

Łukasz Bojarski

Access to Legal Aid in Poland

Monitoring Report



HELSINKI FOUNDATION FOR HUMAN RIGHTS

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Reviewed by

Marek Nowicki, Andrzej Rzepliński

Edited and proofread by

Iza Duda, Agnieszka Bojarska

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PREFACE

Within the framework of the four organizations' joint project on Promoting Access to Justice in Central and Eastern Europe*, the Helsinki Foundation for Human Rights (HFHR) decided to conduct a survey and undertake public activities concerning access to legal aid. Our goal was to provoke a public debate that would result in amendments to the law, as well as changes in practices within this scope. Our activities were aimed mostly at:

- subjecting the problems of access to legal aid to a serious public debate, involving government bodies, legal corporations, and representatives of the non-governmental sector;

- improving the quality and effectiveness of free legal aid;

- increasing access to legal aid for persons who cannot afford to hire a lawyer.

Our aim was to convince decision makers that the above goals could be accomplished through the following means, among others:

- more efficiently using means assigned by the state for legal aid;

- making better use of, improving, and modifying presently functioning procedures, within the existing means;

- introducing, within the existing means, alternative forms of granting free legal aid applied in the world;

- developing forms for granting legal aid to indigent persons that do not burden the state budget (e.g., *pro bono* work);

- conducting state surveys and collecting statistical data concerning legal aid.

* Helsinki Foundation for Human Rights (Warsaw), Interights (London), Public Interest Law Initiative (Columbia University Budapest Law Center), Bulgarian Helsinki Committee (Sofia).

An executive summary and recommendations as to the main postulated changes in the system of access to legal aid, presently functioning in Poland, are presented at the beginning of this report. The report includes also other, more detailed, proposals. Gathering and presenting postulates at the very beginning should allow readers to learn about the scope of our interests and should facilitate the reading of this report.

A glossary of the most important terms related to legal aid, provided at the beginning of the report, will be superfluous for some readers; on the other hand, it may help some of them to understand problems of legal aid, and in particular, as concerns solutions we are not familiar with and which appear in the practice of other countries.

This report is a considerably abridged version of the report published in Polish*. In part, it is also an updated and expanded version of a country report prepared for the Access to Justice Forum in Budapest, December 2002. More information on legal aid in Poland is available on the Foundation's Web site: www.hfhrpol.waw.pl

* This report has been produced with the financial assistance of the European Commission. Opinions expressed in the report are those of the author and cannot be treated as official opinions of the European Commission.

EXECUTIVE SUMMARY

The current legislative framework in Poland does not provide sufficient protection of the right to legal aid for the indigent.

In criminal cases, indigent defendants can receive legal aid if their case falls within the scope of cases for which defense is mandatory. If defense is not mandatory, defendants can receive legal aid on their motion based on indigence. Although there are a number of types of cases for which defense is mandatory, individuals charged with crimes for which the lower sentencing limits are less than three years of imprisonment are not eligible for mandatory defense. This excludes many individuals, who are at risk of imprisonment ranging from less than three to ten or even twelve years, from the guarantee of mandatory defense. As a result, many people do not have a defense counsel during a trial even if it results in conviction and a sentence of imprisonment.

Another problematic aspect in criminal cases is the question of access to defense counsel (with or without legal aid) at the stage of preliminary investigation. Empirical information reveals that in many cases a defendant's first contact with a defense counsel has taken place at the end of the preliminary investigation, at the action of final acquaintance with the investigation files (when this procedural action is mandatory), or even at the first court hearing.

The lack of clear means test is also problematic. There are no clear criteria as to when a person should be granted legal aid, and no explicit duty for the court to provide detailed grounds for its decision, which, together with the lack of possibility to appeal (in criminal cases), leaves this provision discretionary. The absence of a detailed description of the manner in which

an indigent person should “adequately demonstrate” his or her inability to bear the costs of defense results in a limitation of access to legal aid. This is true for both criminal and civil cases. In the latter instance, clear financial criteria (means test) as a condition to apply for legal aid are missing in the procedure for granting an exemption from court fees (costs).

The quality of the legal aid representation is often not satisfactory. The Helsinki Foundation for Human Rights receives complaints about the actions of attorneys, with most clients complaining of *ex officio* defense counsel and attorneys. There are no standards of professional conduct related to *ex officio* cases. There is also no system of quality control. All responsibility lies within professional bodies that are widely criticized for not fulfilling this task properly. The state, while having some possibilities of initiating legal action (for instance, disciplinary procedures against lawyer), does not use its power in this respect.

Statistical data related to legal aid is not collected by the Ministry of Justice, the courts, or the legal professions. Although the amount spent for legal aid increased significantly in the last years, this is primarily a result of an increase in lawyers’ fees. It is not clear whether there has been an increase in the number of legal aid cases. State institutions do not collect data about the number of cases for which legal aid is granted, and data collected by lawyers’ associations is not reliable.

The comparison between the number of lawyers and the number of cases brought to Polish courts, as well as the number of people sentenced, reveals an obvious shortage of lawyers and an enormous need for legal services, including legal aid. The number of cases received by courts has been increasing consistently: from 2,740,000 cases in 1991 to 8,697,000 in 2002. In the same period, the number of attorneys and legal advisers has risen only slightly; there are close to 5,500 practicing attorneys who may appear in all kinds of cases and about 8,000 legal advisers who may represent natural persons (i.e., individual clients), excluding criminal and family law cases.

Attorneys indicated the following problems with the current *ex officio* system:

- too many *ex officio* cases per attorney (although, on the other hand, legal advisers are willing to conduct such cases);
- dramatic delays in payment for *ex officio* cases (sometimes almost two years);
- unsatisfactory fees for *ex officio* cases based on minimum amounts, with no differentiation in payments according to time spent on a case, its complexity, or details of the lawyer's costs.

RECOMMENDATIONS

Proposed changes in the legal aid system

The list of problems and possible solutions related to the present system of access to legal aid for the indigent is long. Entities concerned – state authorities and legal corporations, as well as scientific circles and non-governmental organizations – need to discuss various submitted suggestions and adopt a position in their respect.

We hope that a serious joint reflection of various professional circles on the reform of the system of access to legal aid for the indigent will be continued.

The proposed changes and reforms can be divided into two groups: changes within the current system of legal aid provision that are easier to introduce, and systemic changes that require a broader discussion and thus more time and preparations.

Changes within the current model of legal aid provision

Data collection and evaluation: The Ministry of Justice, legal corporations, and scientific institutions should gather information and statistical data, and conduct **research** and a debate on the system of access to legal aid, which would enable a precise identification of problems and a regular appraisal of the current system's effectiveness.

Development of clear criteria for granting *ex officio* legal aid: Possible activities in this area include the following:

– The Council of Ministers should draft **amendments to provisions of law** regulating access to legal aid to provide such aid to persons who really

need it, and to make the provisions consistent with standards established by the European Court of Human Rights in Strasbourg and by recommendations of the Council of Europe.

- The Ministry of Justice should develop and introduce a **detailed questionnaire (means test)** on the financial situation of persons who apply for *ex officio* legal aid.

- The Council of Ministers should consider the possibility of **partial payment** for legal aid granted *ex officio* to persons who cannot afford to pay the entire lawyer's fee but can cover some of the costs of legal aid.

