constitution of R. of M., 1991
- Law on Family (cleanse text), Official Gazette of R. of M. no. 157/2008
- Law on Civil Procedure, Official Gazette of R. of M. no. 79/2005
- Proposal law for pro-bono legal aid, January 2009,
- Tariff for awards and compensations of expenses for the work of the attorney, Official Gazette of R. of M. no. 153/2008
- The European Convention on Human Rights and fundamental freedoms, 1950
- Universal Declaration of Human Rights, 1948
- A Few Works About Divorce, can be found on:
<http://diggerjones.worldpress.com/2006/12/06/a-few-words-about-divorce/>

- Divorce and its consequences, the article can be found on:
<http://www.cdodite.com/20080425132058/Divorci-dhe-pasojat-e-tij.html>
- The index on the reform of the legal profession, can be found on:
www.albanet.org/rol/publications/kosovo_lpri_04_2007_alb.pdf

PROVIDING FREE LEGAL ASSISTANCE: A POSITIVE OBLIGATION OF STATES UNDER INTERNATIONAL HUMAN RIGHTS LAW

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Abstract

In this article the author focuses on the international obligations that states have towards their individuals regarding free legal assistance. Two international human rights treaties are in focus, namely the International Covenant on Civil and Political Rights, as well as the European Convention on Human Rights. The case law of the bodies that follow the implementation of these treaties is necessary to understand these obligations, thus it is taken into consideration.

First of all, the concept of positive obligations of states is described as major part of human rights obligations. After that the concept of free legal aid is explained as flowing from the right to access to courts and the right to a fair trial. Also the pre-conditions for the state obligation to exist to provide free legal aid is analyzed, in major part the interests of justice and the lack of material needs of the individuals, as well as the requirement the free legal aid to be effective. The article finishes with analysis of the Macedonian criminal and civil procedure legislation and its accordance with these treaty obligations.

1. General remarks on positive obligations

States have many obligations under international law. Some of these obligations derive from treaties (are treaty based), and some of them derive from customary international law, both being the two major sources of international law.¹

¹ The sources of international law are enumerated in the Statute of the International Court of Justice (ICJ), in Article 38.1, available at <http://www.icj->

As examples, such obligations are the prohibition of the threat or use of force and the peaceful settlement of disputes.² States under international law have also obligations towards human rights. These obligations are mostly based on treaties, which means that states have obligations only if they have become a party to a specific treaty.³

Nevertheless, there are some rules (obligations) in international law regarding human rights that are binding on states without the requirement that a specific state to be party to a treaty ("without any conventional obligation")⁴. Such obligations derive from international customary law, particularly from the peremptory norms of international law-the so called jus cogens norms.⁵ In the latter case, all states are obligated to comply with such rules, nevertheless if they are or are not party to a specific treaty. In international law there is a wide acceptance for the prohibition

[cij.org/documents/index.php?p1=4&p2=2&p3=0](http://www.unhcr.org/refworld/docid/3ae6b3930.html) [last visited 19 October 2009]. There are enumerated the sources which ICJ applies to solve disputes between the states. However, these sources are well accepted by international law scholars as sources of international law.

² Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 2.3. and 2.4. The UN Charter is available at: <http://www.unhcr.org/refworld/docid/3ae6b3930.html> [last visited 19 October 2009]. So, these obligations are treaty based since they derive from the UN Charter as a specific treaty.

³ Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <http://www.unhcr.org/refworld/docid/3ae6b3a10.html> [last visited 19 October 2009]. In Article 18 of this convention, as an exception of this rule "a State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed".

⁴ Case Concerning the Application of the Convention on the prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Judgment of 26 February 2007, para. 161. All cases of ICJ are available at <http://www.icj-cij.org/docket/index.php?p1=3> [last visited 20 October 2009].

⁵ The jus cogens norms are defined in the Vienna Convention on the Law of Treaties (VCLT), supra note 3, as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". See id, Article 53. For more information, see Cassese, Antonio, International Law, (Oxford, 2001), 138-148.

of genocide and the prohibition of torture as being part of jus cogens norms.⁶

As it was pointed out, states have obligations under international law towards individuals' human rights. Although there are different doctrinal explanations who is the beneficiary of these obligations,⁷ today is widely accepted that states' obligations under international human rights law are towards individuals under their jurisdiction, whether in their territory or outside their territory, where states have effective control.⁸ So states undertake obligations in international law that owe to the individuals under their jurisdiction or subjects to their control. For this reason, under some treaties, individuals under the jurisdiction of the states have the right to submit individual complaints against the state and claim a violation of the international law by that state.⁹ But let's see what in concrete these obligations mean for a state.

First of all, states under international law have obligations **to respect** human rights guaranteed in the treaties (or customary law) they are bound by. The obligation to respect human rights is defined as a **negative obligation**. Namely, the state has an obligation to refrain from taking

⁶ For the recognition of the prohibition of genocide as a jus cogens norm, see case concerning Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v. Rwanda), ICJ Judgment of 3 February 2006, para. 64; For the prohibition of torture as a jus cogens norm in international law, see International Criminal Tribunal for Former Yugoslavia, Prosecutor v. Furunxhija. Case No. IT-95-17/1-T, Judgment of 10 December 1998, para. 144.

⁷ The classic doctrinal explanation is that international law governs the relations between states, thus making individuals only third party beneficiaries. According to this view, states do not take any obligation under international law towards individuals. See e.g. Ratner, R. Steven and, Abrams, S. Jason, Accountability For Human Rights Atrocities In International Law: Beyond The Nuremberg Legacy, Second Edition (Oxford, 2001), p. 4.

⁸ See e.g. Cassese, A., supra note 5, p. 361-362; see also Human Rights Committee, General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States parties to the Covenant: 26/05/2004, CCPR/C/21/Rev.1/Add.13 (General Comments), para. 10.

⁹ The most effective system of individual complaints is based on the European Convention of Human Rights [hereinafter ECHR] (Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No.: 005, opened for signature 4 November 1950 and entered into force 3 September 1953), the judgments of which are binding upon the state-parties. See for more, Janis, W. Mark, Kay, S. Richard and Bradley, W. Anthony, European human rights law: text and materials, Third Edition, (Oxford, 2008), p. 114.

some acts which can violate those rights for which the state has taken an obligation in international law to respect. From the human rights corpus, civil and political rights have been defined as freedoms from the arbitrary intervention of the state.¹⁰

They are assumed to be cost free rights since it "does not cost a state to refrain from doing something".¹¹ In this way states have obligations to refrain from committing genocide, crimes against humanity, torture, arbitrary killings etc.

However, the obligations of the states today have evolved in something more than only "respect" of human rights. Namely, international treaties impose obligations not only to respect, but also **to protect and ensure human rights**.¹² The obligation "to protect" and "ensure" actually raises the question of **the positive obligations of the states**. Economic, social and cultural rights are considered to be positive rights since for their effective enjoyment and exercise states are required to take more positive measures to provide them.¹³ But states have positive obligations not only towards economic, social and cultural rights. Some classic civil and political rights cannot be effectively enjoyed without some positive measures taken by the states. Even the most basic civil rights, such as the right to life or the freedom from torture, require undertaking of positive obligations by the states.

For example, the right to life guaranteed under Article 2 of European Convention of Human Rights (ECHR), doesn't not mean that states have only an obligation to refrain from intentional and unlawful killings. According to the European Court of Human Rights (ECtHR) the obligation of the states "extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions...backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions".¹⁴ Also, the obligation to protect the right to life includes the

¹⁰ McGoldrick, Dominic, The Human Rights Committee, (Oxford, 1994), p. 11.

¹¹ Joseph, Sarah, Schultz, Jenny and Castan, Melissa, The International Covenant on Civil and political Rights, Cases, materials and commentary, (Oxford, 2000), p,21.

¹² See e.g. Human Rights Committee, General Comment 31, supra note 8, para.2 and 6.

¹³ Id.

¹⁴ ECtHR, case Osman v. the United Kingdom, Application no. 87/1997/871/1083, Judgment of 28 October, 1998, para. 115. All the judgments of the ECtHR can be found

obligation of the states to take preventive measures to protect an individual whose life is at risk from other persons.¹⁵ Additionally, the obligation to protect the right to life under Article 2 of ECHR (read together with the general obligation "to secure", from Article 1) requires "some form of effective official investigation when individuals have been killed as a result of the use of force".¹⁶

The right to be free from torture also includes positive obligations for the states. Thus for example, Article 7 of the International Covenant on Civil and Political Rights (ICCPR),¹⁷ prescribes that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". This provision does not say anything about positive obligations of the states. But without positive obligations, a provision like this can be largely ineffective. For this reason, the Human Rights Committee (HRC) has interpreted Article 7 of ICCPR as imposing positive obligation on the state-parties to ensure that private persons in the society do not inflict torture (the duty to protect).¹⁸ An interpretation like this is necessary since the contrary will not make any sense. Namely, in circumstances when states have only obligation to refrain from inflicting torture, but allow private entities to do so, we cannot talk about effective enjoyment of human rights.

Exactly from this viewpoint can be described the free legal aid as a positive obligation of the states. If states have taken an obligation to allow individuals free access to courts so they can determine their civil rights and obligations, and also guarantee to them the right to defense in criminal proceedings, so this right become effective, in some circumstances states will have an obligation to provide free legal assistance. Otherwise, the right to a fair trial and the right of an effective defense in criminal proceedings will be only declaratory rights and not effective at all. And many international jurisdictions such as ECtHR have

on the official HUDOC data base of the Court, at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/>.

¹⁵ Id.

¹⁶ ECtHR, case Nachova v. Bulgaria, Application no. 43577/98 and 43579/98, Judgment of 6 July 2005.

¹⁷ International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, and entered into force 23 March 1976 [hereinafter "ICCPR"].

¹⁸ HRC, General Comment 31, supra note 8, para. 8.

underlined many times that human rights make sense only if they are practical and effective, and not only "theoretical and illusory".¹⁹

2. The obligation to provide free legal assistance derives from the right to a fair trial and effective access to courts and tribunals

The most important human rights treaties guarantee the right to a fair trial. This right is considered as a "key element of human rights protection and serves as a procedural means to safeguard the rule of law".²⁰ In other words, this right provides to the individual some procedural guarantees before the domestic courts (or other bodies with judicial powers) that help in the substantive protection of their rights, whether in civil or criminal proceedings.

The International Covenant on Civil and Political Rights (ICCPR) as a universal, as well as the European Convention on Human Rights (ECHR) as regional treaty, both guarantee the right to a fair trial. ICCPR has specific provisions in its Article 14, thus ECHR guarantees the same right in its Article 6.

The right to a fair trial has many key elements in it, every one of them with high relevance for the individual. Some of the key elements of this right are: the right to effective access to courts and tribunals, the equality before the courts, which means that the parties should be treated equally by the Courts; the equality of arms in civil and criminal proceedings; the right to a public hearing before an independent and impartial tribunal. Specific guarantees are provided for persons charged with criminal offence, such as: the presumption of innocence, the right to be informed in the language they understand about the nature and cause of criminal charges, the right to an adequate time and facilities for the preparation of the defence, the right to communicate with a council, the right of the accused to be tried without delay (or in reasonable time), the right to a free legal assistance etc.²¹

¹⁹ ECtHR, case Airey v. Ireland, Application no. 6289/73, Judgment of 9 October, 1979. See also, ECtHR, case Luedicke, Belkacem and Koç v. Germany, Application no. 6210/73; 6877/75; 7132/75, Judgment of 28 November 1978, para. 42-46.

²⁰ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, 23/08/2007, CCPR/C/GC/22 (General Comments), para. 2.

²¹ For interpretation of Article 14 of ICCPR, see HRC, General Comment No. 32, supra note 20; for interpretation of Article 6 of ECHR, see Janis, W. Mark, Kay, S. Richard and

In this way, the right to a free legal assistance is seen as a part of the right to access to courts and the right to a fair trial. This means that, under certain conditions (we will deal with this later), states are obligated to provide free legal assistance to the individuals in order those individuals have access to courts, or in order their trial to be fair and just. Said in other words, the failure of the state to provide legal assistance is a violation of its obligations taken through international treaties. This shows the clear positive nature of the obligation of the state to provide free legal assistance.

Here we should make a distinction. Namely, ICCPR and ECHR expressly guarantee the right to a free legal assistance for a person charged with a criminal offence. In article 14, paragraph 3 (d), ICCPR guarantees to a person accused with a criminal charge the right "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".²²

On the other hand, ECHR in its Article 6, paragraph 3(c) prescribes that the person charged with a criminal offence has the right "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require".²³ So, when there is a criminal charge against one person, under both these treaties the free legal assistance has to be provided (under the given conditions). This solution is accepted since in criminal proceedings some basic human rights can be restricted such as the right to liberty or even the right to life.

However, such a guarantee does not exist expressly in these treaties for a person in proceedings where there is no criminal charge against him/her. This may lead to a conclusion that such a right does not exist under these treaties. But the ECtHR has interpreted Article 6(1), namely the right to effective access to courts as requiring sometimes providing free legal assistance. Namely, in the case *Airey v. Ireland*, the Court concluded that,

Bradley, W. Anthony, *European Human Rights Law: Text and Materials*, supra note 9, p. 718-826.

²² ICCPR, supra note 17, Art. 14.3(d).

²³ ECHR, supra note 9, Article 6.3(c).

"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".²⁴

The ECtHR concluded that states have an obligation in certain circumstances to provide free legal assistance even in civil proceedings. This is seen as important for the effective access of individuals to courts for the determination of their civil rights and obligations. Still, States are free to choose their means to achieve this end, and offering free legal aid is one of those means.²⁵

The point the ECtHR makes is that a right to free legal assistance in civil proceedings cannot be created as such (like in the cases where there is a criminal charge, where the ECHR has an express provision). But the free legal aid is one of the means through which states can achieve a higher level of effectiveness of individuals' right to access to courts. And whether an obligation will exist for the state, will depend on the circumstances of the case, above all the complexity of the procedure.²⁶

Similarly, the Human Rights Committee has held that the right to a fair trial and effective access to relevant proceedings depends on the availability or absence of legal assistance.²⁷ But as a matter of an obligation, a little different from ECtHR, the wording of the HRC seems softer. In its General Comment on Article 14, the Human Rights Committee encourages the states "to provide free legal aid in other cases" outside the scope of Article 14, paragraph 3(d).²⁸ The word "encourage" definitely does not create an obligation for the states, in this way making ICCPR in this respect a softer instrument than ECHR. Also, in some communications, the HRC explicitly accepts that ICCPR "does not

²⁴ ECtHR, case Airey v. Ireland, supra note 19, para. 26: see also ECtHR, case McVicar v. The United Kingdom, Application no. 46311/99, Judgment of 07 May 2002.

²⁵ Id.

²⁶ Id.

²⁷ HRC, General Comment No. 32, supra note 20, para. 10.

²⁸ Id.

contain an express obligation as such for any State party to provide legal aid to individuals in all cases but only in the determination of a criminal charge where the interests of justice so require (article 14(3)(d)).²⁹

On the other hand, the case law of the Human Rights Committee leaves an impression that there is a need of wider interpretation. The HRC interprets article 14, paragraph 1 of ICCPR as producing obligation only in specific areas where the interests of justice require the individual to have legal assistance.³⁰ Thus, the HRC also creates an obligation for the states only in certain areas, but does not create a general obligation.

Those specific areas are particularly the cases when a person sentenced to death is seeking constitutional review of irregularities suffered in a criminal trial. For example, in a communication *Currie v. Jamaica*,³¹ the HRC held that "where a convicted person seeking Constitutional review of irregularities in a criminal trial has not sufficient means to meet the costs of legal assistance in order to pursue his Constitutional remedy and where the interests of justice so require, legal assistance should be provided by the State".³² The argument given by the Committee is that a higher court dealing with irregularities in criminal proceedings still has to comply with the requirements of Article 14, paragraph 3(d) since the higher court will be called to determine whether the conviction of an individual in a criminal case violated his rights under the Covenant.³³

In this way, under ICCPR the obligation of the states to provide free legal assistance also goes beyond the situations when against an individual exists a criminal charge, for which there is a dose of criticism.³⁴ This

²⁹ Human Rights Committee, *Kennedy v. Trinidad and Tobago*, Communication No. 845/1998, CCPR/C/74/D/845/1998, 26 March 2002, para. 7.10.

³⁰ The HRC, under these circumstances usually relates Article 14.1 with Article 2.3. of ICCPR, where in the latter the right to effective remedy is guaranteed. But at the end, in these specific cases the HRC finds a violation of Article 14, paragraph 1, in conjunction with Article 2, paragraph 3. See e.g. HRC, *Kennedy v. Trinidad and Tobago*, supra note 29, para. 7.10.

³¹ Human Rights Committee, *Currie v. Jamaica*, Communications No. 377/1989, CCPR/C/50/D/377/1989, 31 March 1994.

³² *Id.*, para. 13.4.

³³ Human Rights Committee, *Taylor v. Jamaica*, Communication No. 705/1996, CCPR/C/62/D/705/1996, 4 June 1998, para. 7.3.

³⁴ Some members of the Human Rights Committee are against this wider interpretation of the Committee. In some communication they deliver Individual

obligation in civil proceedings (outside the scope of Article 14.3(d)) derives from Article 14.1 of ICCPR. But the situations where the HRC has accepted that there is a positive obligation do not go far beyond paragraph 3(d) of Article 14. Namely, the situations such as those elaborated above, when an individual is sentenced to death and is seeking constitutional review of irregularities suffered in a criminal trial, first of all have to deal with criminal proceedings, thus under extensive interpretation and taken together with other articles of ICCPR (particularly Article 2, paragraph 3),³⁵ are not too hard to support.

Secondly, the interests of justice in cases of death penalty are more demanding, thus the Human Rights Committee in such cases tries to find different legal solutions those judgments to be reconsidered by higher domestic courts.³⁶

As a conclusion, seeing it pro futuro, the HRC can withdraw the obligation of the states to provide free legal aid from Article 14.1 of ICCPR. And this is in cases outside Article 14, paragraph 3(d), where there is no dilemma since the obligation is stipulated explicitly. The basis for this obligation will be the right to effective access to courts and tribunals.