- The Ministry of Justice should prepare clear **guidebooks** for citizens that explain their right to *ex officio* legal aid. We suggest that simple, clear, and understandable instructions be drawn up, informing people of the possibilities and procedures for exercising one's right to defense and representation in all cases – of both hired, *ex officio*, and mandatory defense and representation – together with a form for applying for an *ex officio* lawyer.

Changes in the procedure for appointing attorneys and legal advisers: The Ministry of Justice, judicial bodies, and legal corporations should consider compiling **new lists** of attorneys and legal advisers, different from the existing ones, from which lawyers would be appointed to conduct specific *ex officio* cases:

- lists of willing professionals (with an additional possibility of stating individual specialization or preferences as far as *ex officio* cases are concerned), to be used in the first place;

- lists of specialization and preferences, to be used in the second place;

- alphabetical lists of all lawyers, to be used if the other two lists prove insufficient.

Judges should appoint **legal advisers** as *ex officio* representatives in civil cases more often. Legislators should consider moving the power of decision on granting legal aid from judges adjudicating in particular cases to independent institutions or court registrars.

Fees for *ex officio* cases: The Ministry of Justice should determine **precise rules** concerning the payment of fees for *ex officio* cases, to eliminate delays in their payment.

Quality of legal aid: The Ministry of Justice and Legal Professions – the Bar and Legal Advisers – should establish **minimum standards** for lawyers conducting *ex officio* cases. The Ministry of Justice and legal professions should establish **evaluation procedures**, such as evaluation forms, to monitor the quality of performance of *ex officio* lawyers. Legislators should consider introducing the possibility of appealing disciplinary decisions of the professional disciplinary courts to common courts of law. The Bar and Legal Advisers Department of the Ministry of Justice should undertake actions aimed at making disciplinary responsibilities realistic. The Ministry of Justice should start to exercise its **supervisory powers** with respect to the legal profession. Disciplinary hearings should be made public.

Promoting positive attitudes and image: Steps to promote positive attitudes among lawyers and to take care of the legal profession's image, can include the following:

- The Ministry of Justice and legal corporations should introduce the element of **promoting *pro bono* attitudes** among lawyers into their training system; for example, part of the training could take place in non-governmental organizations providing citizen advice or at university law clinics.
- The legal circles should consider a proposal to organize a competition in which lawyers and law offices that make the greatest contributions in the area of legal aid to the indigent or *pro bono* work would be awarded for their activity (promoting positive attitudes).

Systemic changes

Legal aid fund: The Council of Ministers should consider putting sums of money for state-financed legal aid into a **separate legal aid fund**.

Legal Aid Board/Commission: The Council of Ministers should consider the possibility of creating an **independent institution** dealing with problems of access to legal aid and administration of the system: the Legal Aid Board/Commission.

Alternative models for provision of legal aid: The Council of Ministers should plan for the introduction of models for legal aid provision as alternatives to *ex officio* legal aid, such as:

- taking out some funds from the legal aid budget and developing a **pilot Public Defender Office program**, modeled on that of other countries (within the jurisdiction of a single regional court) and staffed with lawyers dealing exclusively with *ex officio* legal aid;

- considering the possibility of introducing another model – **contracting legal services** for the indigent – whereby individual lawyers or law offices would undertake to conduct *ex officio* cases within a given jurisdiction for a fixed fee;

- conducting a comparative survey of **costs and effectiveness** of legal aid provided within different solutions described above, and potentially introducing a mixed model applied by many countries;

- combining a pilot Public Defender Office program with the **lawyers' training** – so that, supervised by experienced attorneys, the trainees could provide *ex officio* legal aid during their training;

- creating an institution of **“duty attorneys”** who provide legal aid in emergency situations such as arrest or detention.

Recruitment to the legal professions: The Ministry of Justice and legal professions should introduce fully **objective criteria and procedures** for recruitment of attorneys and legal advisers. The Bar should open access to the attorneys' profession to significantly raise the number of attorneys (accepted on the basis of high but objective standards).

Legal Aid Act: The Council of Ministers should consider adopting a **separate Legal Aid Act**, which would regulate all major issues related to access to legal aid.

Assistance provided by non-governmental organizations: Legal professions and non-governmental organizations should develop **standards for cooperation**. NGOs should create an Internet **database** of leaflets, guide-books, handbooks, etc., prepared by various organizations and institutions.

Extra-judicial legal assistance: The Council of Ministers should consider developing a system of access to extra-judicial legal assistance – in the form of a right to free or partially paid for (depending on means) **consultation or legal advice**. Such a system would allow the resolution of many cases without involving the administration of justice. Already existing all over the country, Poviats' family assistance centers and Poviats' consumer protection centers might be the institutions that, if well equipped and staffed, could play the role of local legal advice centers for the indigent.

Alternative methods for resolving disputes: The Ministry of Justice, responsible for educating judges and prosecutors, as well as legal professions, responsible for educating attorneys and legal advisers, should place an emphasis in their training on the use of existing possibilities of alternative dispute resolution methods (e.g., mediation, settlement). When drafting legislative changes, the Council of Ministers should create the possibility of alternative dispute resolution.

GLOSSARY OF THE MOST IMPORTANT TERMS

Solutions applied in the world

***ex officio* defense system**

A system of appointing attorneys/defenders for *ex officio* cases from among all members of the local bar/legal advisers (based on alphabetical lists of lawyers). The system is based on the assumption that each member of the Bar may be appointed in an *ex officio* case. This system is currently operating in Poland.

Legal Aid Board (LAB)

A body coordinating the system of legal aid provision. Such board consists usually of representatives of various legal circles. The powers of the board may include, among others, making decisions on granting legal aid, determining principles and standards for granting such aid and remuneration for lawyers, supervising entities granting legal aid (e.g. Public Defender Offices, privately contracted lawyers), administering the legal aid budget, conducting surveys of the system (such boards exist e.g. in the Netherlands and in England).

Public Defender Office

An institution employing lawyers appearing as defenders in *ex officio* cases. The Office may either employ lawyers (exclusively to conduct *ex officio* cases) or cooperate with lawyers practicing privately outside of the Office. The Office may operate as a central government agency, local government agency, within the Bar or as a non-governmental organization funded by the

government. Public Defender Offices exist e.g. in the United States (in about 50% of the states), in Israel or Lithuania.

contracting (franchising) system

A system based on contracts between appropriate institutions (e.g. the Legal Aid Board) and law offices or individual lawyers; pursuant to such contracts, a law office or a lawyer is obliged to conduct all, some or a specific category of *ex officio* cases in a given jurisdiction (e.g. in a court district) in return for a fixed fee (e.g. a lump sum or per case).

judicare

A system similar to “*ex officio* defense” of appointing individual attorneys/ defenders for *ex officio* cases based on lists of lawyers who volunteered to conduct such cases (e.g. according to their specialization) or were authorized to provide such assistance by an appropriate institution having fulfilled certain conditions (e.g. the Netherlands, Israel).

duty lawyers

Attorneys conducting 24-hour-long duties during which they provide *ex officio* legal aid to detainees who cannot afford a lawyer (various manners for remunerating such lawyers are adopted).

specialized lists

Lists, kept by a court (or another body appointing *ex officio* defenders/ attorneys), of lawyers accepting *ex officio* cases of a given type.

law clinics (university law clinics)

Law clinics are usually organized at universities’ law departments and based on voluntary work of law students under the supervision of law professors or practicing lawyers. Considering the scale of their operation, clinics do not offer an alternative model for providing legal aid. Their purpose is, primarily, to educate law students and enable them to acquire certain experiences useful in their further professional practice. Clinics constitute one of the so-called practical subjects. They also make students – future

lawyers – more sensitive to the problems of indigent people to whom they provide legal aid.

extra-judicial legal assistance

Professional assistance of a lawyer not related, however, to case submission in court or to pending litigation (limited e.g. exclusively to legal advice or assistance with drafting a letter and not including representation in court). Such assistance may be granted e.g. in the form of a short (e.g. half an hour) free or partially paid for visit with a lawyer.

***pro bono* work**

Free of charge provision of advice and legal assistance by lawyers to the indigent, independently or within social organizations. In some systems, lawyers are obliged to devote a certain amount of hours per year to such work.

legal aid fund

A separated part of a budget allocated exclusively to cover costs of *ex officio* legal aid. Funds for the legal aid fund may be paid from the central or local budget, court fees, fines or penalties, all kinds of donations, partially also from persons to whom legal aid is granted.

means test

A detailed questionnaire including data on income, property and family situation of a person applying for legal aid, used as the basis for evaluating such person's ability to cover all or some of the defense / representation costs.

Legal Aid Act

An act specifying general principles for granting and providing legal aid in all types of cases. In the countries of our region, such act is binding e.g. in Lithuania and Slovenia, and an appropriate draft is being prepared in Hungary.

Quality of legal aid

minimum standards

Detailed guidelines, binding in certain legal aid systems, for conducting a case (e.g. a list of mandatory activities during a case), facilitating evaluation of the quality of a given case's conduct. Such guidelines may apply to all or only to *ex officio* cases.

professional ethics principles

Principles of conduct of an attorney/legal adviser towards clients, court authorities and colleagues. Unlike in the case of minimum standards, the Polish professional ethics principles do not include very detailed guidelines and are rather general. They may constitute the basis for evaluation of a lawyer's behavior and the manner of conducting a case. The principles of professional ethics of attorneys and legal advisers in Poland are determined by the National Council of the Bar and the National Council of Legal Advisers, respectively. They are available at the corporations' Web sites.

disciplinary procedures (disciplinary prosecutor and disciplinary court)

Proceedings conducted by a professional self-management and initiated if principles of professional ethics are infringed by a member of the corporation – an attorney or a legal adviser (for example, as a result of a complaint by a client, court or *ex officio*). Such proceedings are conducted before a corporate disciplinary court and a disciplinary prosecutor appears as prosecutor. A disciplinary court in Poland includes selected members of a given corporation, while in other countries participation of the outside persons is also sometimes allowed.

malpractice insurance (OC) of attorneys/legal advisers

Mandatory malpractice insurance of attorneys and legal advisers, which is applied to cover potential damages caused by them when performing professional activities. An injured client may demand the payment of compensation from an insurance firm. If the payment of compensation is denied, such client is entitled to recourse to the law and claim for indemnity

against a lawyer. Attorneys and legal advisers are insured collectively; agreements are entered into on their behalf by corporate bodies.

Other terms related to legal aid

private attorney/legal adviser

An attorney/legal adviser hired by a client pursuant to a contract and representing such client for a specified fee.

***ex officio* defense**

Defense of a defendant in a criminal case on the basis of an appointment of a lawyer for such case by a court; a defender's fee is – as a principle – paid for by the State Treasury. Attorneys and, in rare situations (e.g. defense in petty offence cases), also legal advisers may be appointed defenders in criminal cases in Poland.

mandatory defense

Defense in criminal cases, in which due to characteristics of a defendant (e.g. hearing impairment) or nature of the case (e.g. accusation of a crime), a defendant has to have a defender; participation of a defender in proceedings and in some other activities is mandatory in such cases. If a defendant has no private defender, an *ex officio* defender is appointed.

***ex officio* defense on application**

Defense in a case in which a defendant is granted an *ex officio* attorney due to such defendant's difficult financial situation, as determined by court, which does not allow him to hire a defender.

***ex officio* representation**

Appointment of an *ex officio* attorney or legal adviser to conduct non-criminal, but for example civil, family law, or labor cases. An *ex officio* representation is granted by a court and a specific person is usually appointed by a professional self-management. Obtaining *ex officio* representation depends

on a prior exemption from court costs by a court. An attorney's fee is paid for by the State Treasury or enforced from an opposing party that lost the case.

obligatory assistance of attorneys and legal advisers

A limitation stating that a specific legal action may be performed, with few exceptions, only through an attorney or a legal adviser. In Poland, such an activity would include, for example, drafting and submitting an appeal in certain cases and always in cases for cassation, constitutional complaints, applications for re-institution of proceedings.

exemption from court costs

A decision issued by a court at the request of a party pursuant to which such party does not bear any litigation costs or bears such costs partially.

“adequate demonstration” of inability to bear costs

A reliable justification and documentation by a party that he/she is in such a difficult financial situation that he/she is not able to bear costs of defense and applies for appointment of an *ex officio* defender (Article 78 § 1 of the Code of Criminal Procedure).

minimum fees

Minimum fees for conducting specific types of cases or performing specific activities by an attorney/legal adviser. In justified cases (nature of the case, difficult financial situation of a client), an attorney/legal adviser may receive a fee lower than the minimum rate or even resign from a fee altogether.

non-governmental organizations

Private not-for-profit organizations created to accomplish a social goal (for example, associations and foundations). Non-governmental organizations do not include political parties. Within their specialization, many non-governmental organizations provide also citizen and legal advice and cooperate with professional lawyers. For example, there are organizations dealing with protection of children, women, single fathers, victims of crimes, victims of doctors' errors, consumers' rights and many other.

Citizen Advice Bureaux

Non-governmental institutions providing advice to people in a difficult situation. Assistance provided by the Bureaux includes informing clients of possible ways to solve a specific problem; advisers do not undertake actions on behalf of their clients and do not make decisions for them. First Citizen Advice Bureaux were established in Great Britain after World War II. Since the beginning of the nineties, such bureaux have also been established in Poland.

social assistance

Assistance provided by territorial local governments to persons in a difficult situation. Social assistance, although in practice to a very small extent, includes also legal advice and in some cases (see: Poviats' family assistance centers) representation of such persons before a court or another body.

Poviat's family assistance centers (*powiatowe centra pomocy rodzinie*) (PFAC)

Units created by a Poviat (district), performing specific tasks with respect to social assistance. PFACs are obliged to provide legal advice to people benefiting from social assistance. Pursuant to the Act on Social Assistance, PFACs' managers may institute actions for maintenance on behalf of third parties and may also file applications for determination of a degree of disability on their behalf.

Poviat's consumer rights spokesman (*powiatowy rzecznik konsumentów*)

A body appointed by a Poviat (district) council (may be joint for several Poviats) providing free assistance to consumers. A consumer rights spokesman provides free legal advice within this scope and may also, for example, institute actions on behalf of consumers, participate in pending litigations and also appear as public prosecutor in cases prosecuted as petty offences against consumers.