When this obligation will exist will depend on the circumstances of the case, particularly the question which rights from ICCPR are jeopardized in the domestic proceedings. As in our cases, if the right to life will come at stake, the HRC has a view that such an obligation should exist. But, as a matter of principle, if once we establish such an obligation, it is not hard to put other provisions from ICCPR under the same obligation.³⁷

Opinions arguing against this holding of the HRC. In one of them they argued that "(t)he Constitutional Court does not determine the criminal charge against the accused. It merely decides a constitutional issue-whether the decision of the Trial Court or the Appellate Court suffers from any constitutional infirmity. The Constitutional Court does not determine the guilt of the accused and the proceeding before the Constitutional Court can therefore not be regarded as an integral step in the criminal process leading to the determination of the criminal charge". See, HRC, *Taylor v. Jamaica*, supra note 33, Individual Opinion signed by Mr. Nisuke Ando, Mr. Prafullachandra Bhagwati, Mr. Th. Buergenthal and Mr. D. Kretzmer.

³⁵ See supra note 30 and the accompanying text.

³⁶ See also, Sarah Joseph et al., supra note 11, p. 285.

³⁷ See e.g. Human Rights Committee, Consideration of reports submitted by State Parties under Article 40 of the Covenant, Concluding observations of the Human Rights Committee on Norway, UN. Doc. CCPR/C/79/Add.112, 1 November 1999. In these Observations, the HRC expressed its concern about the absence of "satisfactory legal

3. The free legal assistance has to be effective

As it was already said, the obligation to provide free legal assistance exists expressly under ECHR and ICCPR for individuals charged with criminal offences.³⁸ The reason why for these proceedings an explicit obligation exists, is because after a criminal proceedings an individual can be sentenced to imprisonment or even capital punishment (in some states). Under these circumstances, basic human rights are at stake, such as the right to liberty (freedom) or the right to life. For the substantive protection of these rights states are obliged to provide free legal assistance. And what is more important, the legal aid has to be effective, not only formally provided.

This was concluded` by ECtHR in one of its benchmark cases regarding the free legal assistance, namely the case *Artico v. Italy*.³⁹ In this case, the applicant was imprisoned for dishonesty, and in the appeal he asked the Court of Cassation to provide him with free legal representation, which was granted and a lawyer from Rome was appointed.⁴⁰ However, the lawyer failed to provide any legal help to the applicant. The lawyer was claiming that other professional commitments and his health prevented him from taking any action to assist the applicant in the proceedings.⁴¹ Under these circumstances, the applicant requested another lawyer to be appointed, but this was not done. This was the main reason for the ECtHR to find a violation of Art. 6.3(c). Namely, the ECtHR repeated that the ECHR intends "to guarantee not rights that are theoretical and illusory, but rights that are practical and effective".⁴² In addition to this general holding, two major points of the ECtHR were made. First, the Court concluded that the mere nomination cannot be seen as providing effective free legal aid. Since, the appointed lawyer can "die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties".⁴³

In these situations cannot be said that states have fulfilled the obligation to provide free legal aid. Second, the Court holds that the state cannot be

aid" not provided to the Sami, which results in interferences of their rights under Article 27 of the Covenant. See *id*, at para. 16.

³⁸ See *supra* notes 22 and 23 and accompanying texts.

³⁹ ECtHR, case *Artico v. Italy*, Appl. No. 6694/74, Judgment of 13 May 1980.

⁴⁰ *Id*, paras. 8-13.

⁴¹ *Id*, para. 14.

⁴² *Id*, para. 33.

⁴³ *Id*.

held responsible for every failure of the appointed lawyer. Nevertheless, in situation when the state authorities are notified for the failure of the appointed lawyer to provide free legal aid, their remaining passive and not taking any positive steps to ensure effective enjoyment of a right from the Convention is what makes the Convention to be violated. More specific, in the present case the Court finds that the authorities, after had been notified by the applicant about the appointed lawyer's failure to provide free legal aid, had two possibilities so they comply with the requirement from Article 6.3(c).

Namely, they should have appointed another lawyer, or influence the already appointed lawyer to fulfill his obligations.⁴⁴ But none of these two options was chosen. The authorities remained passive which caused the violation of Article 6.3(c) of ECHR. A lawyer was appointed but without any effective consequences for the applicant. He didn't provide legal help although he was appointed. Thus, there was no effective legal aid, which means violation of the Convention.

The Human Rights Committee has also held that the provided legal assistance has to be effective and that a state may be held responsible for violation of Article 14.3(d) if the state authorities hinder the appointed lawyers to effectively fulfill their task (provide free legal aid)⁴⁵ or when they remain passive while the behavior of the lawyer is incompatible with the interests of justice.⁴⁶ In this latter case, when it is obvious the misbehavior of the appointed lawyer by the authorities (basically the judges in criminal proceedings), they have to take some steps so the accused person does not remain without effective defense. If they remain passive, although there is appointed lawyer, the obligation under Article 14.3(d) will not be fulfilled since the legal aid will not be effective.

As examples when the behavior of the lawyer is against the interests of justice are given when there is a withdrawal of an appeal (without consultation) in a death penalty case, or when the lawyer is absent from a hearing of a witness in death penalty cases.⁴⁷ Thus, in the communication

⁴⁴ Id., para. 36.

⁴⁵ HRC, General Comment 32, supra note 20, para. 38; see also, HRC, Karina Arutyunyan v. Uzbekistan, Communication No. 917/2000, CCPR/C/80/D/917/2000 (2004), para. 6.3.

⁴⁶ HRC, General Comment 32, supra note 20, para. 38.

⁴⁷ Id.

Kelly v. Jamaica,⁴⁸ the HRC first of all concludes that in death penalty cases the convicted person (or accused) should have free legal assistance during all stages of judicial proceedings. And this is not contested in this case, since there was a lawyer assigned to the author of the communication. However, in further review of the communication the Committee found that the author actually was left without effective representation. Namely, his appointed lawyer had decided to abandon the appeal, without consultation of the author since, according to him, the appeal had no merit.⁴⁹ The HRC concluded that states have to take positive measures to ensure that the lawyers, once they are assigned to provide free representation (legal assistance), this representation be effective and in accordance with the interests of justice.⁵⁰ Particularly, it is notable, that in death penalty cases, the interests of justice will require taking more effective steps by the states to ensure that lawyers do not leave the accused (or convicted) person without effective assistance.

4. Criteria under which states have obligation to provide free legal assistance

States have obligation to provide free legal assistance only under specific conditions. These conditions are expressly described in both international treaties in our focus, namely ICCPR and ECHR. In Article 14, paragraph 3(d) of ICCPR, requires states to provide individuals free legal assistance "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". Similar, Article 6, paragraph 3(c) of ECHR reads: "Everyone charged with a criminal offence has the following minimum rights: ...if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require".

According to both these provisions, two conditions have to exist so an obligation of the states to provide free legal aid is established.

First, the material needs of the accused person; and second the interests of justice.⁵¹ And both these conditions have to be cumulatively fulfilled.

⁴⁸ HRC, Paul Kelly v. Jamaica, Communication No. 253/1987, CCPR/C/41/D/253/1987 at 60 (1991).

⁴⁹ Id, para. 5.10.

⁵⁰ Id.

⁵¹ See e.g. ECtHR, case of Quaranta v Switzerland, Application no. 12744/87, Judgment of 24 May 1991, para. 27.

4.1. Sufficient means to pay legal assistance

As far as material needs of the accused are concerned, there is not much of a debate in international human rights bodies in our focus. It seems like states enjoy wider discretion to decide upon this issue, especially regarding the conditions under which is considered that an individual has no means to pay for a legal aid.

This will depend on many questions, including the standard of living in the country, but particularly on the personal situation of the applicant, his/her assets and incomes.⁵² Of course “the burden of proving a lack of sufficient means should be borne by the person who pleads it” which means by the individual.⁵³ S/he has to show with specific documentation (certificates, etc.) about the assets and incomes that receives whether monthly or per annum. Also, states retain the right to require the individual to reimburse the expenses about the official appointment of lawyers to defend the individuals.⁵⁴

4.2. The interests of justice

The second condition is more elaborated by the ECtHR and the HRC. Under the case law of both these human rights bodies, the main factor that determines whether the interests of justice require providing free legal aid is the gravity of the offence and the complexity of the case. The ECtHR has held that the seriousness of the offence the applicant is accused of, and the severity of the sentence s/he risks, is the first criterion to be considered when determining whether an obligation for the state exists to provide free legal aid.⁵⁵ And of course, the death penalty cases are those when the interests of justice will require providing free legal aid by states.

Although this is not an open issue for the ECtHR,⁵⁶ the HRC on the other hand has emphasized the importance of providing free legal aid in death

⁵² See.e.g. ECtHR, case of Pakelli v. Germany, Application no. 8398/78, Judgment of 25 April 1983, para. 34.

⁵³ ECtHR, case of Croissant v. Germany, Application no. 13611/88, Judgment of 25 September, 1992, para. 37.

⁵⁴ *Id.*, para. 38.

⁵⁵ ECtHR, Quaranta v. Switzerland, *supra* note 51, para. 33.

⁵⁶ The death penalty is prohibited under Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, ETS 187, adopted 3 May 2002 and entered into force 1 July 2003. This Protocol bans the death penalty in all circumstances including

penalty cases. According to the Committee, in such cases, where the right to life of the accused is at stake, the interests of justice will always require a legal aid to be provided in all stages of the proceedings, including the preliminary investigations.⁵⁷

But it seems like legal representation is not always needed only in death penalty cases. The ECtHR has interpreted Article 6, paragraph 3(c) as it requires providing legal aid (representation) in all cases when the possible sentence for the accused is imprisonment. The Court held that "...where deprivation of liberty is at stake, the interests of justice in principle call for legal representation".⁵⁸ In the present case, the applicant had been sentenced to 30 days imprisonment for not paying the poll tax.⁵⁹ The Court found a violation and concluded that states have obligation to provide free legal aid in all cases when the accused person might be sentenced to imprisonment.⁶⁰ Even in cases when the applicants make simple appeals, still, because of the severity of the sentences, according to the Court, the interests of justice will require a free legal assistance to be granted.⁶¹

Contrary to this, in cases that involve traffic speeding offences or other minor offences, that can lead only to a fine (not imprisonment), the HRC has held that there is no obligation of the state to provide free legal aid.⁶²

for crimes committed in times of war. Also, there is no possibility of derogation or reservation under this Protocol. With status of 26 October 2009, 41 member states of Council of Europe have ratified this Protocol. Only Azerbaijan and Russia have not signed this Protocol (those who have signed but not ratified are still under international obligations. For these obligations, see Article 18 of the Vienna Convention on the Law of Treaties, *supra* note 3. For the latest status of signatures, ratifications and entering into force of this Protocol, see the official web page at: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=187&CM=8&DF=26/10/2009&CL=ENG> [last visited 26 October, 2009].

⁵⁷ See e.g. HRC, *Aliboeva v. Tajikistan*, Communications No. 985/2001, CCPR/C/85/D/985/2001 para. 6.4.

⁵⁸ ECtHR, case *Benham v. the United Kingdom*, Application no. 19380/92, Judgment of 10 June 1996, para. 61.

⁵⁹ *Id.*, para. 56.

⁶⁰ *Id.*

⁶¹ See e.g. ECtHR, case *Boner v. the United Kingdom*, Application no. 18711/91, Judgment of 28 October, 1994, para. 44.

⁶² HRC, *O.F. v. Norway*, Communication No. 158/1983, CCPR/C/OP/2 at 44 (1990), para. 3.4.

Normally, individuals have their right to be assisted by a lawyer paid by them, but the interests of justice do not impose an obligation on the states to provide legal aid. After all, such obligation does not exist under international law (treaties under consideration). However a state can choose to provide free legal aid under the domestic legislation in wider areas which are not covered with international law. And that is quite reasonable, since international human rights law guarantees a minimum standard of rights, which can be expanded within the domestic law.

Beyond the gravity of the offence (and severity of the sentence), the other criterion which determines whether the interests of justice require providing free legal aid is the complexity of the procedure. Thus, procedures where complicated legal issues are to be argued, the interests of justice will require representation by a lawyer. In this way, to the individuals will be given a chance to argue their position more successfully, thus giving effect to their right to effective defense. Some important elements from the "complexity of the procedure" criterion can be withdrawn from the Airey case,⁶³ which the ECtHR emphasized in another case, namely in the MacVicar case.⁶⁴ The Court emphasized some points which can have effect on the complexity of the procedure. Some of these points are: the proceedings conducted before high courts can be more complex; second, issues that involve complicated points of law that require expert evidence or x calling and examining witnesses are complex; thirdly, the emotional aspect of the procedures (such as separation or divorce procedures that involve private matters) can require legal assistance because of the personal position of the applicant; lastly, the Court finds important even the background of the applicant as relevant to the determination of whether the procedure is complex.⁶⁵

Under this interpretation of the ECtHR, as a conclusion, applicants can justify their need to have legal assistance without too many practical difficulties. They will not be entitled to free legal aid only in case of minor offences, which are not complicated from the legal point of view and where the sentence is not death penalty or imprisonment. But even in cases where the sentence is only a fine, or even in civil proceedings, if the applicants are not lawyers and do not have knowledge in law, they can also be entitled to free legal aid under international law. Their

⁶³ Airey v. the United Kingdom, supra note 19.

⁶⁴ McVicar v. The United Kingdom, supra note 24.

⁶⁵ Id, para. 49.

entitlement to free legal aid derives from their right to effective defense and the right to fair trial. The reason is because a person who is not a lawyer can never present effectively the defense as good as a lawyer. On the other hand, in legal proceedings (criminal and civil) there are always legal issues that are complex for the applicant and s/he does not understand. Examination of experts and witnesses cannot have the same result if they are made by a lawyer or not. Even in some legal issues that the applicants have certain degree of knowledge, the legal issues are not separated one from another. In legal proceedings, for effective arguments to be made, the knowledge of the entire legal system is required, not only to certain legal issues.

For these reasons, the interpretation of the right to free legal assistance made by the human rights bodies (HRC and ECtHR) is broad and has evolved in time. Their point is that states have to provide free legal aid in both, criminal and civil proceedings. The legal aid is needed when the individuals concerned do not have sufficient means to pay by themselves, and when they really need legal aid, because of the lack of knowledge, the complexity of the procedure, the complexity of the legal issues, their personal position (foreigners)⁶⁶, their knowledge and understanding of legal issues, their emotional situation etc.

5. Macedonian legislation regarding free legal assistance (aid) reviewed under these international obligations

Macedonia is a state party to ICCPR and ECHR.⁶⁷ As such it has obligation that derive from these treaties. Macedonia has obligation to

⁶⁶ See e.g. ECtHR, case *Pakelli v. Germany*, supra note 52. In this case the applicant was a national of Turkey that appealed on his conviction in Germany. Upon his request a free legal representative to be appointed, the Federal Court decided that Pakelli did not need a legal representative. The ECtHR decided that the legal representation was necessary in these proceedings because of the complex legal issues raised in the case. It is argued, however, that the essential reason was that Pakelli was a foreign national with different mother tongue than German. See Alastair R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Hart Publishing, Oxford and Portland, 2004, p. 118.

⁶⁷ Macedonia is party to ICCPR by succession from 18 January 1994. See the status of ICCPR at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#1 [last visited 26 October 2009]. Macedonia is party to ECHR from 10 April 1997, from the deposition of the declaration of ratification. See the status of ratification of ECHR at the official web page

provide free legal aid to individuals under its jurisdiction (citizens and non-citizens). And Macedonia has pretty much a good basis to comply with its obligation under these treaties. There are only few issues where Macedonia should focus in more detail in the future with aim of improvement.

Let's start with analysis of the Macedonian legislation. Under the Law in Civil Procedure (hereinafter "LCiP"),⁶⁸ as well as the Law on Criminal Procedure (hereinafter "LCrP"),⁶⁹ individuals have right to free legal aid (representative) if they do not have sufficient means to pay for it. Under LCiP, a party in a civil procedure, under its own proposition can be freed from all the costs of the proceedings, including the judicial taxes as well as representation.⁷⁰ The only condition is the party that requests to be freed from the judicial expenses not to have sufficient means to pay for those expenses. This condition has to be verified with documents issued by state organs.⁷¹ The right of free representation is conditioned with another criterion, namely the necessity of protection of the rights of the party that seeks free representation.⁷² This may sometimes indicate that because of the complexity of the procedure it is necessary the party to have legal representative.

However, it can always be interpreted as the justice requires free representation since the rights of the individual are endangered. Under the LCrP, every individual charged for a criminal offence for which is proscribed life imprisonment, the legal aid is mandatory in all the phases of criminal proceedings. The appointment of legal representative is also mandatory in cases when a person is in custody.⁷³ For persons accused of criminal offense for which is prescribed sentence of imprisonment of 10 or more years, the appointment of a defense lawyer is mandatory from the moment when an accusatory act is issued.⁷⁴

<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=26/10/2009&CL=ENG> [last visited 26 October, 2009].

⁶⁸ Law on Civil Procedure, Official Gazette of the Republic of Macedonia, no. 79/05, from 21 September 2005.

⁶⁹ Law on Criminal Procedure, Official Gazette of the Republic of Macedonia, no. 15/05 from 7 March 2005.

⁷⁰ Law on Civil procedure, supra note 68, art. 163-165.

⁷¹ Id, art. 164, para. 2.

⁷² Id, art. 165, para. 1.

⁷³ Law on Criminal procedure, supra note 69, article 66, paragraph 1 and 2.

⁷⁴ Id, article 66, para. 3.

In all these cases, if the accused person does not appoint a lawyer by him/her self, than the court will appoint one ex officio and will pay the expenses.⁷⁵ In this way, in all these situations described above, the possibility for legal representation in criminal proceedings is guaranteed. All these situations are of a nature when the rights of the accused are endangered by the custody or the long imprisonment as a risk for the individual. For these reasons the free representation (if the accused does not want to have his/her own lawyer) in criminal proceedings is guaranteed as a form to satisfy the interests of justice.

However, in cases where the mandatory representation in criminal proceedings does not exist, an accused person can also have free representation, if s/he proves that does not have sufficient means to pay for one. But, under this precondition, the criminal offence for which the person is accused has to be prescribed sentence of 1 year or longer.⁷⁶ And this is one provision where there is a gap between Macedonian legislation and its obligations under international law. Namely, free legal aid in criminal proceedings is not guaranteed if the person is accused of an offence for which a sentence is prescribed imprisonment shorter than one year. And as we saw, under the case law of ECtHR, when the accused person is at risk to be imprisoned (after the end of the criminal proceedings), no matter the length of the imprisonment (it can be even 15 days), the free legal representation has to be guaranteed.⁷⁷ A change in this direction is needed.