PART I

INFORMATION ABOUT THE PROJECT

The Helsinki Foundation for Human Rights in Poland (HFHR) is conducting the project Access to Legal Aid within the larger project on Promoting Access to Justice in Central and Eastern Europe. As part of this project, HFHR had planned in 1999, and has been conducting since 2000, surveys and activities aimed at promoting access to legal aid in Poland.

One of the basic problems in Poland and in other countries of our region is the widely understood access to justice, and within its scope, in particular, access to court and access to legal aid. It is also one of the spheres of interest of the Helsinki Foundation for Human Rights. Activities we have undertaken in this respect so far include, for example, the following:

– Monitoring of work conditions in district courts in Poland and publication of a report (1998–1999).¹ The report was quoted during a budgetary debate as an argument for increasing government expenditures for the judiciary,² it was extensively discussed in public, and it was also presented by its authors to the Parliamentary Commission on Justice and Human Rights (*Komisja Sprawiedliwości i Praw Człowieka*). As stated by the Vice-minister of Justice during the Parliamentary Commission's meeting, it helped to allocate bigger funds in the budget for the administration of justice.

¹ Ł. Bojarski and J. Swaton, *Warunki pracy sądów rejonowych: Raport z monitoringu* (Work Conditions of District Courts: Report of Monitoring), Helsinki Foundation for Human Rights, Warsaw, 1999. Seria: *Raporty, ekspertyzy, opinie*, nr 23. The first draft of the report, before its publication, was made available in November 1998.

² Shorthand notes from the plenary meeting of the Sejm of the Republic of Poland (RP) on 9 November 1998, first reading of a draft Budgetary Law for 1999 (3rd office term, 34th session), MP Tadeusz Syryjczyk; see the Web site of the Sejm of RP.

– Providing advice to individual clients of HFHR’s Public Interest Law Actions section in the following matters: right to defense, right to legal aid, and misconduct of *ex officio* appointed attorneys. These matters were addressed with court, Bar, and disciplinary authorities.

– Participation of HFHR’s employees in a series of meetings with a group of experts from Western European countries, the United States, South Africa, and Central and Eastern European countries concerning access to legal aid (Oxford, 1998; Warsaw, 1999; London, 2001; Budapest, 2002).

For several years, up to and including the present, the problem of access to legal aid has not received a lot of attention in Poland. Neither government bodies nor research institutes conduct surveys concerning this problem. HFHR’s work clearly indicates that there are many problems requiring changes in the access to legal aid.

How do we understand the notion of legal aid? The main sphere under survey was the narrowly defined term “legal aid”, i.e., *ex officio* legal aid paid for by the state. This notion can also be understood widely as any free assistance of a legal nature granted to a person, such as:

- exemption from court costs;
- free legal advice and assistance with drafting procedural writs – provided by social organizations, as well as within the scope of social legal assistance supported by local governments pursuant to the Act on Social Assistance;
- activities of social organizations before courts in the name or on behalf of citizens;
- the institution of actions by a public prosecutor;
- the assistance of the ombudsperson in specific cases;
- the obligation of proceeding authorities to inform participants of their legal situation;
- the court’s obligation to rule more than demanded in certain cases.

Although our main sphere of interest was *ex officio* legal aid, we also dealt partly with the other above-listed phenomena.

I.1. Activities undertaken

Review of law. Poland does not have one single legislative act concerning legal aid; instead, these problems are regulated through many separate legal acts. For research purposes, more than one hundred legal acts of various kinds were selected. Provisions concerning widely understood legal aid were found in seventy-nine of them. We have prepared a compilation of these regulations. We have also compiled information on international standards for legal aid.

Analysis of jurisprudence. We have reviewed jurisprudence of Polish and international courts concerning the issue of access to legal aid and its quality.

Analysis of statistical data. Although direct data concerning various aspects of access to legal aid is almost nonexistent, analysis and comparison of indirect data allowed us to collect certain information. We have attached particular importance to, for example, determination by the state of its expenditures for legal aid, and the number of cases in which *ex officio* legal aid was granted.

We have reviewed data, among others, from the Ministry of Justice, the National Council of the Bar, the National Council of Legal Advisers, the Public Prosecutor's Office, the police, and the Prisons Administration.

Empirical surveys. These included the following:

- interviews based on a questionnaire;

Survey in courts

- of parties not represented by an attorney or a legal adviser, concerning, among others, reasons for such lack of representation and the possibility to obtain legal aid;

- of parties having an attorney or a legal adviser (either private or *ex officio*), concerning, among others, the manner in which they obtained legal assistance, evaluation of the quality of the lawyer's work, costs, and other relations between the lawyer and the client;

Survey in penitentiaries

- of imprisoned persons not represented by a defender, concerning, among others, the reasons for lack of representation and the possibility to obtain legal aid;

- of imprisoned persons having a defendant (either private or *ex officio*), concerning, among others, the manner in which they obtained legal assistance, evaluation of the quality of the defender's work, costs, and other relations between the lawyer and the client;

Examination, carried out as a pilot survey, of the **opinions of attorneys, legal advisers, and public prosecutors** concerning the system of legal aid paid for by the state, including difficulties and proposed changes;

Pilot survey of **non-governmental organizations** providing advice and civil and legal assistance, concerning the type of assistance granted and ways in which it is granted, persons receiving such assistance, competence of persons providing it, institutional conditions, problems, and proposed changes;

Interviews with presidents of district and regional courts and focus groups with **judges** to examine their opinions about the present system of legal aid and proposed changes.

Case studies. Based on cases received by the HFHR's Public Interest Law Actions section, we have developed the following case studies:

- negative examples of the functioning of *ex officio* legal aid, illustrating the main problems;

- examples of disciplinary procedures in cases of misconduct by *ex officio* defenders and attorneys.

Problem description. For the project's needs, we have developed an analysis of problems, such as the following:

- interpretation and application of Article 78, Section 1, of the Code of Criminal Procedure – the problem of “adequate demonstration” by a defendant requesting an appointment of an *ex officio* defender, “that he or she is not able to bear costs of defense without detriment to necessary support and maintenance for himself or herself and family”;

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- restrictions in access to legal aid for persons who want to sue an attorney for damages caused by the attorney in performance of his or her work;
 - malpractice insurance for attorneys and legal advisers for damages caused in performance of their work;
 - serious restrictions in access to the profession of attorneys and legal advisers as one of the reasons of the lack of legal aid and its poor quality, along with the need to broaden the number of practicing lawyers, and possible solutions.

Collection of materials. When conducting the project, HFHR collects numerous materials concerning problems with access to legal aid and international standards, as well as solutions adopted by other countries. We want to make these materials available to interested entities – the first step was the translation and publication of selected materials for participants of the Legal Aid Forum in Poland. These materials are also available at the foundation's Web site: www.hfhrpol.waw.pl.

Legal Aid Forum. On 7–8 June 2002, HFHR, in cooperation with the Parliamentary Commission on Justice and Human Rights, organized a Legal Aid Forum³ at the Parliament (Sejm) of the Republic of Poland. Information on surveys conducted by HFHR, results of surveys, and proposed changes in practice and law with respect to access to legal aid were presented during the forum. More than 120 persons representing authorities (legislative, executive, and judiciary), legal corporations, non-governmental organizations, and the scientific world participated in the forum. Foreign experts shared their experiences in other countries.

European Legal Aid Forum. Also within the project, on December 5–7, 2002, the European Legal Aid Forum took place in Budapest (the European Forum on Access to Justice). Representatives of the Ministries of Justice, courts, the Bars and non-governmental organizations from the countries of Central and Eastern Europe, the Balkans, the Caucasus and Russia, as well as representatives of international institutions such as the European

³ The Forum's program is attached to the report.

Commission and Parliament, the Council of Europe and the World Bank, participated in the Forum. Ten reports on access to legal aid in the countries candidates to the European Union (including Poland) had been prepared for the Forum. During the Forum, information on surveys conducted by HFHR was presented. National reports are available in English at the following address: http://www.pili.org/library/access/country_reports.html.

Report. The Final Report on Access to Legal Aid was published. The book consists of project findings, HFHR's recommendations as to the reform of the system of legal aid (both law and practice), summaries of voices from the Legal Aid Forum, and a presentation of international standards related to the subject.

Leaflets. HFHR published information materials for citizens concerning, among other things, the possibility to obtain lawyers' assistance and including practical instructions on how to proceed in cooperation with a lawyer, what to do when such cooperation is problematic, etc.

Activities planned. HFHR will continue to deal with problems concerning legal aid. Organization of the Legal Aid Forum at the Polish Parliament, as well as publication of the report, completes the first stage of the project. Other activities planned by us include:

- continuation of the research on law and practice in the *ex officio* legal aid field;
- publications on legal aid in law journals;
- participation in a public debate and works undertaken to improve access to legal aid and the quality of this aid.

I.2. First steps toward reform

The above-mentioned surveys and activities undertaken allow HFHR to examine legal aid from various perspectives. However, the picture obtained thus far is still fragmentary and incomplete. We realize that the surveys, to a large extent, are more successful in terms of quality than of quantity, and do not provide an in-depth examination of opinions. Our goal, however, is to draw attention to problems occurring in the application of legal aid and

to provoke a public debate on necessary changes and reforms. We treat our surveys as the beginning, not the end, of the road to legal aid reform. We believe that we can encourage government bodies and legal corporations, the academic world, and the non-governmental sector to conduct systemic work on the shape of legal aid in Poland. We ourselves will participate in such work and public debate.

We are pleased to observe the interest that the discussed issues have already inspired. On the eve of the Legal Aid Forum, in May 2002, a team was appointed at the Commission on Human Rights of the National Council of the Bar to develop a proposal of the Bar aimed at creating an efficient *ex officio* legal aid system. The team has been analyzing solutions applied in other countries. The next stage will include the formulation of changes proposed by the Bar.

The chairman of the Parliamentary Commission on Human Rights (which co-organized the forum) at that time, Member of Parliament Grzegorz Kurczuk – who became Minister of Justice a month later – emphasized several times, both as chairman of the commission and later as the Minister of Justice, the importance of access to legal aid and declared that the Ministry would undertake work in this respect.

The director of the Legislative Department at the Ministry of Justice, Judge Marek Sadowski, promised participants of the Legal Aid Forum that its achievements would be taken into consideration as part of ongoing legislative work (for example, of the Civil Law Legislative Commission developing new principles concerning costs of civil proceedings). Works of the commission following the forum proved this to be a serious commitment. The draft law includes, for instance, establishing a “means test” of a kind that was proposed by HFHR.

In addition, the Polish Ombudsman (*Rzecznik Praw Obywatelskich*) stressed his interest in reforming the system of granting legal aid. So far, for instance, the Ombudsman’s Office has signed cooperation agreements with some University Law Clinics.

Legal aid is also a matter of interest for a number of NGOs. Some of them, such as the Stefan Batory Foundation and Freedom Foundation, have

a specific strategic approach. By granting funds to other NGOs, they try to standardize their work and establish cooperation or networks.

An interest in the issue of legal aid has also been expressed by representatives of the Bar and Legal Advisers.

All of this shows that the subject is at the moment a matter of interest for many bodies and institutions. Our goal, therefore, would be to establish a working group consisting of representatives of these different actors. There is a need for a collaborative structured effort to reform the system of granting legal aid, and all steps along this way should be discussed among institutions interested.

Below are some quotations from introductory remarks and comments showing the interest gained by the Legal Aid Forum that the Helsinki Foundation for Human Rights organized.

I.3. Transcript from the “Legal Aid Forum”, 7–8 June 2002, the Parliament of the Republic of Poland

Marek Nowicki, President of the Helsinki Foundation for Human Rights

Good morning, Ladies and Gentlemen. My name is Marek Nowicki, and I am president of the Helsinki Foundation for Human Rights. I would like to extend a warm welcome to all present at the conference to which we have invited you together with the Commission on Justice and Human Rights. We have with us Mr. Grzegorz Kurczuk, chairman of the Parliamentary Commission on Justice and Human Rights, whom I will ask to say a few words in a minute [...]

MP Grzegorz Kurczuk, Chairman of the Parliamentary Commission on Justice and Human Rights

As an introduction, I would like to say the following: some of the most important issues in Poland include problems connected with access to justice. [...] What you are going to discuss, the subject of the meeting – that is, activities that should or are being undertaken in order to improve access to justice in

Central and Eastern Europe, that is, also in Poland – are in my opinion some of the most important ones, and I do not say so only as a lawyer and chairman of the Parliamentary Commission but also as a practicing lawyer and a careful observer of what is going on in our country.

I hope, Ladies and Gentlemen, that you examine the entire problem, and first of all the issue of access to legal aid in our countries, in this very competent group you have gathered here. I think that this is also important considering that our country, but also several others, is a candidate for the European Union, where certain standards are binding. We would like to have such standards as well, but we know how bad the situation is in this respect. I think that your discussions, Ladies and Gentlemen, which I consider a significant element of a public debate on legal aid, will result in certain definite proposals. I believe that it will be possible to transform the fruits of your discussion into something that I would call proposals of legislative changes that are also being undertaken, for example, by my commission interested in such issues. Finally, I think that we will use the result of this conference, what you are going to discuss, to first of all propagate the knowledge of certain standards, and I think that this is also very important

Sylweryusz Królak, Undersecretary of State, Ministry of Justice

The initial material for the debate that is to follow should be evaluated as prepared very professionally. Its contents will certainly constitute the basis for discussion that will allow us to formulate postulates and conclusions, which should then be very thoroughly analyzed by all public authorities. This circumstance alone allows us to state that the course and results of the conference will have material significance for shaping a free legal aid model in Poland.

Judge Marek Sadowski, Director of the Legislative Department, Ministry of Justice

Thank you very much. I think that this first speech after the material's presentation [HFHR report] will be the most inconvenient, because the majority of critical comments are addressed to the Minister of Justice and her staff, since they are responsible for creating a good system of ex officio legal aid. [...]

This conference and its results will be certainly extremely useful also for the Ministry of Justice. The collected material has already been useful; its short and swift analysis may surely lead to some attempts at formulating conclusions or proposals. [...]