Another point necessary to be made is that Macedonian institutions (especially courts) have to follow the work of the appointed lawyers ex officio. Namely, as it was pointed out earlier, the mere appointment does not mean that an effective legal assistance was provided. There are situations when appointed lawyers by the courts in Macedonia do not take effective steps to protect the rights of the accused who receive the free legal aid. In these situations, the courts have to replace those lawyers or to make them fulfill their obligation.⁷⁸ Otherwise Macedonia will be in collision with the obligations already taken in the international arena.

⁷⁵ Id, article 66, para. 5.

⁷⁶ Id, article 67.

⁷⁷ See supra, notes 58, 59 and 60 and the accompanying text.

⁷⁸ ECtHR, case of Artico v. Italy, supra notes 39-44 and the accompanying text.

Bibliography

1. Cassese, Antonio, International Law, (Oxford, 2001);
2. Janis, W. Mark, Kay, S. Richard and Bradley, W. Anthony, European human rights law: text and materials, Third Edition, (Oxford, 2008);
3. Joseph, Sarah, Schultz, Jenny and Castan, Melissa, The International Covenant on Civil and political Rights, Cases, materials and commentary, (Oxford, 2000);
4. McGoldrick, Dominic, The Human Rights Committee, (Oxford, 1994);
5. Ratner, R. Steven and, Abrams, S. Jason, Accountability For Human Rights Atrocities In International Law: Beyond The Nuremberg Legacy, Second Edition (Oxford, 2001);

TOWARDS A JUST AND EQUAL ENVIRONMENT FOR ALL THE CITIZENS – PRO BONO LEGAL AID IN MACEDONIA

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Abstract

This work aims to analyze the recently adopted Law on pro-bono legal aid in order to understand the theoretical background of this institute. It will give some comparative approaches regarding the regulation of pro-bono legal aid in other countries in order to offer a parallel view of the situation in Macedonia.

Respective conclusions and recommendations will be given in the end in order to emphasize some options of ameliorating the process of offering legal aid for free.

Introduction

According to the Constitution, Republic of Macedonia, among other things, is a social state. This means that citizens of this country should live in an appropriate social welfare and have appropriate social security and social rights. One of the fundamental human rights is the right to access the judicial institutions and to fulfil the rights guaranteed with the Constitution and the laws of the country. This is related to the right to a fair trial, right to counselor and the equality before law. But it is well known that justice costs, and it costs a lot.

Therefore, it is a worldwide known fact that many people cannot succeed in fulfilling their rights because they lack the financial means to do this. Thus, many people become victims of injustice because they do not have an opportunity to realize their rights. Justice delayed is justice denied,

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they say, but what about justice not at all recognized? Therefore, many injustices come and go and people cannot react nor do anything because they cannot afford it.

And of course, they feel deprived of their rights, inferior to the others who always seem to be more powerful, and therefore, they understand that there is no justice in their world, at least no justice for them.

This is why the idea of pro-bono legal aid represents a noble and human undertaking. It tends to offer hope, help and opportunity to people who are denied many things in their lives. It strengthens the humanity and solidarity as main values among people and reminds us all that underneath it all, we are all just human beings and we should help each other, take each other's hand. Yes, it sounds idealistic, and therefore, in the real world, things don't work like that and often, as it will be seen, in reality the pro-bono legal aid cases are not taken very seriously since they don't have anything else to offer apart from feeling good for doing a good deed. I consider that the problem of pro-bono legal aid among judicial and legal perspectives has a very important cultural and psychological perspective and this approach should also be taken into consideration.

Pro-bono legal aid can be implemented through professional lawyers who carry on legal cases where they don't get paid their complete fee. This is how it is regulated in our country, with the Law on pro-bono legal aid. But it also can be implemented through legal clinics within law faculties where law students can help and provide legal aid free of charge, supervised, of course, by their teachers and professional lawyers. This is how it is done in many countries and it can serve as an example for us as well, although, the legislation in Macedonia does not cover such an opportunity for now. I will refer to how this idea can be implemented in our country, since according to the legislation, the law faculties of our country also need to offer to students clinical teaching, but in reality, this words means something else in our country compared to how clinical teaching is organized in other countries.

It is a good thing that Macedonia adopted a specific law on pro-bono legal aid. But the way it stands for now, offers fewer opportunities for real implementation of this idea in comparison to other countries that have a longer tradition of offering this kind of help. I will suggest some ways to reform the law in order to implement it better and in a more successful way.

1. Legislative provisions

The Law on free of charge legal aid (hereinafter “the Law”) was adopted by the Parliament of RM on December 31, 2009. According to the general provisions, the goal of this Law is to provide “to citizens and other persons equal access to the institutions of the system in order for them to be informed and to receive efficient legal aid, in accordance with the principle of equal access to justice²”. The Law also indicates that the procedure for providing pro-bono legal aid is an urgent procedure³. The pro bono legal aid is implemented through the Ministry of Justice (MJ), lawyers (attorneys) and accredited civil society organizations (NGOs) and is financed through the Budget of RM⁴. It is classified as:

- a) **Initial legal aid** - initiative legal counseling on the use of legal aid, general legal information and legal aid in filling the formal request on asking for pro-bono legal aid. This part of the legal aid is implemented by the regional sectors of the MJ and NGOs.
- b) **Legal aid** - representation of the client in all the instances of judicial and administrative procedures and writing formal documents in these procedures. This part of the legal aid is implemented exclusively by lawyers (attorneys)⁵.

The pro-bono legal aid is a social category of legal aid dedicated to persons who cannot fulfill their right to access to justice in other ways. According to the Law⁶, eligible persons for receiving pro bono legal aid are:

- Persons who otherwise receive social aid,
- Persons who receive assistance related to disability,
- Those who have the lowest pension according to the standards of the state, as well as

² The Law on free of charge legal aid, Art. 2.

³ Ibid.

⁴ Ibid. Art. 4.

⁵ Ibid. Art. 6

⁶ Ibid. Art. 14.

- Single parents who raise one or more children.

Eligible persons to receive pro-bono legal aid are⁷: citizens of RM, persons who have applied for asylum in this state⁸, foreigners and citizens of EU according to the conditions required by this law as well as persons with no citizenship. The Law provides that the pro-bono legal aid is given if it is found that paying for the legal representation would put to risk the economic wellbeing of the family. The economic wellbeing of the family is considered at risk if the incomes of the family are less than 50% of the average salary in RM⁹.

The Ministry of Justice keeps a registry for pro-bono legal aid. There is a list of attorneys who give pro-bono legal aid as well as a list of civil society organizations that give previous pro-bono legal aid. The attorneys and the organizations that intent to give pro-bono legal aid send a request to the Ministry of Justice that is eligible to enlist them in the registry through a decision that allows the attorneys and the organizations to do so¹⁰.

Attorneys who give pro-bono legal aid are entitled to ask for reimbursement of their costs as well as for payment of their fee, and the law provides that they are entitled of their fee minus 30% of the normal fee that would be paid in a similar case¹¹. Their costs and their fee are paid according to the Budget of RM, so in this case, the given legal aid is not entirely pro-bono since the lawyers do get their fee (70% of it), not from the client but from the Ministry. This is a bit different from states such as USA where when a lawyer takes a pro-bono case, they don't get their fee, only the coverage of their costs.

The Law also provides that the Ministry of Justice, in cooperation with the Bar Association, Notary Association, the Bailiff association and the Association of Mediators organizes Days of free of charge legal counseling for all the citizens for issues related to advocacy, notary, mediation and execution of decisions¹².

⁷ Ibid.

⁸ The Law on amending the Law on free of charge legal aid, art. 2.

⁹ The Law on free of charge legal aid, Art. 12.

¹⁰ Ibid. Art. 27-33.

¹¹ Ibid. Art. 36.

¹² Ibid. Art. 39.

The Law also makes it possible to give pro-bono legal aid in cases that are lead before courts of other states and it specifies the provisions in this direction in the articles 40-46.

The adoption of this Law should be regarded as a very positive step to regulate such an important issue which is the right of every human being to access to justice. It is a formal undertaking to give opportunity to people who cannot afford it otherwise, to fulfill their rights in a democratic society. It also represents a major step in trying to change the existing mentality in this country when it comes to pro-bono work in general and specially, to pro-bono in legal cases. Macedonia is one of the countries where the voluntary work is not really valued; instead it is rare and almost non-existing. This is particularly so among people who have a certain profession and receive certain incomes. It is very rare to see some of these people to voluntarily give up a part of their income and to work without being materially rewarded for what they do. It is a material world in Macedonia, sometimes more material than in other countries. However, if the fact that it is a poor state, with low GDP, with high unemployment rates and with very poor living standard, it can be understood. Voluntary work, solidarity and good will are sometimes values that cannot develop in a place where people struggle with poverty in every day basis.

2. The need for legal clinics

Analyzing the above mentioned Law on Pro-bono legal aid gives the impression that not all the means of giving pro-bono legal aid are exhausted in the Law. We have a situation where according to the Law on Higher Education, Universities need to organize clinical teaching for the students, and this means for the law students as well. If we take a look at what precisely is meant by “clinical education”, we will find out that according to the law, an expert in the field must give a lecture for the students at least 2 hours during the semester.

However, this is not what the world considers as a legal clinic. The legal clinic approach (which is developed in USA) provides that law students work either with real cases, through pro-bono programs that are developed within the university or within law firms, or otherwise, they simulate cases in moot courts.

Therefore, I think one way to introduce more efficient pro-bono legal aid is to include the law students in this process. As a law which has been adopted

recently, it should have had covered this issue, and maybe initiate the needed changes in the legal system to make it possible. Of course, the legislation in RM does not recognize the possibility for a law student to represent a client at court. However, it is possible that students could be involved in giving previous legal counseling for clients in need or assist to professional lawyers in their work with those clients. This would be helpful for the students, because they would get a real practical impact in their studies, moreover, the clients that seek pro-bono legal aid would benefit immensely from it.

When it comes to clinical legal education, Bücken & Woodruff define it as “teaching lawyers skills and values through experiences that require the students to ‘do like a lawyer’ rather than to just think like a lawyer¹³”. I think this should be taken into consideration when clinical legal education is required in our countries since what we do as clinical teaching is very far away from this definition.

Furthermore, Stuckey explains that “typically, clinical or experience based legal education is categorized as simulation, live client (in-house) clinics, or externships¹⁴” where “The basic differences between them are: “in simulation based courses, students assume professional roles and perform law-related tasks in hypothetical situations; in in-house [live client] clinics, students represent clients or perform other professional roles under the supervision of members of the faculty; and in externships, students represent clients or perform other professional roles under the supervision of practicing lawyers or they observe or assist practicing lawyers or judges in their work¹⁵.”

This kind of legal education would not only make sure that the students who graduate from law schools will have the needed practical skills that are required for their profession, but also that there would be more possibilities to offer pro-bono legal aid to clients who need it. It should be kept in mind that including students in pro-bono legal aid programs can prove as more useful than requiring professional lawyers and attorneys to take pro-bono cases since law students and young graduates usually seek for ways to enter in the lawyers community and make their place there, so they can serve as a very enthusiastic group of young people who can agree to voluntary work and do it responsibly, since

¹³ (Bücken & Woodruff, 2008)

¹⁴ (Stuckey, 2007), p. 812.

¹⁵ *Ibid.*

sometimes, in the beginning of someone's career, it is not so important how much one gets paid, rather, how much experience does one get from a job.

I definitely think that the approach towards clinical legal education in RM needs to change and to be related to the above cited definition. It is already done in other European countries, and I would like to mention the example of the Faculty of law in Zagreb¹⁶ where the clinical legal education is a mandatory part of the legal studies program, and students spend a whole year participating in moot courts and simulations. If the simulation technique is combined with live client clinics or externships, this would have direct impact on the efficiency of pro-bono legal aid in the country.

Another way to increase the efficiency of pro-bono legal aid would be to make certain hours of pro-bono work mandatory for professional lawyers (attorneys). As it was explained above, the Law provides that lawyers and organizations apply to be registered in the list of pro-bono lawyers, so it depends on their will whether they will do pro-bono work or not. There is a rising tendency in USA to make pro-bono work mandatory for lawyers. Recently, a rule was passed by the New York State Chief Judge Jonathan Lippman according to which "The approximately 10,000 lawyers who apply to the New York State Bar each year will have to demonstrate that they have performed 50 hours of pro bono work to be admitted¹⁷". Although there is criticism that mandatory pro-bono work can prove as contra efficient since lawyers usually "don't want to be told what to do¹⁸", and therefore, there are worries that lawyers who are made to work pro-bono will not do their job correctly, however, this can be considered as a major step towards ensuring pro-bono legal aid for people who desperately need it.

The Law on free of charge legal aid makes a good distinction between previous legal aid and legal aid in general. It would be a good idea to involve student legal clinics beside civil society organizations as subjects who give previous legal aid. It would be a good start to change the practice of clinical legal education and to make it a more efficient one.

¹⁶ (Faculty of Law, University of Zagreb) <http://www.pravo.unizg.hr/>

¹⁷ (Barnard, 2012).

¹⁸ *ibid.*

On the other hand, lawyers should be encouraged not only to take pro-bono cases but also to mentor undergraduates and postgraduate students in working with pro-bono cases. I think the Law, as it stands now, offers very limited possibilities to provide pro-bono legal aid, therefore these possibilities should be extended in order for the citizens to receive the needed aid.

Conclusions

Two main conclusions can be drawn from this article:

- Adopting the Law on free of charge legal aid is a major step forward to organize, regulate and systemize the pro-bono work in RM. It differentiates between previous and normal legal aid and divides these two stages of legal aid between different subjects (Ministry of Justice and civil society organizations for previous legal aid and professional lawyers-attorneys for normal legal aid). However, the Law is very limited in offering pro-bono legal aid because, it doesn't make it mandatory for the lawyers.
- The idea of clinical legal education should be developed in the law faculties in RM in a more appropriate way and similarly to countries that have developed sustainable clinical legal education programs. This would prove very helpful for increasing the efficiency of pro-bono legal aid as well as it would give the students a chance to receive qualitative practical skills that they will need in their profession. The enthusiasm of young undergraduates and postgraduates should be used in a manner that would be beneficiary both for the students and for persons who need pro-bono legal aid.

The Chief Judge Lippman who made pro-bono work mandatory for lawyers in the state of New York has stated: "The legal profession should not be seen as argumentative, narrow or avaricious but rather one that is defined by the pursuit of justice and the desire to assist our fellow

man¹⁹”. Usually lawyers are identified as people who only care for profit and nothing else.

However, it should be kept in mind that their profession is sometimes similar to physicians, where the higher purpose of justice, humanity, solidarity and fairness should prevail and be more important than other material things.

In order for this to be realized, the mentality should change. Every person has his own system of values and decides important things on his own. The humanity and solidarity of lawyers can be measured, and this measure is very simple: the hours of their voluntary pro-bono work.

Bibliography

Antoine, R. (1992). International Law and the Right to Legal Representation in Capital Offence Cases - A comparative Approach. *Oxford Journal of Legal Studies* , 284-294.

Barnard, A. (2012, May 1). Top Judge Makes Free Legal Work Mandatory for Joining State Bar. *The New York Times* , p. A21.

Bücker, A., & Woodruff, W. A. (2008). The Bologna Process and German Legal Education. *German Law Review Journal* , 575-618.

Faculty of Law, University of Zagreb. (n.d.). Retrieved March 12, 2012, from <http://www.pravo.unizg.hr/>

Legal Help for the Poor - State by state listing of Pro Bono Programs. (2012). Retrieved January 12, 2012, from American Bar Association: <http://apps.americanbar.org/legalservices/probono/directory.html>

McKay, F. (2003). Civil Reparation in national Courts fo Victims of Human Rights Abuse. In M. Lattimer, & P. Sands, *Justice for crimes against humanity* (pp. 283-302). Oregon, Portland: Hart Publishing.

¹⁹ Ibid.

New York Law Help. (2012). Retrieved January 12, 2012, from <http://www.lawhelp.org/ny/>

Pro Bono Net - Volunteer lawyers and legal aid advocates. (2012). Retrieved January 12, 2012, from Lawyers serving the public good: <http://www.probono.net/>

Silver et al. v. UK, A.61(1983) 5 EHRR 247 (European Court of Human Rights March 25, 1983).

Stuckey, R. (2007). Teaching with Purpose: Defining and Achieving Desired Outcomes in Clinical Law Courses. 13 Clinical Law Review 807.

Закон за бесплатна правна помош. (2009). Службен весник на РМ, бр. 161 од 30.12.2009.

Закон за дополнување на законот за бесплатна правна помош. (2011). Службен весник на РМ, бр. 185 од 30.12.2011.

PRO BONO LEGAL AID (GERMAN MODEL)

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Abstract

This work strives to research the possibility of offering of legal aid (pro-bono) in the context of comparative aspect, respectively, it strives to research and analyze the German model of this institution. In the first part of the work will be given references related with the actual legal frame and will be discussed about the necessity of bringing of the Law on pro-bono legal aid in the Republic of Macedonia. In the second part we will focus on the German law, where the concept of pro-bono legal aid has been raised above the philosophical category “*Guter Rat nicht teuer sein/the good advice should not necessarily be expensive*”. In this frame we will look the manner of regulation and functioning of the pro-bono legal aid in this legal system.

We will be discussing about the historic of the pro-bono legal aid in the German law, its actual definition, the fact that who is competent to offer pro-bono legal aid, the conditions under which it is given, who are its users, when it can be refused, and in the end, how this burdens a state budget, as is the Federal Republic of Germany (for the state budget, good advice, however, it is not that cheap).

Introduction

On basis of the article 1 paragraph 1 of the Constitution of the Republic of Macedonia it is democratic and social state¹. In accordance with this constitution norm it is highly needed the democratic and social rights of its citizens to be confirmed. Some of these rights are confirmed in the Constitution of Republic of Macedonia itself, but they are closely confirmed with separate law, especially with laws of the social sphere²,

¹ Article 1 paragraph 1 of the Constitution of Republic of Macedonia, 1991

² Article 1, 2, Law on social security, Official gazette of Republic of Macedonia no. 50/97

but, undoubtedly also with law of the sphere of civil procedure³. For the democratic and social character of Republic of Macedonia speaks article 9 of the Constitution with which it is proclaimed that, all citizens of Republic of Macedonia are equal with their freedoms and rights, regardless of gender, race, colour of skin, ethnical and social origin, political and religious views, social and wealth position, and as a result, to all citizens is secured equal access to the law and the institution of the system⁴.