The Ministry of Justice is working on a new law on court costs in civil cases, which is also to provide for a mechanism of granting of an ex officio attorney. Since this task is performed by the Civil Law Codification Commission, acting with the Minister of Justice – I am obviously familiar with the status of this work and the scope of proposals, but the work has not been completed and I declare straight away that a lot of thoughts that have been expressed here, included in the materials, will be reexamined. [...]

The act on court costs in civil cases is to be prepared; the draft of this law is [supposed] to be ready in this semi-annual period, but it probably will not be; it is in the plans of the Council of Ministers but probably will not be completed. I think that you [organizers – the Foundation] will be in a way responsible for the fact that the work on the draft of the law will not be completed, as so many issues were submitted and indicated here that it is worthwhile to discuss the law once again at least in the part concerning appointment of ex officio attorneys.

Igor Dzialuk, Vice-Director of the Department of International Cooperation and European Law, Ministry of Justice

A strong point of this report is, first of all, the fact that it is well based in the reality of the country that it is to serve and is not just an advertisement of systems removed by light-years from a situation in the country; secondly, it does not aspire to the function of reliable scientific research with all of the consequences – based on certain surveys, it draws certain conclusions but does not claim to be infallible, and this is also its great value. Also, the report rightly differentiates two parts of the discussion (I refer to conclusions here): a certain planned vision of the system the way it could be in the future, and a clear statement that there are no simple answers here – nor as a result of conducted surveys could the report formulate definitive conclusions. It clearly separates this mission from certain organizational and immediate changes that could help to better administer and manage the potential that is available

Attorney Andrzej Kalwas, President of the National Council of Legal Advisers

First of all, I would like to warmly thank Professor Rzepliński, President Nowicki, and the Helsinki Foundation for bringing up this subject. It is very good that such difficult issues as problems connected with justice administration, provision of legal aid, and the profession of a defender, attorney, or legal adviser as co-factors or co-participants of the justice administration should be discussed by professionals, people who are familiar with these issues – extremely difficult, sensitive, socially meaningful, but also evoking emotions. [...]

Attorney Bożenna Banasik, Commission for Human Rights at the National Council of the Bar; Dean of the Regional Bar in Łódź

I represent the Commission for Human Rights at the National Council of the Bar. Ladies and Gentlemen, first of all I would like to thank Mr. Łukasz Bojarski and congratulate him on presenting such a thorough, it seems to me, report and at the same time thank and congratulate him on excellent research and speed in collecting information – as on page 32, there is a note on the establishment, as of the end of May, of a team at the Commission for Human Rights of the National Council of the Bar, dealing with all of those issues we are discussing today. The subject scope of this conference [has been important] for many years [...] during meetings of the National Council. Unfortunately, a unified solution has not been found so far, and it is good that this conference is taking place now when these subjects are alive again at the meetings of the Council, and found their expression in particular in our Commission for Human Rights. A special team has in fact been appointed to deal with this, a team consisting of many colleagues from all over Poland. [...]

Attorney Dr Marcin Radwan, Commission for Human Rights at the National Council of the Bar

I think that in general this is an opportunity to present the fact that our team has been established and that we are trying to think of these problems, and at the same time approach them in such a way that a certain solution is developed that would resolve at least some of the current problems connected with ex officio legal aid in Poland. I do not hide the fact that since this team was

established at the end of May, it would be naturally difficult to have conclusions that we could present, or ready legislative solutions at this point. Generally, I think that we are very grateful to the organizers for all of the knowledge they provided us with, since it will be undoubtedly one of the important elements that we have to master in order to further tackle these problems. [...]

I hope that we will be able to cooperate both with the foundation and with other institutions when building this model, and that we will be able to contribute certain concrete issues.

Attorney Zofia Daniszewska, the Regional Council of the Bar in Białystok

On behalf of the corporation, I would like to thank the Foundation for preparing the report. I will admit to a weakness, that at our commission we have been signaling the problem for ten years, and we were not able to carry out the survey ourselves. So thank you very much for this report; for showing the problem and solutions, we extend double thanks. We now have material to think about how we are going to participate in this help, because I think the issue of whether such help is necessary we attorneys should not even discuss, as we understand it is clearly necessary.

PART II

ANALYSIS OF EXISTING STATISTICAL DATA

The population of Poland is approximately 39 million people. The **judicial system** in Poland is made up of courts of three instances. It is composed of 299 district courts, 41 regional courts, and 10 appellate courts, as well as the Supreme Court. Administrative decisions are controlled by a separate system of administrative courts. This currently comprises the Chief Administrative Court and its ten local branches. Starting in 2004, there will be regional administrative courts, with the Chief Administrative Court serving as the court of second instance. Legislation is being examined by the Constitutional Tribunal to determine its compliance with the Constitution. There are also military courts.

Lawyers in Poland (attorneys and legal advisors) have the exclusive right (with few exceptions) to provide legal services and advice. Legal advisors may provide legal services in all cases except criminal and family law cases. But only some legal advisors may work with individual clients – natural persons. The rest work in the business sector and public administration. Legal advisors, unlike attorneys, may be employed on a labor contract. However, those who are employed through such a contract may not represent natural persons.

The Bar (consisting of the National Council of the Bar and twenty-four local councils) and **Legal Advisers** (consisting of the National Council of Legal Advisers and nineteen local councils) are separate, independent legal professions. Both make decisions on admitting new members (who are selected through an entrance examination, complete the three-and-a-half-year apprenticeship training, and pass final exams, organized by the professions themselves), adopt rules of professional ethics, consider complaints against lawyers, and conduct disciplinary procedures.

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

In Poland there is **no separate budget** for legal aid. Costs of legal aid are covered by the state (through the budgets of particular courts).

There have been **no comprehensive surveys** on legal aid conducted in Poland so far. Neither the courts nor the Ministry of Justice collects any relevant data. The Institute of Justice at the Ministry of Justice has not conducted research, either. Similarly, professional bodies of attorneys and legal advisers do not deal with problems of access to legal aid in a comprehensive manner. Although certain statistical data is collected and preserved in this way, such data is insufficient and, unfortunately, partly unreliable.

Court statistics in Poland are detailed. The fact that they do not include data on legal aid confirms a small interest in this issue. Research on access to legal aid and the quality of such aid, on efficiency of the present model of granting legal aid to the indigent, and the collection of appropriate statistical data constitute tasks for various entities.

One of the goals of the HFHR project is **to encourage** government bodies, research institutes, corporations of attorneys and legal advisers, and the academic world to undertake surveys and to systematically collect data in this field. The more entities engage in the research (including non-governmental institutes and organizations), the bigger the chance that such research is objective and comprehensive.

The problems of access to legal aid are so significant that they deserve appropriate research work to be undertaken urgently and decisions to be made on the necessity and directions of the reform. A situation in which the state spends increasing amounts of public funds on free legal aid and has no factual knowledge of how such funds are allocated seems to be incorrect. Collection of appropriate data and its analysis would enable the evaluation

of many elements of the current system as far as their consistency with international standards and effectiveness.

Some of the data could be obtained with relatively small changes to the existing court statistics. The problems connected with legal aid should become one of the research tasks included in the **government's statistical plans**. Results of research and analysis of statistical data would enable a comprehensive evaluation of the legal aid system's status quo. Such evaluation could in turn produce conclusions concerning potential changes in the practice and the law. This would also enable a **simulation of changes** to the current model.

Introduction of changes does not necessarily mean an increase in expenditures for legal aid, but rather a more **rational use** of such funds. It would be worthwhile to consider an introduction of **pilot programs**, which would allow comparing the efficiency of an *ex officio* legal aid system with, for example, a public defender office system.

For example, mass media regularly inform us of difficulties with finding attorneys who would undertake *ex officio* defense in big criminal cases requiring significant involvement.⁴ Costs of free legal aid in such cases are very high.⁵ A cost simulation could show that allocating appropriate funds to create a **pilot public defender office**, for example in one court district, is a better solution than maintaining only the *ex officio* defense model.

Experiences of other countries prove how research and collection of appropriate data or testing solutions through pilot programs help in making decisions on reforms.

⁴ These problems were best illustrated in a Katowice case concerning "pacification of the Wujek mine," during which consecutive attorneys were refusing to undertake defense and thus making the opening of and regular course of proceedings impossible; see, e.g., B. Cieszewska, *Adwokaci nie chcą bronić*, Rzeczpospolita, 16 September 1999, p. C1; I. L., *Kolejni obrońcy proszą o zwolnienia*, Rzeczpospolita, 18–19 September 1999; B. Jaworska and L. Ostalowska, *Obrona się broni*, Gazeta Wyborcza, 16–17 October 1999.

⁵ See e.g., information on costs of the so-called "cocaine case" in Warsaw; Rzeczpospolita, 17 October 2002.

Scope and costs of legal aid. All over the world, various criteria are applied to evaluate whether a state is complying with its obligation to ensure an access to legal aid for its citizens who cannot afford to hire a lawyer. Data is collected, *inter alia*, on the absolute amount of funds for legal aid, and comparisons are made, for example, between government expenditures for this purpose per citizen and *per capita* domestic income. This enables a comparison of the scale of expenditures in particular countries, taking into consideration their wealth.⁶

Some countries, where the granting of legal aid depends on a specified minimum income and property (e.g., the Netherlands), calculate the number of citizens who are entitled to legal aid paid for fully or in part by the state as a result of their financial situation.

Efficiency of systems for granting free legal aid. One of the criteria used in evaluation of the efficiency of free legal aid is the calculation of an average cost incurred by the state per case. This allows a comparison of costs of different legal aid delivery models – for example, in the *ex officio* legal aid system adopted in Poland and in a system where staff lawyers provide free legal aid (e.g., a public defender office operating in Lithuania, Israel, or the United States). To calculate an average cost per case, it is necessary to obtain data concerning expenditures of the state for *ex officio* legal aid, as well as information on the number of *ex officio* cases.⁷ Data that would allow reliable calculations in this respect **is not collected** in Poland.

We can only present the data that is available and mention what is missing in Poland. Despite its scantiness, the existing data allows certain

⁶ See E. Johnson Jr., “Comparative Commitment to Equal Justice: Some New Statistical Indicators,” which provides extensive literature. The article was prepared for the International Legal Aid Group conference in Melbourne, Australia, on 13–16 July 2001. The article also provides a list of expenditures for legal aid in some countries. This and other articles from the conference (regarding legal aid systems in various countries) are available on the Internet. See also E. Johnson Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, Fordham International Law Journal 24 (2000). This entire issue of the periodical is devoted to the problem of access to legal aid and comprises a collection of articles and the transcript of a discussion carried out during the Partnership across Borders Conference: A Global Forum on Access to Justice, in New York on 6–8 April 2000.

⁷ It is also necessary to define the term “case,” so that it is clear whether it includes legal aid granted in one instance or throughout the entire proceedings.

conclusions to be reached. We shall attempt to consider, among others, the following questions:

- Do authorities know how much the Polish state spends on legal aid and what these funds are used for?
- What is the scope of *ex officio* legal aid in Poland – how many people, and in what cases, are granted such aid, and is the data presented by the Main Statistical Office reliable?
- Are there enough attorneys and legal advisers in Poland, and are they able to satisfy the legal services market?

II.1. Expenditures of the administration of justice for legal aid

“Costs of free legal aid” mean costs of legal aid provided by *ex officio* attorneys and legal advisers paid for with state budget funds. This sum includes expenditures from the budget of the Ministry of Justice paid in a given financial year and due budgetary obligations to be paid.

Expenditures of the administration of justice for free legal aid (in PLN – Polish Zlotys)⁸

Year	1997	1998	1999	2000	2001	2002
Expenditures	7,051,128	10,350,485	23,508,803	31,939,162	22,366,695	62,835,283
Obligations	4,776	200,860	84,907	6,370,624	32,210,370	25,755,782
Total	7,055,904	10,551,345	23,593,710	38,309,786	54,577,065	88,591,065

We see that in 1999, compared to 1998, expenditures for free legal aid increased almost by 123.6% and that in recent years (in particular when comparing 2001 and 2002) this increase, although slightly smaller, has remained very clear. In addition, the number of obligations of the State Treasury towards attorneys and legal advisers has been increasing.

⁸ Data from Grażyna Urbaniak, chief accountant of the Budgetary Department of the Ministry of Justice; Department of the Budget and Assets of the State Treasury.

The table below presents the increase of expenditures for free legal aid in relation to all state budgetary expenditures (the picture is not completely correct, however, as one has to take into consideration an error resulting from carrying over “obligations” in consecutive years). For comparative purposes, expenditures for the general budget line “common courts” are presented.

Legal aid expenditures in relation to all state budgetary expenditures
(in PLN – Polish Zlotys)⁹

Year	Total budgetary expenditures	Expenses for: “common courts”	Percent of expenditures in total budget	Expenditures for free legal aid	Percent of expenditures in total budget
1999	142,099,762,000	1,706,659,000	1.20%	23,594,000	0.016%
2000	156,309,815,000	2,112,097,000	1.35%	38,310,000	0.024%
2001	181,604,087,000	2,351,970,000	1.29%	54,577,065	0.030%
2002	185,101,632,000	2,560,317,000	1.38%	88,591,065	0.047%

The fact that there have been significant outstanding payments – unpaid obligations of the State Treasury for *ex officio* cases – makes it difficult to determine the amount of expenditures and obligations of the state for legal aid in a given year (regardless of when they are paid). The table below shows an attempt to determine the amount of adjudicated fees in a given year; it seems to be rather accurate.¹⁰

⁹ Data taken from Budgetary Laws for consecutive years.

¹⁰ Amounts of adjudicated fees have been calculated in the following manner: expenditures in a given year were reduced by obligations accrued until the previous year and increased by obligations accrued in a given year. The result should present an accurate scale of fees adjudicated in a given year. An error may result from the fact that some obligations are carried over each year and may disturb the true picture.

**The amount of adjudicated fees for *ex officio* cases in a given year
(in PLN – Polish Zlotys)¹¹**

Year	1999	2000	2001	2002
Sum of adjudicated fees (in millions of PLN)	23.4	38.2	48.2	56.4
% of the total state expenditures	0.016%	0.024%	0.026%	0.030%

This table, **closer to the truth**, indicates that both in absolute numbers and with respect to the entire state budget, there has been an increase of expenditures for free legal aid – not as significant, however, as the previous table would indicate.