In terms of social justice expresses as well as the Law on courts of the Republic of Macedonia. Under the provisions of this law, everybody has recognized equal rights before the courts, in terms of protecting the rights and interests guaranteed by the law and that no one shall be deprived of this right due to lack of material sources⁵.

Social justice, respectively the right of equal access under the law, at the same time, represents one of the new principles on judiciary, which are defined in Article 6 of the European Convention on human rights and fundamental freedoms⁶ and are differentiated in the constitutions of states in transition, among which also Constitution of R. of M. This principle is included in the strategic plan of the Ministry of Justice of RM, (for the period of 2008-2010), which aims to meet the conditions which must be fulfilled in the way of our country towards the European family, such as: the development of the democracy, rule of law, protection of human rights and freedoms, harmonization of legislation with, “*acquis communautaire*”, stability of institutions, etc⁷. Although, as we noticed above the right of equal affairs is protected and guaranteed by

³ Article 163-169 of the Law on Civil Procedure, Official Gazette of Republic of Macedonia no. 79/2005, regulates the cases in which, the court releases the party from paying the court expenditures if according to the general material state is not in position to cover the expenditures without damaging the personal legal defense and its close family. The party is released from paying the court taxes, the advanced payment for the witnesses, experts, the courts decisions and expenses related to the representation. In this case all the expenses are covered by the court funds.

⁴ Article 9 of the Constitution of Republic of Macedonia, 1991

⁵ Article 7 paragraph 1, 3 of the Law on Courts, Official Gazette of Republic of Macedonia no. 58/2006.

⁶ European Convention for the protection of Rights and freedoms was adopted by the Council of Europe in 1950, while the Convention and its protocols 1, 4, 6 and 7 are ratified by the Assembly of RM on 10.04.1997

⁷ Strategic plan of the Ministry of Justice 2008-2010, January, 2008,

various constitutional and legal norms, however, in reality, due to the known social structure in our country, there are rare cases where certain categories of citizens are limited or completely deprived of the use of their constitutional and legal rights, only because of the lack of material sources⁸, “the opinion of a lawyer costs expensive”.

Equal chances for citizens, primarily means guaranteeing equal rights. But not only that. Equal chance means to know your rights, to dispose with them, and if necessary to ask for the realization and protection of them by judicial means. For an effective protection of rights, it is required that the road to justice and courts do not become virtually impossible because of rules on court costs. For reasons mentioned above it is needed to intervene in this special part of the civil procedural law and to be established a legal mechanism to protect citizens in grave financial condition.

This financial barrier that deprives citizens of their basic rights (the right to equal pro-bono outside procedural and procedural legal assistance is fundamental social right) claims to be avoided with the Law on pro-bono legal aid, which we already have it as law proposal⁹. But, since the Republic of Macedonia has a dim tradition regarding provision of pro-bono legal aid and in this regard leaves much to be desired¹⁰, we will have a overlook of the institute of pro-bono legal aid in the German legislation, which the institute concerned has a reach more dimensional and includes a very important segment of social justice.

1. Pro-bono legal aid in the German legislation

With the codification of the provisions on pro-bono legal aid in 1980, the Federal Republic of Germany has entered the circle of those few states which, pro-bono legal aid had relied on the legal framework¹¹. States, that had long tradition in state financing of pro-bono legal aid, or states

⁸ Law proposal on pro-bono legal aid, Skopje, January, 2009.

⁹ The legal aid foreseen for specific cases is specified with the provisions 163-169, of the Law on civil procedure including protection of rights only within the procedures that are in progress and do not include outside procedural and procedural cases.

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¹¹ Vallender Heinz, Beratungshilfe, Eine untersuchung insbesondere zur Rechtsstellung der Verfahrensbeteiligten, Köln, 1990, fq.18

where the legislative body for the past 20 years, had shown considerable activity, in terms of this field of law, where first of all: England¹², USA¹³, Sweden¹⁴, Netherlands¹⁵ and Belgium¹⁶.

The foundations of the procedural pro-bono legal aid, determined in form of fundamental principles of the right of the poor's (*Armensrechts*), in Germany we find in the second half of the XVI century and the beginning of the XVII century.

Since that time for offering of legal services by the courts were requested funding, which were poured into the state vault. But, since certain categories of people, were not in position to pay the given amounts in money, they were released of paying with money by the state they were appointed an attorney¹⁷.

¹² In 1949 came into force in England, "Legal Aid and Assistance Act" with which it was provided legal advice and legal care outside court for antisocial people which was realized through chosen attorneys by free will. Today legal aid in England is based on "Legal advice and Assistance Act 1972". According to which the claimant of the right can provide advice and information of all kinds by the chosen attorneys.

¹³ In the United States there is a long tradition of legal assistance (Legal Aid) for citizens with minimal income. Since 1876 in New York rose: "German Legal Aid Society", with the aim of providing legal assistance to the displaced from Germany which in 1980 was transformed into "New York Legal Aid Society". A powerful stimulus to the development of pro-bono legal aid program for legal aid made under the influence, "Economic Opportunity Act", which in 1964 placed within Johnson's government action, "Was on Poverty-fighting poverty".

¹⁴ According to Swedish law on legal assistance from 10.10.1967, in Sweden everyone has the right to a certain counter use of outside procedural legal assistance. Persons with minimal income are completely exempt from paying. If such assistance is not enough, then the legal aid applicant submits a proposal for general legal assistance.

¹⁵ The outside procedural and procedural legal aid in Netherlands is regulated by law, but unlike German law of transition from outside procedural advice and representation, in procedural legal aid is consequent and consistent. The right of legal aid enjoys the foreigners and statelessness person, including foreign legal entities. In this country pro-bono legal aid is provided by attorneys organized in Bureau of Attorneys.

¹⁶ In Belgium Article 445 of the Judiciary Cod from 10.10.1967 obliges the chamber of attorneys to form, "Bureau de consultation et defense" in order to provide outside procedural and procedural legal assistance for citizens with minimal income. The law passes the right to the Bureau of Attorneys to determine which counter value should be paid by the claimants of the right of the taken service.

¹⁷ Vallender Heinz, *Beratungshilfe, Eine untersuchung insbesondere zur Rechtsstellung der Verfahrensbeteiligten* Koln, 1990, page 44

One unique regulation of the right of the poor's was realized with the Code of civil procedure of 1877. With this act the state formally took over the coverage of expenditures of the procedure, in cases when the party is not in position to do it, without risking his and close families standing. With all the success of normative articulation of such an important segment of social right, qualitative changes in this direction where realized in the year 1933, with the novels of the Code on civil procedure¹⁸. These changes stay into force until the adoption of the Law on pro-bono procedural legal aid (*Prozesskostenhilfegesetz*) in the year 1980¹⁹.

The origin of today's outside procedural pro-bono legal aid dates since the second half of the XIX century. It was, the German Social Democratic Party – SDP which for the first time in the year 1875 and latter in 1891 in the program Gothaer, respectively, the Program of Erfurtit, which composed its political platform, it did seed offering of pro-bono legal aid for the citizens in difficult financial condition. After this first initiative, in this regard where engaged also different religious associations, women's associations and different state institutions, that where backed by the attorneys associations, and so was created the office for legal advices.

Since 1905 attorneys took over that in their offices or within the locals of the courts to offer pro-bono legal aid for the citizens in need (since 1913, in Frankfurt as well as in Karlsruhe). After first World War the general economic situation created as result of the war, stimulated the Municipalities to take measures for organizing offices that will offer pro-bono legal aid for the citizens in need. Those offices were prepared and were handed to the local attorneys, which were organized according to the motto "Attorneys in service" and were obliged to offer pro-bono legal aid²⁰. Those forms of practice of offering outside procedural pro-bono legal aid where given till the adoption of the Law on legal advising and representation of the citizens with minimal income

¹⁸ Vallender Heinz, *Beratungshilfe, Eine untersuchung insbesondere zur Rechttellung der Verfahres beteiligten*, Koln, 1990, page 44

¹⁹ 114-127, *Zivilprozessordnung, GerichtsverfassunsG, Rechtsflegergesetz, Kostenrecht, EuGVO (ZPO)*, 44. Auflage, Munchen, 2008

²⁰ GreiBinger Georg, *Beratungshilfegesetz*, Berlin, 1990, page 9.

(*Beratungshilfegesetz*)²¹, on 18.06.1980, that entered into force on 01.01.1981²². By bringing of this law was secured the normative framework related to the outside procedural pro-bono legal aid.

1.1. Notion of the pro-bono legal aid (*Kostenlose rechthilfe*)

The pro-bono legal aid in the German law (*Kostenlose rechthilfe*), it is considered as important instrument of social security that has a strong impact in effective control of the legal, functional and social state. Pro-bono legal aid presents one state social effect that is mainly beard by the advocacy, and is brought up with the aim of offering pro-bono legal aid, for certain categories of citizens (seekers of the right), that are not in position to cover the expenses for advices or representation by the attorney, meantime that there is no other option at disposal for defense and realization of their rights.

Pro-bono legal aid is a complex institute²³ which in itself incorporates two components: first component (before procedural) contains in itself, pro-bono legal advising (*kostenlose Beratung*) and pro-bono representation (*kostenlose Vertretung*) outside court procedure. Joint together, outside procedural pro-bono legal advising and representation is known as (*Beratungshilfe*).

The second component (procedural), consist legal aid that is offered during the court procedure (*Prozesskostenhilfe*).

The outside procedural pro-bono legal aid (*Beratungsgilfe*) in the German law is supported with the Law on legal advising and representation of the citizens with minimal income

²¹ Gesetz über Rechtsberatung und Vertretung für Bürger mit geringer Einkommen (*Beratungshilfegesetz – BerHG*),

²² Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen (*Beratungshilfegesetz – BerHG*) vom 18. Juni 1980 (BGBl. I S. 689), das zuletzt durch Artikel 27 des Gesetzes vom 17. Dezember 2008 (BGBl. I S. 2586) geändert worden ist "(translation – Law on legal advising and representation of citizens with minimal income (*Beratungshilfegesetz – BerHG*-) which for the last time was changed with Article 127 of the Law on 17.12.2008. In the course we will refer only to as: Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen (*Beratungshilfegesetz – BerHG*)

²³ Eve Becker, Grundfragen und problem der rechtsberatung, *Betragezur allgemeinen rechts-und Staatslehre*, Berlin, 1994, page 10

(*Beratungshilfegesetz*)²⁴, meantime, the procedural legal aid (*Prozesskostenhilfe*), is supported with the normative framework of the Code of civil procedure²⁵, respectively in the articles 114/127, which are integrated and are brought up in the level of the law on pro-bono legal aid (*Prozesskostenhilfegesetz*)²⁶.

1.2. Outside procedural pro-bono legal aid (*Beratungshilfe*)

Outside procedural pro-bono legal aid (*Beratungshilfe*) based in the Law on legal advising and representation of the citizens with minimal income (*BerHG*), for the citizens with minimal income are secured legal advices pro-bono and legal representation, in one outside court procedure. If the efforts for and outside procedural solution is proven unsuccessful and it seems that the initiation of a court procedure is necessary will follow procedural legal aid (*Prozesskostenhilfe*) based in (*PKH*).

Outside procedural pro-bono legal aid in the German legislation is defined as aid for acknowledgement of the rights outside a court procedure²⁷. So, outside procedural pro-bono legal aid means the possibility of the seeker of the right to get professional advice in terms of judicial matters that concern him/her, to get some kind of “first” legal “aid”. This aid in first place, consists of advices and information’s that are offered by the attorney and that are referred to the volume and the nature of the law, that in the concrete case belong to the seeker of the justice, as well as to the possibilities and modalities for realizing of this right. The outside procedural pro-bono legal aid in case of need includes also the representation of the seeker of the right, which consists compilation of various documents and outside procedural representation,

²⁴ Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen (*Beratungshilfegesetz – BerHG*),

²⁵ Vallender Heinz, *Beratungshilfe, Eine untersuchung insbesondere zur Rechtssellung der Verfahrensbeteiligten*, Köln, 1990, page 38

²⁶ 11-127, *Zivilprozessordnung, Gerichtsverfassungsg, Rechtsflegergesetz, Kostenrecht, EuGVO (ZPO)*, 44 , Auflage, München, 2008

²⁷ 1, abs.1. Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen (*Beratungshilfegesetz – BerHG*) vom 18. Juni 1980 (BGBl.IS. 689), das zuletzt durch Artikel 27 des Gesetzes vom 17. Dezember 2008 (BGBl.IS. 2586) geändert worden ist” (translation – Law on legal advising and representation of the citizens with minimal income (*Beratungshilfegesetz – BerHG*-) which for the last time was changed with the article 127 of the Law on 17.12.2008.

as for example establishing contact with third party, even in direct manner through telephone or electronically.

The outside procedural pro-bono legal aid is counterpart of procedural pro-bono legal aid in the field of outside procedure. By state care every citizen is offered the equal chance in using of the rights, regardless of their personal, wealth and economic situation. The expenditures conducted during this process are covered by federal units of the Federal Republic of Germany.

The law on legal advice and representation of citizens with minimal income that serves as normative coverage in the procedure of offering outside procedural pro-bono legal aid (1980), came as a result of a long discussion realized in the science and academic circles. It is known as a modern, classic, social, reforming and with sui generis nature law for the rights of the poor (armenrecht) that advanced the equal chances of the citizens towards justice and institutions of the system²⁸.

1.3. Conditions under which the outside procedural pro-bono legal aid is offered

One legal advice or one representation by one attorney creates benefit for him, the given value of money in name of the offered legal aid. The level of money, the seeker of the justice frequently is not in material position to cover it. With the acceptance of the request for outside procedural pro-bono legal aid, the realized expenditures are carried by the state and the society in general. But, in order not to be processed with money of the society without any basis, the outside procedural pro-bono legal aid is offered only than when are met certain legal conditions.

The outside procedural pro-bono legal aid is offered in cases when the seeker of legal aid:

1. According to its personal and economic situation and cannot provide the necessary means to realize its right,
2. There are no other opportunities for aid (clause of subsidiary),

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3. Are not familiar with their rights²⁹,

Taken in general the outside procedural pro-bono legal aid is provided in all cases when fulfilled the conditions for providing of procedural pro-bono legal aid under the provisions of Code of Civil Procedure (CCP)³⁰, for which we will talk below.

1.4. Subject that have right of outside procedural pro-bono legal aid

Outside procedural pro-bono legal aid is firstly offered to natural persons. This aid is also offered to other persons, like, in all cases when according to the rules of the Code of Civil Procedure (CCP), the seekers of the right, without any counter compensation are allowed to procedural pro-bono legal aid³¹. With the expression “others”, in this case means:

1. Persons that acquire the capacity of party with court decision, e.g. Violence administrator, guardian of the heritage, the manager of the testament,
2. The legal persons of the state e.g. associations and foundations with legal capacity,
3. Public enterprises, limited liability company, comanditaire enterprise as well as
4. In entirety all civil associations, that have ability of party, but, are not legal persons³².

According to German Law, right to outside pro-bono procedural legal aid also have natural persons with foreign nationality. Meantime, this right is not acknowledged to legal persons and foreign civil associations, that have ability of party, but are not legal persons³³.

²⁹ Absatz 1. Nr.1 Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen (Beratungshilfegesetz – BerHG)

³⁰ 115, Zivilprozessordnung, Gerichtsverfassungsgesetz, Rechtslegergesetz, Kostenrecht, EuGVO (CCP), 44. Auflage, München, 2008

³¹ 1. Absatz. Nr.2 Gesetz über über Rechtsberatung und Vertretung für Bürger mit geringer Einkommen (Beratungshilfegesetz-BerHG)

³² GreiBinger Georg, Beratungshilfegesetz, Berlin, 1990 page 29

³³ GreiBinger Georg, Beratungshilfegesetz, Berlin, 1990 page 27

If it is about foreign law, the outside procedural pro-bono legal aid, is offered only if the issue for which it is requested pro-bono legal aid, has any objective or subjective connection with Federal Republic of Germany.

Seekers of the law who lives in one European member states will be offered outside procedural pro-bono legal aid. German citizens shall be provided with outside procedural pro-bono legal aid in any European Union member state, in this occasion he will be assisted by state matrix, respectively, by German court of general land competence (the court where he has residence or temporary residence), in drafting the application, completion of documentation etc.

1.5. Cases in which outside procedural pro-bono legal aid is offered

The outside procedural pro-bono legal aid (advising and in certain cases even representing) is offered in cases that occur in field of:

- Civil rights, ex. Contract for sale and purchase, issues that derive from rent, requests for compensation, traffic accidents, neighbor conflicts, divorces, family issues, other family matters, inheritance conflicts, issues that derive from the insurance law etc;
- Labor law, for ex. Secession of labor relation;
- Administrative law, for ex. Social aid, funds in cash for flat, building issues, expenses and tax law, the right of education and higher education;
- The constitutional law for ex. Constitutional appeals because of the breach of the rights guaranteed with the constitution;
- The social law, for ex. In the pension issues and social care, in issues of securing from unemployment;

In the field of the criminal law are offered only legal advises, but, not representation. However, lately, the lawmaker deems appropriate that the

process of providing outside procedural pro-bono legal aid be extended to other areas of law, indicating so in criminal and financial law³⁴.

1.6. Competent subjects for offering outside procedural pro-bono legal aid

The outside procedural pro-bono legal aid is offered by attorneys and Centers of legal aid, that are members of the Chamber of Attorneys. Outside procedural pro-bono legal aid is offered by the special centers for offering of legal advises, which are established on bases of agreement with the Ministry of Justice³⁵.

The issue of providing outside procedural pro-bono legal aid is not regulated. It is not regulated the same way in all federal entities of the Federal Republic of Germany. In some of them there are special centers for counseling, which are able to provide pro-bono legal advice. In Bremen and Hamburg instead of outside procedural pro-bono legal aid, there is in function for a longer period, the public center for legal advice, therefore, the applicant of the right in these countries is not obliged to seek a attorney under the rules of the law on legal advice and representation citizens with minimal income (Beratungshilfegesetz – BerHG). In Hamburg Centers distribute public legal information for legal advice while in Bremen, Chamber of employers that have been created since 1956³⁶.

In Berlin, the applicant has the right broader space for choice between legal counseling offered by public centers for legal advice and outside procedural pro-bono legal under the Law on legal advice and

³⁴ Entscheidung des Bundesverfassungsgerichts (zu 2 Abs. 2 des Beratungshilfegesetz) (BVerfGE20081014)

B. v. 06.11.2008 BGBl. I S. 2180; Geltung ab 14.11.2008 In one decision of 06.11.2008 the Constitutional Court considers that article 2, paragraph 2 of the Law on legal advice and representation of citizens with minimal income (Beratungshilfegesetz _BerHG) which does not allow offering legal aid also in issues of the financial law is in opposite with article 3 paragraph 1 of the Constitution. In the transition period until this decision of the Constitutional Court is not implemented in the legal framework, the judges of financial field should not refuse to offer legal aid only because for this does not direct the actual law.

³⁵ Schoreit Armin-Dehn Jurgen, Beratungshilfe, Procekostenhilfe – BerH/PKH – Kommentar, Heidelberg, 2008, page 132

³⁶ 14. Absatz 1.2. Gesetz uber Rechtsberatung und Vertretung fur Burger mit geringem Einkommen (Beratungshilfegesetz – BerHG)

representation to citizens with minimal income (Beratungshilfegesetz – BerHG)³⁷

The outside procedural pro-bono legal aid may be provided by the court of first instance (Amtsgerecht) but only exceptionally and in limited extent. Reasons for this are known fact, that court is competent for authoritative and impartial resolution of disputes. This role of the court excludes the possibility of advising the claimant of the right, much less, when he presents one of the sides, whose conflict the court must resolved. So, definitely, the competence of providing outside procedural pro-bono legal aid, primarily have the attorneys.

However, despite what was mentioned above, under the provisions of (BerHG), the court is competent to provide pro-bono legal aid in cases where the applicant of the right is not able to provide the resources necessary to provide legal aid by the attorney, meanwhile, there is no other opportunity for legal aid (i.e. not likely to use legal aid offered by the union, insurance companies that insure from the breach of the right, landlord of housing associations etc.)

The legal aid that is provided by the court of first instance, deals with specific cases from the field of civil law and especially the labor law. The aid consist of simple advice, information and guidance, through which the applicant of pro-bono legal aid, advised and instructed only related to the fact that which are the possibilities of providing legal aid, in most cases for cases of legal aid that is offered by the associates of the court³⁸. So, legal aid that is provided by the courts is not genuine aid. In any case, outside procedural pro-bono legal aid that is provided by the court is free.

Although in principle the court offers no legal aid (it makes it very rare and very restrictive), however, the requester of the right, the outside procedural pro-bono legal aid will always win through the court, but always only as the mediator of the process. Thus, the requester after compiling the request for outside procedural pro-bono legal aid, should

³⁷ 14.Absatz 3. Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen (Beratungshilfegesetz – BerHG)

³⁸ 4. Absatz 1.2. Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen (Beratungshilfegesetz – BerHG)

submit it to the court of first instance³⁹. Even in cases when the requester of the right has directed directly at the attorney, the last one is obliged immediately or in additional manner to direct with request to the court⁴⁰.

1.7. The request for providing outside procedural pro-bono legal aid

The request with which is requested outside procedural pro-bono legal aid can be done in oral manner or in written form⁴¹. In the form of the petition, the requester of the right in first place should give the data:

1. Related to which the pro-bono legal aid is requested and basic personal data for the opponent;
2. Should prove about his personal situation (personal data);
3. Should prove about his personal wealth situation⁴², respectively, provide data on gross income, of any kind whether, as e.g.: data on personal income and persons with whom the applicant lives in the right common household (proof on the amount on personal income, or tax receipt), data from pension income, income from rent, income for housing, additions childish, income from unemployed status, income from self-employment, etc.);
4. Should prove on expenses on housing, burdens on household or eventually, for cases special burdens ex. (because of the individuality, big debts etc.).

³⁹ 4. Absatz 1. Satz 1, Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen (Beratungshilfegesetz – BerHG)

⁴⁰ Vertretung zur Einföhrung von Vordrucken im Bereich der Beratungshilfe (Beratungshilfевordruckverordnung-BerHVV), 17.12.1994, (BGBl.IS.3839), tritt am 01.01.1995 in Kraft die zuletzt durch Artikel 115 des Gesetzes vom 30.07.2004 (GBl.IS.2014) geändert worden ist". With article 15 of the law on 30.07.2004 (BGBl.IS.3839), hereinafter as: Verordnung zur Einföhrung von Vordrucken im Bereich der Beratungshilfe (Beratungshilfевordruckverordnung - BerHVV)

⁴¹ A. Absatz 1. Satz 2, Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen (Beratungshilfegesetz – GerHG)

⁴² 4. Absatz 1. Satz 2, Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen (Beratungshilfegesetz – BerHG)

If from the gross income are removed the taxes, the amounts of social security, the insurance from unemployment or other insurances, remains the amount on basis of which the court assesses the ability to provide outside procedural pro-bono legal aid.

Outside procedural pro-bono legal aid will be allowed in cases when after removing the above amounts, to the requester of the right remain available the amounts in cash up to 2301 Euros or exactly 256 Euros for the persons whom he holds⁴³.

Outside procedural pro-bono legal aid may be allowed even when the applicant has property value, which otherwise would have categorized him in the category of persons that on basis of overall property cannot be winners of outside procedural pro-bono legal aid. This happens in cases where property value that the applicant possesses are dedicated for certain purposes as for ex. Studying, specialization, house, household, etc.

Federal Minister of Justice is authorized with the consent of the federal Council to undertake legal measures for the simplification and unification of the forms through which is made the request for allowing outside procedural and procedural pro-bono legal aid and to the modalities for reimbursement of remuneration of the attorney after providing of the legal aid⁴⁴.

For the flow of the procedure according to the request for providing of outside procedural pro-bono legal aid applicable are rules of the Law on voluntary judicial issues (freiwilligen Gerichtsbarkeit – FGG)⁴⁵.

⁴³ Verordnung zur Einföhrung von Vordrucken im bereich der beratungshilfe (Beratungshilfевordruckverordnung - BerHVV)

⁴⁴ 13 Absatz 1. Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen (Beratungshilfegesetz – BerHG),

⁴⁵ 5. Absatz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen (Beratungshilfegesetz – BerHG), guides on applying regulations of the law: Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit – FGG (translation: Law on voluntary judicial issues that has ceased to be applied from 01.09.2009, when has entered into force Gesetz über das Verfahren in Familiense und in den Angelegenheiten der freiwilligen Gerichtsbarkeit – FamHG (translation: Law on procedures relating family issues and other cases of voluntary judicial)

The procedure is generally fast, but there are no special procedures for emergencies. In fact, the very possibility of providing outside procedural pro-bono legal aid covers emergency cases.

1.8. Competence related to decision making related to the request for outside procedural pro-bono legal aid

Regarding the request to provide outside procedural pro-bono legal aid, decides the court of first instance in the place where the applicant has residence (general powers of the land). If the applicant has not residence within the country, competent to decide on the request for legal aid is the court of first instance, in the territory in which is shown the need for legal aid.

If the court considers that the conditions are met to provide pro-bono legal aid, while it itself could not provide necessary legal aid, the applicant sends authorization (Berechtigungsschein) for outside procedural pro-bono legal aid with which the last one, can direct to any attorney, according to his free will⁴⁶.

The applicant, the request for outside procedural pro-bono legal aid can submit directly to the attorney. In this case he must document his condition and Personal property (all data which are submitted to the court otherwise) and to ensure that for the same issue so far he has not been provided nor deprived with outside procedural pro-bono legal aid by the court⁴⁷. Than the attorney directs the request to the court of first instance, in the place where the applicant has residence.

The mandated attorney to whom the applicant has addressed the authorization (Berechtigungsschein) issued by the court or who is elected directly, is entitled to request by the applicant sum of 10 Euros⁴⁸, while by the state budget he will withdraw additional 30 Euros⁴⁹ for the first

⁴⁶ 6. Absatz 1. Satz 1. Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen (Beratungshilfegesetz – BerHG),

⁴⁷ 7. Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen (Beratungshilfegesetz – BerHG),

⁴⁸ 8. Absatz 1. Gesetz über Rechtsberatung und Vertretung für Bürger mit geringer Einkommen (Beratungshilfegesetz – BerHG),

⁴⁹ No. 2501 VVRVG, Vergütungsverzeichnis, Gesetz über die Vergütung der Rechtsanwältinnen und Rechtsanwälte (Rechtsanwaltsvergütungsgesetz-RVG),

advising, or 70 Euros in case of representation. If the attorney continues to advise and represent for the same issue, than will withdraw from the budget only 70 Euros. Amounts which the attorney wins from mandates of before procedural pro-bono legal aid, according to rules are much lower than the amounts estimated in normal mandates⁵⁰.

The attorney and his mandate in the procedure of pro-bono legal aid cannot be taken out for other compensation from it which is determined by law. Any such agreement would be invalid⁵¹, because the rest of the funds the attorney will withdraw from the state budget.

Attorneys that are contacted upon request drawn up by the regulations of law on legal advising and representation of citizens with minimal income, as well as, public Center counselors for legal advising, which are determined with directive by the judicial administration, are obliged to keep the professional secret. Only underwritten permit of the applicant, third parties may have access to the acts and take information's⁵².

If the opponent of the applicant, is obliged to the applicant to cover the expenses for legal aid (this happens, when he as debtor is late with fulfilling his obligation, toward the applicant and is obliged to compensate the damage), he should compensate the honorary of the attorney. The request to compensate the honorary is made by the attorney himself. The transfer of funds for compensation of the attorney cannot be made valid, if it is on damage of the applicant.

The sum that will be compensated to the attorney is estimated according to regulations for awarding of attorneys by the state ark⁵³.

(translation: (No. 2501 VVRVG), VV-the register of services, Law on attorney services and attorneys

RVG), 05.05.2004 (Rechtsanwaltsvergütungsgesetz – RVG),

⁵⁰ (No. 2503 VVRVG), Vergütungsverzeichnis, (Rechtsanwaltsvergütungsgesetz-RVG

⁵¹ 8. Absatz 2. Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen (Beratungshilfegesetz – BerHG),

⁵² 12. Absatz 3. Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen (Beratungshilfegesetz – BerHG)

⁵³ 9. Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen (Beratungshilfegesetz – BerHG), and (131 der Bundesgebührenordnung für Rechtsanwälte – BRAGO)

(translation: article 131, Federal book of rules for awarding of attorneys – BRAGO)

1.9. Refusing the request for outside procedural pro-bono legal aid

If the court of first instance, to which is directed the request for outside procedural pro-bono legal aid, after assessing the offered documentation, considers that are not met the conditions for providing of outside procedural pro-bono legal aid, takes decision to refuse the providing of legal aid.

The providing of outside procedural pro-bono legal aid can be refused in cases if:

1. The applicant has secured the right in some other manner;
2. About the same issue there is in development court procedure;
3. He has success of winning a direct official aid by the court;
4. It is about a certain field of the right, in which cannot be provided outside procedural pro-bono legal aid;
5. In special cases if provided one more beneficial form of outside procedural pro-bono legal aid (ex. Through landlords associations);

If the court of first instance with its decision refuses the request of the applicant for providing of outside procedural pro-bono legal aid, towards this decision the applicant can be served with (Erinnerung), a remedy which is not related with term⁵⁴. The right to use the legal remedy called (Erinnerung), in opposite connotation has also the state ark (Die Staatskasse), and this comes into expression in cases when it is considered that the applicant without right has won pro-bono legal aid⁵⁵.

The decision on allowed legal aid may be canceled, in case the court finds that the claimant of the right has supported the request on untruthful data.

The attorney has not the right to refuse advising and representation. Every attorney is obliged to provide outside procedural pro-bono legal

⁵⁴ 6. Absatz 3, Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen (Beratungshilfegesetz – BerHG),

⁵⁵ 6. Absatz 4, Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen (Beratungshilfegesetz – BerHG),

aid and to accept the mandate of the applicant that is directed with authorization (Berechtigungsschein). Exceptionally the providing of legal aid can be refused for justified reasons.

2. Procedural pro-bono legal aid (Prozesskostenhilfe),

Development of civil proceedings and resolution of issues within it, is accompanied with huge expenditures. These expenditures are related to: registration and stamp of acceptance of the case, office expenses, expenses related to compensation of judges and their honorary, expenses for an interpreter, notary expenses, expenses for witnesses, travel expenses, expenses for announcement in newspapers, expenses for lawyers and other administrative personnel.

A portion of these expenses, as a rule carries the initiator of the procedure, therefore, the participants of the process. In principle, the expenses of the procedure are borne by the participant that loses the process. But, if the participant is very poor and is unable to cover these expenses, then these expenses will be borne by the state, through the institute of procedural pro-bono legal aid.

Frohlich spouses live with their two minor in a place in Postman. Mr. Frohlich works as a postman, so that from his income the family has available 1900 Euros a month. They live in a rented flat with a rent of 480 Euros a month. One day the Frohlich family through a letter is informed that the landlord has raised the rent in amount of 730 Euros, 250 Euros more. Mr. Frohlich has it clear that the rent cannot be raised as dramatic without being informed on time by the landlord. He wants to initiate a lawsuit in court, but the justice is costly. In meantime, by one colleague of his, he is informed that he has right of procedural pro-bono legal aid. So, Mr. Frohlich heads to court.

Procedural pro-bono legal aid (*Prozesskostenhilfe*) is a very personal form of state social assistance in the field of judiciary. This aid is provided for tracking and protection of rights before the courts of the country. The procedural pro-bono legal aid is not provided before the arbitration tribunals⁵⁶.

⁵⁶ Curt Engels, *Prozesskostenhilfe*, Hamburg, 1990, page 15

Provisions of procedural pro-bono legal aid are contained in articles 114/127 of the Code of civil procedure (ZPO)⁵⁷, and therefore the providing of procedural pro-bono legal aid is not duty of the state administration, but is rather exclusive duty of the court. Despite this fact, the procedure of providing pro-bono legal aid is not civil court procedure, but is a procedure of its kind (*sui generis*)⁵⁸.

Provisions with which the providing of procedural pro-bono legal aid is regulated, contained in the Code of civil procedure, influenced the dissolution of the so-called right of the poor (*Armenrecht*).

The procedural pro-bono legal aid according to the provisions of (PKH), means a financial assistance to citizens who, according to their personal and property situation, are not able to initiate their own means a court process and to cover attorney costs and other expenses (non at all, partially or only in installments). Such persons at the request may receive procedural pro-bono legal aid, but only if the protection and realization of the claimed right gives enough hope of success⁵⁹ and the suit is not made as a result of abuse of rights. Rise of the lawsuit will be considered as abuse of rights if a reasonable person who does not need pro-bono legal aid in the same case would not have filed a lawsuit⁶⁰.

Procedural pro-bono legal aid begins where it ends the outside procedural pro-bono legal aid⁶¹. If efforts following a fall out of compliance and the issue should be raised before the court, the applicant can be guided by the attorney for the possibility of drafting a request for procedural pro-bono legal aid under the rules of PKH⁶².

Just as the Law on legal advising and representation to citizens with minimal income in the outside procedure (*BerHG*) and the Law on procedural pro-bono legal aid (*Prozesskostenhilfegesetz-PKH*), entered

⁵⁷ Zivilprozessordnung, Gerichtsverfassungsg, Rechtsflegergesetz, Kostenrecht, EuGVO (ZPO), 44. Auflage, Munchen, 2008

⁵⁸ Baumbach Adolf - Lauterbach Wolfgang, Zivilprozessordnung - ZPO, 2009, page 489

⁵⁹ 114, Zivilprozessordnung, Gerichtsverfassungsg, Rechtsflegergesetz, Kostenrecht, EuGVO (ZPO), 44. Auflage, Munchen, 2008

⁶⁰ Pohlmann Petra, Zivilprozessrecht, Munchen, 2009, page 355

⁶¹ Zimmerman Walter, Prozesskostenhilfe, Bielefeld, 2007, page 2

⁶² According to data of the German's association of attorney (*Deutscher Anwalt Verein - DAV*) only 10% of all cases of outside procedural counseling enter in court process. Attorneys use their authority as a "potential of threat" so that the rights of their mandate givers to be realized outside the court process, through mediation of reconciliation.

into force on 01.01.1981. This is not coincidence, since it is known that the two laws were the result of a decade long discussion on the reform of the right of the poor⁶³. While, (BerHG) through free counseling and representation reached to cover a gap in legal care for people with minimal income, (PKH) made an important step towards equal Affairs, providing equal opportunities to the pursuit of issue in court for people in difficult financial position⁶⁴.

2.1. Conditions under which the procedural pro-bono legal aid is provided

Conditions under which procedural pro-bono legal aid is provided are similar to those for outside procedural pro-bono legal aid. As outside procedural legal aid applicant, and the party seeking procedural pro-bono legal aid, the request must provide information on income in cash and those that can be converted into cash. From the gross income of the applicant will be removed: firstly taxes and spending for care (social security) and then will be removed:

- the sum of 382 Euros, for the party and other 382 Euros for the spouse or his/her partner
- the sum of 266 Euros for every person, for which the party takes care according to obligation due to law,
- a additional sum of 174 Euros, for the party that earns income with independent work
- Expenses of (rent, family household, heating),
- Other eventual sums that come from special situations (inability to work).

⁶³ Vallander Heinz, Beratungshilfe, Eine untersuchung inbesondere zur Rechtsstellung der Verfahrenes beteiligten, Koln, 1990, page 44

⁶⁴ Vallander Heinz, Beratungshilfe, Eine untersuchung inbesondere zur Rechtsstellung der Verfahrenes beteiligten, Koln, 1990, page 44

On the basis of the remainder of the income is estimated the potential of allowing of procedural pro-bono legal aid or payments in installments⁶⁵.

Party will be released fully from the trial costs and attorney if there is no wealth to themselves and if the amount of income after removing the above amounts do not exceed the value of 15, - € The applicant whose income after removing the above amounts exceed the amount of 15, - € have the right the trial costs and attorneys costs to cover in monthly installments, and so in the most in 48 monthly installments, within four years, irrespective of how many instances will the process go through.

Calculation of rates is made as in the table: (Euro) starting with installment of 15, - €for persons who have income above 50, - €and continuing so increasing the rates for 15, - € respectively, 20 - €and 25, - €

Income in €	50	100	150	200	250	300	350	400	450	500	550	600	650
Installments in €	15	30	45	60	75	95	150	135	155	175	200	225	250

If the party which has won pro-bono legal aid losses the trial, is obliged to pay the costs of the opponent. In this regard, there is an exception regarding the disputes from the field of labor law. In those disputes, the party that losses the trial in the first instance does not cover the expenses the opposite party's attorney.

2.2. Subject that have the right of procedural pro-bono legal aid

The right on procedural pro-bono legal aid has the party and other persons who have a legal interest for pursuing the matter in court, ex. Intercessor, legal representative (parent, guardian) etc⁶⁶.

These rights in first place have the natural persons in the country; meanwhile the procedural pro-bono legal aid is recognized also to foreign

⁶⁵ 116, Absatz 1. setz 1,2,3,4, Zivilprozessordnung, Gerichtsverfassungsg, Rechtsflegergesetz, Kostenrecht, EuGVO (ZPO), 44 Auflage, Munchen, 2008

⁶⁶ Kunzel Reinhard-Koller Johan, Prozesskostenhilfe, Heidelberg, 1993, page 22

natural persons and those without citizenship, statelessness persons, but only to prosecute the case before the German courts⁶⁷.

Except for natural persons the rights of procedural pro-bono legal aid have:

1. Parties that are not legal persons, but that the quality of party have won according to the decision of the court (e.g. violent administrator, guardian of heritage, executor of the will)⁶⁸;
2. Domestic legal entities e.g. associations with legal power, foundations, public commercial companies, limited liability companies, comanditaire enterprise etc., which are not able to cover the costs and this can not be made as by the object of the dispute, while lifting up the pursuit of issue and the protection of the right would go to the detriment of general interest⁶⁹.

Procedural pro-bono legal aid is not acknowledged to foreign legal persons and communities of persons who have the ability to be a party, but are not legal persons⁷⁰.

Procedural pro-bono legal aid as well as outside procedural pro-bono legal aid is provided mutually even within countries that are members of the European Union. According to Council Directive 2003/8/EG European Union dated 27/01/2003, to improve access to the law on conflicts that cross national frontiers within the European Union, have set some rules of common law for the procedural pro-bono legal aid⁷¹.

From 21.12.2004 in all European Union member states is provided procedural pro-bono legal aid in the field of civil and commercial law. The new law enables citizens of the European Union not only simplified circulation of goods and services, but also access to courts outside

⁶⁷ Kunzel Reinhart-Koller Johan, *Prezsskostenhilfe*, Heidelberg, 1993, page 23, 115.

Zivilprozessordnung (ZPO), 12.09.1950, amended for the last time on 07.07.2009,

⁶⁸ 116 Absatz 1. Zivilprozessordnung (ZPO), 12.09.1950, amended for the last time on 07.07.2009

⁶⁹ 116. Absatz 2. Zivilprozessordnung (ZPO), 12.09.1950, amended for the last time on 07.07.2009; Greibunger Georg, *Beratungshilfegesetz*, Berlin, 1990 page 27

⁷⁰ Schoreit Armin-Dehn Jurgen, *Beratungshilfe, proceskostenhilfe - BerH/PKH-Komentor*, Heidelberg, 2008, page 368

⁷¹ 1067, Zivilprozessordnung (ZPO) Gerichtsverfassungsg, Rechtsflegergesetz, Kostenrecht, EuGVO (ZPO), 44. Auflage, Munchen, 2008,

borders of the respective states and realization of their rights in cases where they lack the means to do so. For this care the Law of the European Union for procedural pro-bono legal aid - EG-Prozesskostenhilfegesetz⁷².

Thus, according to European Directive rules, the right on procedural pro-bono legal aid enjoy also the German citizen with residence in Germany, who in the capacity of the claimant wishes to initiate a trial in France, but is not able to cover expenses related to the process. Until 2003, the German applicant of the right was obliged that the request for procedural pro-bono legal aid to make directly in the court in France, which followed various problems (e.g. linguistic character, if the right applicant was unable to complete the application form in French).

With new rules and amendments to relevant European Directive of the German Code of Civil Procedure, German nationals who need procedural help free the foreign country, a member of the European Union have the right to approach a competent court in the settlement or residence its.

Court assists in translating request and relevant documentation, in completing their direct communication with the foreign, of course, that in assessing the application the court has considered the standard German France. European Directive has brought an innovation, in fact, bring two forms are unique standard that could be drafted in all European Union languages and used in all European Union countries⁷³.

2.3. Cases in which procedural pro-bono legal aid is

Procedural pro-bono legal aid is provided in procedures that are developed regarding the protection and realization of civil subjective rights, and that in:

- Procedures from the field of civil law, especially in family matters, where procedural pro-bono legal aid plays a very important role, e.g. divorcements, disputes concerning children, other family issues, the

⁷² Richtlinie 2003/8/EG des Rates vom 27. Januar 2003 zur Verbesserung des Zugangs zum Recht bei Streitsachen mit grenzüberschreitendem Bezug durch Festlegung gemeinsamer Mindestvorschriften für die Prozesskostenhilfe in derartigen Streitsachen (ABl. EG Nr. L 26 S. 41. ABl. EU Nr. L 32 S. 15); The regulations of the European Directive are involved in the provisions of the German Code of civil procedure articles 114/127

⁷³ 1077, Zivilprozessordnung (ZPO), Gerichtsverfassungsg, Rechtsflegergesetz, Kostenrecht, EuGVO (ZPO), 44, Auflage, München, 2008

procedures regarding the sale and purchase contract, lease contract, claims for damages, traffic accidents, neighborly disputes, inheritance disputes, issues arising from the right insurance, etc.;

- Procedures from the field of labor law, e.g. secession of their employment;
- Procedures from the field of administrative law, such as providing of social support, share-out of assets in cash for a flat, construction issues, the expenditures and tax law, the right to education and higher education;
- Procedures from the field of social justice e.g. pension issues and social care, the issues of unemployment insurance, etc.;
- Procedures from the field of constitutional law e.g. constitutional appeals because of violation of the rights guaranteed by the Constitution;
- Procedures from the field of financial law, to develop financial tribunals;
In proceedings before courts and competent authorities for the protection of the right to patent;
- In proceedings before the Constitutional Court, procedural pro-bono legal aid comes into expression only in exceptional cases and under precisely defined conditions, therefore, only if cases when the right cannot be accomplished without the assistance of attorney⁷⁴.

Procedural pro-bono legal aid does not come into expression in for defense in criminal proceedings, here in the worst case of (prison sentence of one year or more) can be applied for providing the necessary protection (Pflichtverteidiger). Law has foreseen the possibility of providing pro-bono legal aid in the execution procedure to allowance competent is the executive court.

2.4. Competent subjects of provide procedural pro-bono legal aid

Competence to provide procedural pro-bono legal aid has the court before which is under development the court proceeding, or before which court the proceedings would be initiated.

⁷⁴ Curt Eagles, Prozesskostenhilfe, Hamburg, 1990, page 18

This can be the court of highest instance acting under-means of collision. In the case of allowing procedural pro-bono legal aid exists the right of free choice of attorney. If representation by the attorney under the law is necessary, party will be assigned an attorney of his free choice. Party will be assigned an attorney even in cases when this is not necessarily foreseen by law, but by the circumstances of the case it appears that this is necessary or in cases when the other party is represented by an attorney⁷⁵.

The party that seeks the right should choose an authorized attorney for representation. Only in cases when the party cannot find an attorney who is willing to represent in front of the court, the presiding judge by a decision will appoint an attorney to the party⁷⁶.

2.5. Request to provide procedural pro-bono legal aid

Procedural pro-bono legal aid is provided on the basis of the request which is addressed to the court before which is initiated or will be initiate the court proceeding for which legal aid is requested. The request for legal aid may also be done in the record before the court⁷⁷. The request for allowing legal aid in the executive procedure is addressed at the competent court for the realization of execution⁷⁸.

In the application form the party declares himself on his personal and property situation (family reports, profession, wealth, income and charges)⁷⁹. During filling the form of the request the party should have in consideration the cases of legal orders for completing the form within a specified time period, e.g. at revision. If the party within a period designated by the court does not argument it's personal and property data, the court rejects the request to allow the procedural pro-bono legal aid.

⁷⁵ 121, Absatz 1,2, Zivilprozessordnung, Gerichtsverfassungsg, Rechtsflegergesetz, Kostenrecht, EuGVO (ZPO), 44. Auflage, Munchen, 2008

⁷⁶ 121, Absatz 5, Zivilprozessordnung, Gerichtsverfassungsg, Rechtsflegergesetz, Kostenrecht, EuGVO (ZPO), 44, Auflage, Munchen, 2008

⁷⁷ 117, Absatz 1, setz 1, Zivilprozessordnung, Gerichtsverfassungsg, Rechtsflegergesetz, Kostenrecht, EuGVO (ZPO), 44. Auflage, Munchen, 2008

⁷⁸ 117, Absatz 1, setz 3, Zivilprozessordnung, Gerichtsverfassungsg, Rechtsflegergesetz, Kostenrecht, EuGVO (ZPO), 44. Auflage, Munchen, 2008

⁷⁹ 117, Absatz 2, setz 1, Zivilprozessordnung, Gerichtsverfassungsg, Rechtsflegergesetz, Kostenrecht, EuGVO (ZPO), 44.Auflage, Munchen, 2008

2.6. Competent subjects to decide on request for procedural pro-bono legal aid

Regarding the request for procedural pro-bono legal aid decides the court of first instance, before which is initiated or will initiate the court proceeding⁸⁰.

The establishing of the procedure concerning procedural pro-bono legal aid is done without an oral examination⁸¹. Allowing procedural pro-bono legal aid does not include automatically the procedure by means of collision. It is allowed only for an attorney and for an instance, and consecutively ends with bringing the merited decision in the first instance.

If it is necessary to pass into the second instance, then to provide procedural pro-bono legal aid it should be made a new request⁸². Court of higher Instance is competent to assess whether conditions have been met to allow the procedural pr-bono legal aid, and if the remedy that will to be used has predispositions for success. If it finds that conditions have been met, it allows providing of procedural pro-bono legal aid.

Functional competence to decide on the request for procedural pr-bono legal aid in civil cases, in the court of first instance has the single judge, in commercial matters the presiding judge decides, while providing procedural legal aid in the procedure by means of collision decides the room of judges. If procedural pro-bono legal aid is required in the execution procedure, for this decides the executive court⁸³.

Court has power to change the decision on the amount of payments in the form of legal aid, as long as that relevant data (personal and property) based on which it was decided to provide pro-bono legal aid have been

⁸⁰ 127, Absatz 1, setz 2, Zivilprozessordnung, Gerichtsverfassungsg, Rechtsflegergesetz, Kostenrecht, EuGVO (ZPO), 44. Auflage, Munchen, 2008

⁸¹ 121, Absatz 1, satz 1, Zivilprozessordnung, Gerichtsverfassungsg, Rechtsflegergesetz, Kostenrecht, EuGVO (ZPO), 44. Auflage, Munchen, 2008

⁸² 127, Absatz 1, satz 2, Zivilprozessordnung, Gerichtsverfassungsg, Rechtsflegergesetz, Kostenrecht, EuGVO (ZPO), 44. Auflage, Munchen, 2008

⁸³ Schoreit, Armin-Dehn, Jurgen, Beratungshilfe, proceskostenhilfe – BerH/PKH-Komentar, Heidelberg, 2008

changed significantly (the level of personal income has raised)⁸⁴. The decision on allowing procedural pro-bono legal aid has no impact on the obligation of the applicant to compensation expense of opposite party. Thus, if the applicant loses court trial is obliged to compensate the expenses to that opposing party created in the procedure⁸⁵.

2.7. Refusal of the request and cancellation of the given permit to provide procedural pro-bono legal aid

Party to which the requests for procedural pro-bono legal aid has been refused, has the right within a month to appeal the decision with which this request was refused⁸⁶. The appeal is addressed to the court of second instance, which will definitely decide on the request. Complaints can be made only if the value of the object of dispute exceeds the amount of 600 €-. If the value of the object of dispute does not exceed this amount, the complaint can be made only if the court has ignored data regarding personal and property status, relevant for acquiring procedural pro-bono legal aid⁸⁷.

Court has power to cancel the given permission for procedural pro-bono legal aid if:

1. party does not an accurate presentation of the contentious issue, which has been relevant of allowing procedural pro-bono legal aid, in which case, the party has misled the court.
2. The party intentionally or by serious negligence, has provided untruthful data about his personal and property situation, or has not declared himself related to eventual changed data.
3. The party has not provided any information on her personal and property situation

⁸⁴ 120, Absatz 4, satz 2, Zivilprozessordnung, Gerichtsverfassungsg, Rechtsflegergesetz, Kostenrecht, EuGVO (ZPO), 44. Auflage, Munchen, 2008

⁸⁵ 123, Zivilprozessirdnung, Gerichtsverfassungsg, Rechtsflegergesetz, Kostenrecht, EuGVO (ZPO), 44. Auflage, Munchen, 2008

⁸⁶ 567, Absatz 1, 2, 3, 4, Zivilprozessordnung, Gerichtsverfassungsg, Rechtsflegergesetz, Kostenrecht, EuGVO (ZPO), 44. Auflage, Munchen, 2008

⁸⁷ 511, Absatz 2, satz 1, Zivilprozessordnung, Gerichtsverfassungsg, Rechtsflegergesetz, Kostenrechtm, EuGVO (ZPO), 44. Auflage, Munchen, 2008

4. The party longer than three months has not paid monthly installment or any other certain amount⁸⁸.

Conclusion

Pro-bono legal aid in the German is valued as an “art of finding a solution”. This institute builds on a broad interdisciplinary spectrum theoretical scientific and practical of social, legal and psychological science.

The concept of pro-bono legal aid, initially, as institution of the right of the poor, Armenrecht ", can be traced to a history of 1000 years old. Shaping of this institute in the dimension of time, speaks for awareness of the German society in terms of setting up this right in pedestal, giving it priority before property values (of money). This feeling of solidarity clearly is visible by the high level of recognition that this institute enjoys even to this day.

Pro-bono legal aid is based on the norms of the Law on legal advice and representation to citizens with minimal income (BerHG) of 01.01.1981, which regulates outside procedural pro-bono legal aid, respectively, with the norms of the Law on procedural pro-bono legal aid (PKH), which regulates procedural pro-bono legal aid.

The institute of pro-bono legal aid, whether procedural or outside procedural legal aid constitutes a significant segment of contemporary German social justice. Through this institute, are provided equal chances for all categories of society, including those due to the absence of material resources are not able to recognize and realize their rights. By providing pro-bono legal aid, the state takes over coverage of expenses that conditioned by the recognition and realization of the right, within and outside a judicial proceeding. But recently it is noticed a drastic increase of expenses for legal assistance. Thus, when the Law on legal advising and court representation of the citizens with minimal income entered into force (BerHG) on 01.01.1981, it was calculated that annual costs for its implementation will reach from 14 to 18 million DM. Meanwhile, the statistical data showed a other overview of spending for pro-bono legal assistance, respectively, for an amount of €84.5 million in

⁸⁸ 124, Absatz 1, 2, 3, 4, Zivilprozessordnung, Gerichtsverfassungsg, Rechtsflegergesetz, Kostenrecht, EuGVO (ZPO), 44. Auflage, Munchen, 2008

2006 or tenfold more than projected. Just to reward attorneys who provided procedural pro-bono legal aid are spent 361.8 million € Costs for outside procedural pro-bono legal aid and for social procedures, have so alarmingly raised, especially with bringing new rules for users of social assistance "Hartz IV", 2004. In August 2008 in the Berlin social court are processed 50,000. cases "Hartz IV". It is indicative that nearly 46% of the suits initiated before the social court of Berlin are successful, which means that in all cases is provided procedural pro-bono legal aid. The data in figures are example for all Germany.

Bibliography

- Constitution of the Republic of Macedonia, 1991
- Law on social case, Official Gazette of Republic of Macedonia no. 50/97
- Law on civil procedure, Official Gazette of Republic of Macedonia no. 79/2005
- Law on courts, Official Gazette of Republic of Macedonia no. 58/2006
- Strategic plan of the Ministry of Justice 2008-2010, January, 2008
- Law proposal for pro-bono legal aid, Skopje, January, 2009

*

- European Convention for the protection of fundamental rights and freedoms, 1950,
- Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen (Beratungshilfegesetz – BerHG) vom 18. Juni 1980 (BGB1. I S. 689), das zuletzt durch Artikel 27 des Gesetzes vom 17. Dezember 2008 (BGB1. I S. 2586) geändert worden ist”
- Richtlinie 2003/8/EG des Rates vom 27. Januar 2003 zur Verbesserung des Zugangs zum Recht bei Streitsachen mit grenzüberschreitendem Bezug durch Festlegung gemeinsamer Mindestvorschriften für die Prozesskostenhilfe in derartigen Streitsachen (ABl. EG Nr. L 26 S. 41, ABl. EU Nr. L 32 S. 15);
- Zivilprozessordnung (ZPO), 12.09.1950 , i ndryshuar për herë të fundit më 07.07. 2009,

- Entscheidung des Bundesverfassungsgerichts (zu § 2 Abs. 2 des Beratungshilfegesetzes) (BVerfGE20081014), B. v. 06.11.2008 BGBl. I S. 2180; Geltung ab 14.11.2008.
- Verordnung zur Einführung von Vordrucken im Bereich der Beratungshilfe (Beratungshilfевordruckverordnung- BerHVV), 17.12.1994, (BGBl.IS.3839), tritt am 01.01. 1995 in Kraft die zuletzt durch Artikel 115 des Gesetzes vom 30.07.2004 (BGBl. IS.2014) geändert worden ist''
- Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit – FGG
- Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit – FamFG
- Nr.2501 VVRVG), Vergütungsverzeichnis, Gesetz über die Vergütung der Rechtsanwältinnen und Rechtsanwälte (Rechtsanwaltsvergütungsgesetz-RVG),

*

- Baumbach, Adolf – Lauterbach, Wolfgang, Zivilprozessordnung-ZPO, 2009,
- Becker, Eva Grundfragen und Probleme der Rechtsberatung, Beiträge zur allgemeinen Rechts- und Staatslehre, Berlin, 1994,
- Engels Kurt, Prozeßkostenhilfe, Hamburg 1990,
- Greißinger, Georg, Beratungshilfegesetz, Berlin 1990,
- Künzl, Reinhard- Koller, Johan, Prozeßkostenhilfe, Heidelberg, 1993,
- Pohlmann Petra, Zivilprozessrecht, München, 2009,
- Schoreit, Armin-Dehn, Jürgen, Beratungshilfe, Prozeßkostenhilfe – BerH/PKH- Kommentar, Heidelberg, 2008
- Vallender Heinz, Beratungshilfe, Eine Untersuchung insbesondere zur Rechtsstellung der Verfahrensbeteiligten, Köln, 1990,
- Zimmermann Walter, Prozeßkostenhilfe, Bielefeld, 2007

HOW CDD OFFERS FREE LEGAL AID – PRATICAL ASPECTS

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The Center for Democratic Development as a non-governmental, non-profit and independent organization has provided free legal assistance to all citizens (legal advice, drafting of complaints, appeals, applications, claims and other forms of legal assistance).

CDD as part of civil society considered that the issue of free legal aid is very important, because is closely related to citizens' access to justice. Will a citizen have access to justice is not only right but also the obligation of State to enable him access to justice.

Free legal assistance consisted in giving legal advice, assistance and representing not only in criminal, but also in civil and administrative disputes. We as NGO, giving free or partially free legal assistance considered as a part of the basic human right to a fair trial, guaranteed by the article 6 of the European Convention for human rights which represents the main component of the proper functioning of the judicial system in one state. Hence, each has the right to access to justice and to the court. According to this, our state has the obligation to provide practical and effective access to courts by ensuring on the systematic provision of free legal assistance and the obligation not to stop such access to the unnecessary procedures, practices and unnecessary expences.

Analysing laws, institutional and external institutional opportunities in the Republic of Macedonia and with the aim of providing free legal assistance for its citizens, we stand to implement HRSP - free legal aid project.

Legal aid aims to improve people's lives. Therefore, CDD supports the operation of *pro bono* legal clinics across the country and assists those who would otherwise not have access to legal services. CDD supports such clinics by conducting public legal education seminars, providing

referrals to local legal resources and training lawyers and community leaders on economic and civil rights.

Furthermore, CDD is seeking and developing programs for citizen and community empowerment through awareness-raising and institutional capacity-building efforts. The program's legal aid clinics, on the other hand, provide individuals with free legal advice and service to solve their problems and to address community needs, with the combined effect promoting a rule of law culture.

CDD, regarding the implementation of free legal aid projects tries to find the possible answers of the following questions:

1. Who and how to provide free legal aid?
2. Which are the criteria for getting free legal aid – how to define the circle of users?
3. Which is the way of managing the system of free legal aid?
4. How are provided and distributed the funds for free legal aid?

For example, when it comes to future potential customers, it would be good to provide real and concrete evaluation criteria "the rights of the poor, ways of checking the data on the property, and acquiring data on the secondary basis for obtaining the free legal assistance, such as refugee status, family violence, the interest of fairness, etc.. Also, if we talk about possible providers, it seems that the needs of large and should be in the best possible way to use all available resources. It is necessary to investigate whether better performing models in which there is a clear division between the donors according to the form of legal aid (primary and secondary) and or procedures (family relations, labour relations, the status issues of refugees, etc.).

It would be good to assess whether models with more participants better work than when it is providing legal assistance from one centre. Follow-up questions and include a review of quality and standardization of methods of reporting, user and professional evaluation.

The basic idea in the beginning was to start by using all available resources for providing legal assistance and equal access to quality, free or subsidized legal services to those who have need for it. CDD does not have the capacity nor the mandate as well as budget to replace the future

system. Hence, there was/is no possibility that we can provide free legal assistance to all citizens or to finance legal aid providers in entire territory of Macedonia.

CDD does not create an alternative system of free legal help, but attempts to simulate mechanisms that will test the fundamental assumptions. CDD will direct funds to individual providers and selected target groups, but the mechanisms of allocation of resources must be provided to obtain adequate data on the basis of which the following work of participants and the quality of services. Primarily for this purpose, CDD is testing individual models in order to come to realistic and sustainable solutions by providing free legal help those in need.

Two principles govern CDD in the award of funds for free legal aid: economy (price) and the quality of legal aid services. Finding an adequate balance between economy and quality of is one of the most difficult tasks in many countries with developed systems of free legal assistance.

The issue additional gets complicated when you have in mind the socio-economic situation in Macedonia. A large number of still unresolved is the status, property and social issues. Then, some information sociological research shows that every third woman in Macedonia, a victim of physical violence etc... Hence, CDD is seeking to provide guidelines for achieving a balance between quality and economy, as well as to establish clear mechanisms of selection of beneficiaries and providers. Competitiveness and quality can be associated with possible specialization, forms of quality control of offered services, as well as "market value" of primary and secondary legal aid. It seems that poverty, although the central criteria should not be the only one, and existing pilot projects using the extremely low base for the allocation, especially of secondary legal aid.

Legal Help could be provided through legal clinics, authorized NGOs, trade unions and attorney and in the proceedings before the court and those for a peaceful resolution of disputes to those who make requests for free legal aid.

About HRSP

The Human Rights Support Project (HRSP) is a civil society initiative focused on the phenomenon of police misconduct or mistreatment. The project aims to address the use of illegal physical and mental force by authorised Ministry of Interior officials during their official duties, and to assist in the development of an effective mechanism for the protection of the human rights of alleged victims.

In January 2004 three non-governmental organizations including Center for Democratic Development (CDR)-Tetovo, together with the primary purpose to protect the human rights and basic freedoms, started with the implementation of the project for Support of human rights.

Within the activities of this project and its implementation, in the start of this project and afterwards in continuity, the project officers were trained to strengthen and expand their knowledge in theoretical and practical aspects of giving free legal aid with a purpose of successful implementation of this project.

The basic purpose of the project was to provide free legal assistance and counseling to the possible alleged victims of improper police behavior which requires assistance in the submission complaints through various live-available administrative and legal mechanisms.

Project at the beginning was implemented in the former crisis regions, because of the need to give answers to the increased number of cases of violation of Human Rights by the police units.

General purpose of this project was to identify and give free legal assistance to the alleged victims of police abuse, processing their complaints and appeals to the authority competent institutions, implementation of the the media campaign for promotion and recognition of this project, the development of cooperation between the government institutions and non-governmental sector, development of the capacity of non-governmental sector, increasing the confidence of the public prescribed to the institutions of the system - in this case police etc..

In this project of free legal aid, special attention is given to the legal mechanisms for protecting the victims of police abuse, and in particular the Sector for Internal Control and Professional Standards (SICPS), the internal control body within the Ministry of Interior.

The NGOs have also examined the work of the Ombudsman office and have recommended that greater use is made of available tools prescribed by law, including use of the media in egregious cases. However, it was also established that the opening of six regional Ombudsman offices has led to significant improvement in the access of the alleged victims of police abuse to the principle body established to defend their rights.

As part of the free of charge legal counselling, legal officers participating in the project undertake the following activities:

- Interviewing and registration of findings;
- Photographing injuries and other evidence;
- Assistance to injured persons, in order to ensure proper documentation about the injuries;
- Collection of additional accompanying documentation;
- Transfer of information about the particular case to international organisations;
- Providing advice on the legal remedies that are available to the alleged victims, including filing complaints with the MoI Sector for Internal Control and Professional Standards, Ombudsman Office, Public Prosecution Office, as well as private claims and civil suits;
- Assistance to the alleged victims in preparation of letters, claims and complaints, to the above mentioned institutions;
- Accompanying and/or representing alleged victims during meetings with representatives from state institutions;
- Provision of means for socially endangered persons, in order to cover the expense of obtaining medical certificates.

Activities within the project of free legal aid

Local coordination meetings – form of cooperation between HRSP and state bodies

In the frame of implementing the project, local coordination meetings were organised in the offices of each NGO that implement the HRSP. The participants at these meetings include: inspectors from the Sector for Internal Control and Professional Standards (PSU), representatives from the Ombudsman Office, representatives from the Public Prosecution Office and local self-government, as well as representatives from the

international governmental and nongovernmental organizations. These meetings were organised on a monthly basis and provided for direct and effective monitoring of the registered cases of misconduct and mistreatment by the police. The local coordination meetings were organised and moderated by HRSP Project Officers. During the meetings, Project Officers presented new cases and opened up discussion with the present representatives of abovementioned institutions regarding actions that have been taken in relation to the registered cases of alleged victims of improper behaviour by the police within the framework of the HRSP. These meetings had significant impact on the acceleration of procedures being conducted in relation to complaints filed with the PSU and the Ombudsman Office.

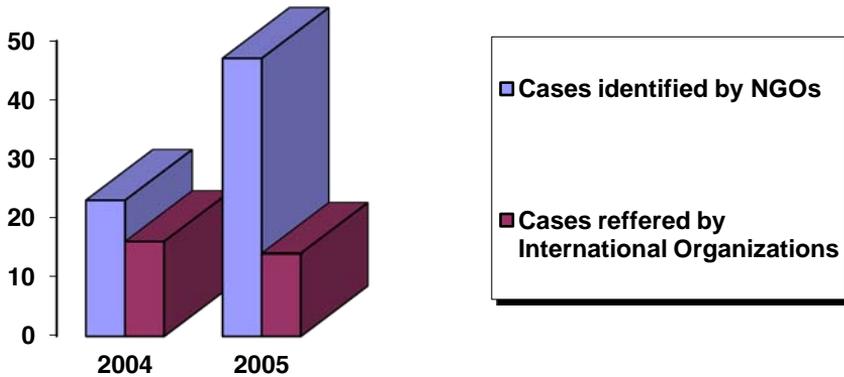
These meetings also improved the access and trust that citizens had in these state institutions and they additionally strengthen the previously established link between civil society and state institutions, which received complaints for possible human rights violations.

- Local coordination meetings provided direct and effective monitoring of registered cases of misconduct and mistreatment by the police;
- These local coordination meetings improved the access that citizens had to state institutions and strengthen the previously established link between the civil society and state institutions that receive complaints for possible human rights violations;
- These meetings were of major importance for the process of acceleration of proceedings that are conducted in relation to complaints filed with PSU and the Ombudsman Office.

Recorded cases of misconduct and mistreatment by the police within HRSP

The implementation of the Project so far, shows that a considerable number of citizens, alleged victims of police misconduct and/or mistreatment turn to HRSP project officers, asking for legal assistance and advice, but were afraid to initiate a procedure against the AOPs from MoI.

Manner of case identification within HRSP



Filing complaints with PSU at MoI

One of the mechanisms available to the citizens, who complain because of misconduct and mistreatment by authorised official persons from MoI, was to file complaints with the Sector for Internal Control and Professional Standards at MoI. The **Sector Operation Rules** regulate the manner in which complaints are filed with the Sector, the investigations that are undertaken by the Sector at MoI on the basis of filed complaints, as well as the time period in which the Sector is obliged to inform the person who filed the complaint, about the results from the investigation conducted.

PSU takes part in the process of direct detection and disclosure of operational irregularities, upon received anonymous tip-offs, complaints by citizens and MoI employees, check-ups and responses to requests submitted by the Public Prosecution Office or the Ombudsman Office, which relate to behaviour and acts committed by MoI employees, and it also undertakes action after getting information about illegal acts that have been committed by MoI members, by operational means.

Filing complaints with PSU

The right of every citizen to file complaints with state and other public bodies, and also to receive an appropriate response in relation to those, is

guaranteed by Article 24(1) of the Constitution of the Republic of Macedonia.

Article 10(1) of the Operation Rules of PSU, prescribes that citizens can file complaints in relation to illegal behaviour, misconduct and mistreatment by the police, and they can do that both in written and verbal form. When filing a verbal complaint, the citizen talks to the police officer on duty, and if that police station does not have a detached PSU inspector, he will appoint one of the policemen who will prepare the **report**. The report is drafted in a separate room and sent to PSU immediately, or within 24 hours. The report has to be signed by both the policeman who received the complaint and the citizen.

Paragraph 3 of the same article prescribes that in the regional organisational units of MoI, which have detached inspectors from the Sector, written complaints should be delivered. Article 17(2), defines the time period within which the Sector has to complete the investigation in relation to the filed complaints. The investigations for less serious types of illegal and unprofessional behaviour are to be completed in a period of **30 days**, after the complaint has been filed, and for more serious types of misconduct and ill-treatment by the police, the final deadline is **90 days**.

Additionally, paragraph 3 states that if the Head of the Sector has given his approval and if there are justifiable reasons, the investigation can last longer, but not more than 6 months. Paragraph 4 adds that in every single case when the investigation lasts for more than 30 days, within a period of 30 days following the filing of the complaint, the citizen will be informed about the continuation of the investigation, because of the need to establish additional facts.

Article 24 of the Rules, provides that the Sector is obliged to inform the persons who filed the complaints, about the progress and results of the proceedings, in a written form.

The proposed Law on the Police, which as of November 2005 is undergoing a procedure for enactment, provides for a deadline of 30 days from the date of the incident, within which the citizen can file a complaint with the police. The HRSP NGOs believe that the proposed period of 30 days is restrictive as far as the protection of human rights is concerned for the following reasons:

- In a considerable number of cases, citizens launched their complaints after the period of 30 days had expired, especially in cases when

citizens complained that the police did not undertake the necessary measures. As a result, the conclusion was that in future, if this deadline is adopted, a considerable number of citizens will be unable to protect their rights by filing complaints with PSU;

- The deadline for submission of complaints to the Ombudsman Office is 1 (one) year. On the other hand, the deadline for filing a civil suit is 3 months. By comparing these deadlines with the 30 days period that is being proposed, it can be concluded that MoI, with the proposed text, is trying to reduce the burden of the Sector i.e. to reduce the number of filed complaints, at the expense of possible restriction of human rights.

During the MINOP¹ meeting held on 08 November 2005, the HRSP NGOs have presented their comments and remarks regarding the proposed Law on Police. The major issue within the overall remarks was the proposed deadline of 30 days². It remains to be seen, whether the working group that prepares the final text of the Law is going to accept HRSP comments and remarks. Unfortunately, the initial reactions are negative, and there is great probability that the Law will be enacted without taking into account the comments by the NGO sector, regarding the deadline that is being proposed.

Requests for information to the MoI Sector

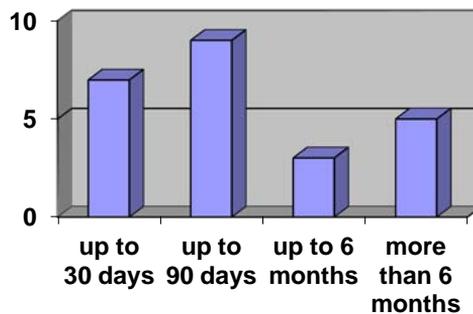
As a result of the untimely responses by representatives from PSU, the personnel working on the implementation of the Project established a practice of submitting requests for information to PSU, for those cases where no response has been received in the prescribed time period, in relation to the complaint filed. In their requests for information, POs ask for information on the status of the complaint, the outcome of the investigation if one has been conducted, and information on the outcome of the disciplinary proceedings i.e. the proceedings for dismissal of the APO from MoI, if such a procedure has been initiated and implemented.

¹ MINOP was an informal group, comprised of representatives from MoI, the Ombudsman Office and different NGOs. At MINOP meetings, NGOs that implement the Project were represented by their Project Coordinators.

² The deadline of 30 days is proposed with Article 8(1) contained in the text of the proposed Law on police.

After the practice of organisation of local coordination meetings was established, the requests for information, besides in a written form by an official correspondence, could be delivered also verbally to the present inspectors from the Sector, which meant that the NGOs that implemented the Project were investing maximum efforts, in order to reduce the time interval, necessary to take actions with respect to filed complaints.

Complaints without any response



Outcome of complaints filed with PSU

Legal framework

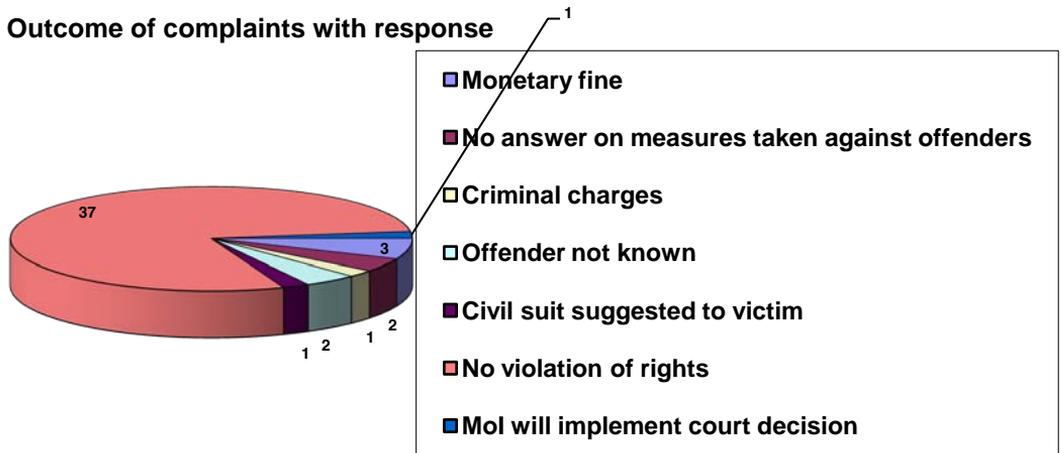
In accordance with Article 21(1) of the Sector Rules, if during the investigation it is determined that there is sufficient evidence to initiate a procedure for dismissal because of violation of job discipline, the Sector will submit a proposal for continuation of the investigation to the Dismissal Committee.

In accordance with Article 133 of the MoI Collective Agreement, after conducting a review and deducing evidence, the Committee established the responsibility of the employee and prepares a written proposal to the Minister of internal affairs, in order for an appropriate decision to be made. If the Committee establishes that the employee is not responsible or if the conditions that are necessary for a decision for dismissal are not fulfilled, it will propose to the Minister to drop the charges, i.e. to terminate the proceedings. If the Minister did not agree with the proposal, the case could be referred back for review, when the facts of the case had been irregularly established or are incomplete, if the material regulations had been wrongly applied, or he/she could make another decision.

Depending on the degree of responsibility of the employee, the conditions under which the violation of the official obligations took place, the seriousness of the violation and its consequences, the Minister can replace the dismissal of the employee with a monetary fine, which cannot exceed 15% of the monthly salary of the employee, for a period of 1 to 6 months.

Besides that, in accordance with Article 144(11) of the Law on Criminal Procedure, on the basis of evidence and information collected, against the person for whom there is a reasonable suspicion that he or she committed an act that would represent a criminal offence, MoI files criminal charges and submits those, together with the evidence and documents about the undertaken measures and activities, to the competent public prosecutor. Furthermore, according to Article 3 of the Sector Rules, the Head of the Sector shall inform the Minister if the investigation establishes existence of incrimination activities, violation of working discipline or unprofessional conduct by an employee from MoI.

Outcome of complaints with response



It has to be mentioned that in some of the cases of alleged police misconduct and mistreatment, the police has filed misdemeanour and criminal charges against the alleged victims.

Punishment of AOPs from MoI who violate human rights

From all these presented cases, recorded within HRSP, one could notice that the only sanction³ that was imposed to authorised official persons from MoI, for whom it was established that they did not act in accordance with MoI rules and regulations, i.e. in the recorded cases of misconduct and mistreatment by the police, is the monetary fine in the amount of 15% of their monthly salary.

There was not even a single dismissal of AOPs from MoI, in relation to all cases recorded by the HRSP. Even more so, the Minister of Internal Affairs has the right to replace the dismissal of the employee with a monetary fine, which cannot exceed the amount of 15% of the monthly salary of the employee, for a time period of 1 to 6 months.

What can be worrying is the fact that the person who filed the complaint is not informed about the sanction that was imposed to the AOP, responsible for the violation. This is in accordance with Article 23 of the Sector Operation Rules, which stipulates that the person filing the complaint will be informed whether a disciplinary measure was imposed on the offender or not, but he/she will not be informed about the type of the measure.

The above mentioned provision is contrary to Article 24(1) of the Constitution of the Republic of Macedonia, which stipulates that every citizen has the right to file complaints to state bodies and other public entities and to receive an appropriate answer in this regard. A response would imply a full, comprehensive response, and not a partial response.

Filing complaints with the Ombudsman Office

In accordance with Article 2 of the Law on the Ombudsman Office, the Ombudsman Office is an entity of the Republic of Macedonia, which protects constitutional and legal rights of citizens and all other people, when those are violated by certain acts, actions or lack of action on the part of state administration bodies and other entities and organisations with public authority.

³ Other sanctions are: dismissal and temporary segregation from work of the AOP from MoI.

The newly established regional offices of the Ombudsman⁴ represented a novelty, and these were located in the following cities: Bitola, Strumica, Stip, Kicevo, Kumanovo and Tetovo. This meant a significant improvement and easier access for citizens to this institution at a local level.

Every person (natural, legal) could file a complaint with the Ombudsman Office, when he or she believed that his/her constitutional and legal rights have been violated. The complaint was submitted in a written form or verbally by completing a report at the Ombudsman Office, whereas neither taxes nor duties were paid for any action that might be undertaken.

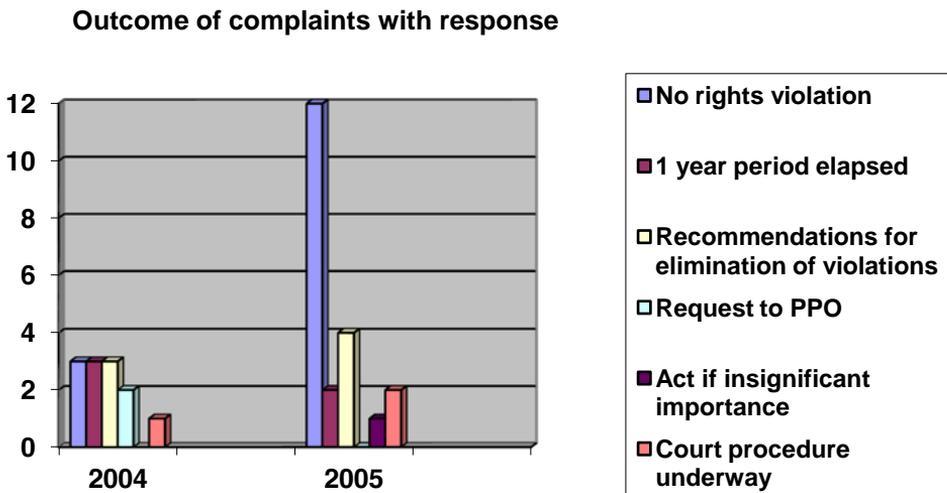
When acting in relation to a complaint, the Ombudsman Office could act in one of the following manners: not initiating a procedure, it could initiate a procedure and it could stop or terminate the procedure. Procedure would not be initiated if there was a pending court procedure in relation to the subject of the complaint, except for its unjustifiable delay, or if the period of one year had been elapsed, from the last decision or action taken by the entity, which constitutes the violation.

Within 15 days from the date when the complaint was filed, the Ombudsman Office is obliged to inform the person who has filed the complaint, whether a procedure has been initiated in relation to the allegations contained in the complaint, or it was maybe established that there are no proper grounds to initiate a procedure. If the Ombudsman Office establishes that constitutional and legal rights and freedoms have been violated, it can apply the following measures:

- 1) Providing recommendations, proposals, opinions and instructions on possible ways for elimination of the violations;
- 2) Proposing certain proceedings to be repeated in accordance with the law;
- 3) Launching initiatives for conducting disciplinary proceedings against an official, i.e. responsible persons;
- 4) Submitting a request to a competent public prosecutor for initiation of proceedings, in order to establish criminal responsibility.

⁴ The regional offices are provided for in the Ohrid Framework Agreement.

Regarding 5 of the filed complaints, the Ombudsman Office applied Article 20(7) of the Law on the Ombudsman Office, which stipulates that the Ombudsman Office shall not initiate proceedings in relation to the complaint, if more than a year has passed since the offence took place or since the last decision of the body or organisation, except in those cases when it believes that the applicant missed the deadline because of justifiable reasons.



It is worth mentioning the fact that the Ombudsman Office respected the deadline of 15 days, following the reception of the complaint, within which the applicant has to be informed whether proceedings will be initiated or not, in accordance with Article 20(9) and Article 22 of the Law on the Ombudsman Office.

There is no legal time period prescribed, within which the Ombudsman Office is supposed to complete the proceedings with respect to filed complaints.

Outcome of HRSP cases starting from criminal charges to indictment

Legal framework

In accordance with Article 42 of the Law on Criminal Procedure (LCP), the Public Prosecutor has the general right and duty to criminally prosecute all perpetrators of criminal offences that are prosecuted *ex officio*.

Additionally, for criminal offences that are prosecuted *ex officio*, the public prosecutor is obliged to undertake all necessary measures for detection of criminal offences and discovering of the perpetrators and for guidance of the pre-trial procedure. During the pre-trial procedure, he/she can also issue orders for application of special investigative measures, under conditions and manner as defined by this Law, he/she can also ask for an investigation to be launched, and raise and represent the indictment, i.e. proposal for indictment before the competent court, to launch appeals to temporary court decisions and file for exceptional legal remedies against valid and applicable court decisions.

According to Article 160 of LCP, an investigation is launched for a specific person, when there is reasonable doubt that he/she has committed a criminal offence. The investigation is launched upon request by the Public Prosecutor, and the request is submitted to the investigative judge. After the investigative judge has received the request for an investigation, the judge will review the documentation, and if he/she agrees with the request, he/she will enact a decision to launch an investigation. The decision for launching an investigation is to be submitted to the public prosecutor and the defendant as well.

Article 142(1) of LCP stipulates that state administrative bodies, institutions with public authority and mandate and other legal entities are obliged to report criminal offences that should be prosecuted *ex officio*, about which they have been informed or have otherwise found out about them. Out of the total number of registered cases within HRSP, on two occasions, it was the Ombudsman Office that filed criminal charges, and there was one more case, where criminal charges have been filed by SIA in Tetovo.

A novelty in the Law is paragraph 3 of the aforementioned article, according to which, every single person is obliged to report a criminal offence, which would be prosecuted *ex officio*. This means that POs from

HRSP are legally obliged to report criminal offences, which are normally being prosecuted ex officio.

Article 174(2) of LCP, stipulates the obligation of the investigative judge to inform the public prosecutor about any possible reasons for termination of the investigation and if the public prosecutor does not inform the investigative judge that he recedes from criminal prosecution in a period of 8 days, the investigative judge will ask the trial chamber to adopt a decision and end the proceedings.

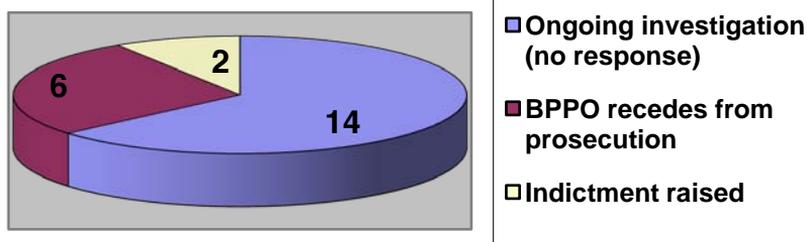
The investigative judge is obliged to end the investigation, if, during the investigation or after its conclusion, the public prosecutor recedes from criminal prosecution.

Article 177(2) of LCP, provides for a period of 15 days after the completion of the investigation, within which the public prosecutor is obliged to give a proposal for completion of the investigation or raising of an indictment, or to announce that he or she recedes from criminal prosecution. The trial chamber can prolong this deadline, upon receiving a proposal by the public prosecutor.

After the changes to LCP from March 2005, instead of the deadline of 8 days, Article 179(3) provides for a **period of 15 days**, within which the victim or individual plaintiff can file for an indictment, i.e. a civil suit, and if they fail to do so, it will be considered as if they have waived their right to prosecute. The proceedings end with a decision. This change of the deadline improves the position of the victim as a prosecutor and the individual plaintiff in the criminal proceedings.

Outcome of criminal charges filed with the Public Prosecution Office

Status of criminal charges filed



Standing Inquiry Committee for protection of human rights and fundamental freedoms

Having in mind that the Standing Inquiry Committee for protection of human rights and fundamental freedoms is one of the state institutions whose basic field of activity are the issues related to human rights, as well as the fact that this is the only Parliamentary Committee established by the Constitution of the Republic of Macedonia, the establishment of a proper relationship with this parliamentary body is of a crucial importance.

The HRSP received political support by the members of the Committee. The political support for the Project by this Parliamentary body was expressed via a statement, contained in one of the Minutes from the Committee sessions.

Notwithstanding the fact that police abuse cases have not yet been referred to the Standing Inquiry Committee, the members of the Committee remain open and available for review of prospective police abuse cases that might be presented before them, if such a need arises.

Civil proceedings for compensation

The Constitution of the Republic of Macedonia and LCP guarantee the right of compensation for victims of police misconduct and mistreatment. Namely, Article 13(2) of the Constitution stipulates that the person, who was illegally arrested, detained or unlawfully convicted, has the right to be compensated, as well as other rights established by law. In addition, the person who was illegally arrested, detained or unlawfully convicted, has the right to be compensated from the state budget funds, has the right to be rehabilitated, as well as other rights established by law, as it is stipulated in Article 11 of LCP.

Out of the total 100 cases of alleged misconduct and mistreatment by the police within the framework of HRSP for a certain period of time, civil proceedings for compensation have been initiated only in 15 of those cases.

Medical certificates and other evidence in cases of alleged misconduct and mistreatment by the police

The basic document that serves as evidence in the registered cases of alleged physical injuries caused by members of the police is the medical certificate. The medical certificate can be issued by any physician who has passed the professional exam and who is in possession of an appropriate work license.

The medical certificate contains general information about the patient, date of issue, information on the present medical condition of the patient (detailed description, size of injury, depth, functional changes), followed by the diagnosis and qualification according to the CC (physical and serious physical injury). The qualification of the physical injury is done according to the degree of detriment of the patient's health. The data that will be entered about the case is basically the information that the physician will manage to get from the patient. One of the problems that occur, is the fact that quite often, physicians write everything what the patient is saying with regards to the manner in which the injuries were inflicted.

As far as medical certificates are concerned, the best possible evidence are the medical certificates issued by the medical centres around the country, because of the fact that in practice, one can find medical certificates with suspicious contents issued by private medical practices. Additionally, the medical certificate has to be obtained on time, within 1 day after the injury was inflicted. Anyhow, in the proceeding before the PSU, the Ombudsman Office and the Public Prosecution Office, there is no distinction made between medical certificates issued by private medical practices and those from the medical centres, as long as the certificate has been filled in appropriately.

Other evidence used in HRSP cases are statements made by witnesses and alleged victims, photographs of the alleged victims and video recordings of the incidents.

БЕСПЛАТНА ПРАВНА ПОМОШ

Adv. Nenat Janicevic, President of the Bar Association of RM

Adv. Shpend Devaja, Vice-president of the Bar Association of RM

Од контекстот на Уставот, како и од најважните инструменти за заштита на човековите права, недвосмислено произлегува дека социјалната и економската положба на граѓаните не смеат да бидат од влијание при реализирањето на основните човекови права гарантирани со Уставот, меѓу кои и еднаквиот пристап кон правдата. Европските стандарди бараат секој, за време на одлучувањето за некое негово граѓанско право или обврска, да има право на правично судење и јавна расправа во разумен рок пред независен и непристрасен суд заснован врз основа на закон. Со членот 6 од Европската конвенција за човекови права се гарантира право на правично судење. Конвенцијата ги обврзува сите држави членки, меѓу кои и Република Македонија. Реализацијата на претходно истакнатите принципи, односно еднаков пристап кон правдата и право на правично судење, оставена е на на државите членки, односно секоја држава индивидуално ја уредува оваа област на начин. Препораките во насока на реализација на овие принципи истакнуваат дека е битно да се преземат сите чекори за да се отстранат економските препораки за учество во правната постапка.

Адвокатската комора на Република Македонија, како единствена професионална организација овластена за пружање на правна помош, односно нејзините членови - адвокатите, тоа го чинат за одреден надоместок.

Меѓутоа, Адвокатската комора на Република Македонија, како професионална институција, истовремено има и обврска да се грижи за заштитата на човековите права и слободи, како и да се грижи за механизмите на правдата во општеството во согласност со законскиот систем во Република Македонија .

Од овие причини, Адвокатската комора на Република Македонија уште пред осум години започна еден многу важен проект, наречен

проект за бесплатна правна помош, правна култура и социјализација. Со овој проект ја разбудивме меѓународната, но и домашната јавност и институции, за единственоста на адвокатурата како професија и давател на правна помош. Отворивме канцеларии за бесплатна правна помош во повеќе градови ширум Републиката, но во план е да се отворат уште вакви канцеларии таму каде што за тоа постојат потреби и можности, како и прифатливи услови.

Имено, една од главните цели на овој проект е обезбедување на редовна и квалитетна правна помош за определени категории на лица кои не се во можност да плаќаат за овие услуги и чии права кон еднаков пристап кон правдата, односно бесплатна правна помош се гарантирани со Уставот, Законите на Република Македонија, како и други меѓународни документи ратификувани во согласност со Уставот. Така, правната помош се дава на определени групи на граѓани кои се загрозувани во остварувањето на нивните права, како што се: хендикепираните лица, самохрани родители, корисници на социјална помош, жртви на семејно насилство, жртви на злоупотреба на деца, како и жртви на трговија со луѓе.

Овие услуги се даваат во сите врсти на случаи: граѓански, кривични и административни.

Корисниците добиваат целосна заштита на нивните со закон гарантирани права, ако тие им се оспоруваат, нарушуваат или загрозуваат. Под целосна заштита се подразбира можност за бесплатна правна помош која вклучува подготовка и пишување на акти, правни совети, елаборирање на сите аспекти и можности, како и можност да се добиваат бесплатни копии од закони.

Бесплатната правна помош се обезбедува преку адвокати на АКРМ, кои ги застапуваат интересите на корисниците пред судовите и другите институции.

Досегашните податоци говорат дека до сега се во работа, односно се завршени вкупно:

БИТОЛА

Вкупно: 763 предмети

636 социјални случаи

77 хендикепирани лица

20 самохрани родители

29 жртви на семејно насилство
1 жртва на трговија со луѓе

**ДЕЛЧЕВО и регионот (КОЧАНИ, ПЕХЧЕВО, БЕРОВО,
ВИНИЦА И МАКЕДОНСКА КАМЕНИЦА).**

Вкупно: 122 предмети

59 социјални случаи
22 самохрани родители
32 хендикепирани лица
8 жртви на семејно насилство
1 жртва на трговија со луѓе

КУМАНОВО

Вкупно: 337 предмети

305 социјални случаи
32 самохрани родители
10 хендикепирани лица

ПРИЛЕП

Вкупно: 119 предмети

99 социјални случаи
11 хендикепирани лица
7 самохрани родители
1 жртва на семејно насилство
1 здружение на хендикепирани лица

ШТИП

Вкупно: 30 предмети

11 социјални случаи
5 самохрани родители
10 хендикепирани лица
4 жртви на семејно насилство

ГОСТИВАР

Вкупно: 67 предмети

45 социјални случаи
22 самохрани родители

Понатаму, како дел од проектот за бесплатна правна помош, на ден 29 мај 2008 година, во објектот Мала станица во Скопје од 10-14 часот, десетина адвокати кои се пријавија да даваат бесплатна правна за овие одредени категории на лица, даваа бесплатна правна помош на истите.

Истовремено, во истиот термин и во другите адвокатски заедници ширум Републиката, на овие категории лица им се даваше бесплатна правна помош од страна на колеги адвокати и тоа во канцелариите за бесплатна правна помош, а доколку такви канцеларии сеуште не се отворени во односното подрачје, сето ова се одвиваше во матичниот суд, односно друга соодветна локација.

Исто така, на 25 октомври 2010 година - Европски ден на граѓанска правда, во сите судови во Република Македонија адвокати даваа бесплатна правна помош во рамки на Проектот за бесплатна правна помош на АКРМ, а на истиот ден, во соработка со Министерството за правда, адвокати исто така даваа бесплатна правна помош во сите подрачни единици на Министерство за правда ширум Републиката. Адвокатската комора на Република Македонија, исто така, зема активно учество и во изготвување на Законот за бесплатна правна помош. Имено, со Законот за бесплатна правна помош се уредува правото на бесплатна правна помош, содржината, постапката во која се остварува, давателите на услугите, органите надлежни за одлучување, заштитата на правото, финансирањето, како и надзорот над неговото спроведување и над примената на одредбите од овој закон.

Бесплатната правна помош согласно овој закон се реализира од страна на Министерството за правда, адвокати и овластени здруженија на граѓани, а се финансира од Буџетот на Министерството за правда. Целта на овој закон е да обезбеди еднаков пристап на граѓаните до институциите на системот, запознавање, остварување и овозможување на ефективна правна помош, согласно начелото за еднаков пристап до правдата.

Воедно, Адвокатската комора на Република Македонија се активираше и околу имплементацијата на овој закон. Така, Адвокатската комора на Република Македонија, со цел да обезбеди што поуспешна имплементација на овој закон од извонредно значење, веќе одредено време соработува со Министерството за

правда во врска со уписот на адвокати во Регистарот за давање правна помош, а истовремено прави и континуиран напор за да ги поттикне адвокатите да учествуваат во давањето бесплатна правна помош, како и да се изврши упис на сите заинтересирани адвокати во Регистарот за давање правна помош.

PROBONO

LEGAL AID

Research Project - South East European University