The increase of expenditures resulted mostly from a significant increase of attorneys and legal advisers' fees for *ex officio* cases,¹² although based on information from the National Council of the Bar, we may assume that the number of *ex officio* cases has also increased (see below).

Since 1 September 1998, *ex officio* legal aid in criminal cases is also granted at pre-trial; thus, the Ministry of Justice has data on amounts spent on *ex officio* legal aid, separately for public prosecutor's offices and courts, as of 1999.

**Data concerning state expenditures on *ex officio* legal aid for public prosecutor's offices
and courts, 1999–2002 (in PLN – Polish Zlotys)**

Year	1999	2000	2001	2002
Public prosecutor's offices	216,879	677,386	589,743	750,743
Courts	23,376,831	37,632,400	53,987,322	87,840,322

¹¹ Rounded up.

¹² Regulated at the time of discussed changes by the Ordinance of the Minister of Justice on Fees for Attorneys and Legal Advisers of 12 December 1997. Currently, these issues are regulated by Ordinances of the Minister of Justice, separate for attorneys and legal advisers, of 28 September 2002 (Journal of Laws No. 169, items 1348 and 1349), "concerning fees for attorneys and covering by the State Treasury costs of free *ex officio* legal aid"; and "concerning fees for legal advisers and covering by the State Treasury costs of free *ex officio* legal aid", respectively.

This data¹³ reveals that the total of expenditures and obligations for *ex officio* legal aid at pre-trial in 1999 constituted 0.9 percent of the total amount of expenditures and obligations for legal aid granted by courts. By 2000 it was already closer to 1.8 percent; therefore, costs of legal aid at pre-trial have significantly increased – only to drop again immediately (they constituted 1.09 percent of total expenditures and obligations of courts in 2001, and only 0.85 percent in 2002). However, this data does not fully correspond to reality, because fees for legal aid at pre-trial are also sometimes paid for by the courts. The fees are paid, first of all, pursuant to an application submitted by an attorney or a legal adviser to the public prosecutor's office conducting the proceedings; such application is then approved by a public prosecutor in the case and directed for payment to the Budgetary Department of a given public prosecutor's office. Often, however, when a case is being examined later, an attorney or legal adviser submits the bill for pre-trial costs to the court, and remuneration is adjudicated together with the bill for court appearance.

Thus, **there is no data** that would allow us to determine unequivocally which portion of expenses for *ex officio* legal aid is spent at pre-trial and, consequently, what is the scope of such aid granted at this stage.

Errors in the periodical report of the European Commission. Data included in the periodical report of the European Commission concerning the progress of Poland toward accession to the Union, published in 2002,¹⁴ is surprising. We are pleased to emphasize that – for the first time – the problems of legal aid appeared in the periodical report.¹⁵ However, the data provided is incorrect. It states that in 2001, Poland spent 54 million zlotys from the state budget and an additional 48 million zlotys from the budget

¹³ Calculations based on data from Grażyna Urbaniak, chief accountant of the Budgetary Department of the Ministry of Justice; Department of the Budget and Assets of the State Treasury.

¹⁴ *2002 Regular Report on Poland's Progress toward Accession*; the report is available on the Web site of the European Commission and on the Web site of Urząd Komitetu Integracji Europejskiej (UKIE).

¹⁵ In reports for 2002, the European Commission included, in the majority of cases for the first time, legal aid issues for the following countries: Bulgaria, the Czech Republic, Hungary, Latvia, Poland, Romania, and Slovakia; see the Web site of the European Commission.

of the Ministry of Justice for legal aid. Moreover, according to the report, this data does not include *ex officio* representation in civil cases. Although we have not managed to reach the source of this information, a comparison of these figures with data provided by us above shows that most probably a mistake was made and the same expenses were listed twice.¹⁶

Contribution of represented parties in expenditures for *ex officio* legal aid. Parties in proceedings are also charged with expenses for *ex officio* legal aid. Only when the enforcement of payment is not effective does the state have an obligation to pay the fee for legal representation. Therefore, the state, which incurs such costs, has a legal title to claim them from some of the represented parties. It is not clear how often the state takes advantage of such titles in practice. It could be presumed that the scope of this phenomenon is small;¹⁷ however, it would be worthwhile to examine it, since if the state were more active in this respect, expenses would be lower.

Lack of a separate budget for free legal aid. Although expenses for free legal aid are being monitored, appropriate amounts to cover them are not being planned for in the state budget. Every year's outstanding payments (sometimes several years old) of fees to lawyers are a clear proof of this.

During preparation of a budget, particular units plan future expenses based on expenses incurred in a preceding year. However, costs of free legal aid are not placed in a separate category but are instead included in the paragraph "costs of proceedings before courts and public prosecutor's offices," which also includes, among other things, fees for opinions issued by medical schools, costs of securing by a court executive officer and execution by such officer, observation in a hospital, costs of transportation of a body, field sessions of a court, costs of delivery and transportation of a defendant, witnesses, experts, delivery of summons and other writs, and announcements in the press and on radio and television.

¹⁶ The entire short section, included in two paragraphs, of the periodical report on legal aid should be critically evaluated as fragmentary and unreliable. We are even more upset by the fact that such information for other countries is more complete.

¹⁷ Information confirmed by judges.

A draft prepared by a team of the Chief Administrative Court during work on the reform of administrative procedure was the first proposal of a wider approach to the issue of legal aid in Poland. The postulate to create a separate fund of legal aid has, however, been lost at the finish of parliamentary work.¹⁸

II.1.1. Conclusions

Need for research and planned state policy. Although we possess data concerning state expenditures for free legal aid, this data does not reveal, e.g., how much of the funds relates to legal aid in criminal and how much to civil and other cases; what part of the funds is paid to attorneys and what to legal advisers; the number of cases in which parties were granted legal aid; whether and how this number increased with the increase of expenses; in what cases aid was granted and for what reasons; whether, for example, in criminal cases such aid was due to the mandatory defense requirement or it was granted on application; as far as obligations are concerned, we do not know when they were incurred.

The state has **no clear policy** for creating funds for legal aid or incurring expenses. It seems that calculation and regulation of outstanding payments remain the only fields of interest.

The very inadequate knowledge of the phenomenon provided by the analysis of expenditures does not allow implementation of a thought-out policy. Thus, the first step should be obtaining knowledge, based on which it will be possible to approach the issue of legal aid paid for by the state in a systemic manner.

We propose drafting and changing **appropriate forms of reports**, which would allow the monitoring of expenditures by the state for paid for *ex officio* legal aid on a regular basis and also the collection of information on, e.g., the number of cases in which such fees were paid, the type of cases, at what stage of the proceedings, and to whom (attorneys or legal advisers), etc.

¹⁸ More about the proposal of the Chief Administrative Court's team in following chapters of the report.

Legal aid fund and Legal Aid Board (Commission). The lack of a separate legal aid fund, and including expenditures for this purpose in a broader budgetary category covering many other types of expenses at the disposal of courts and public prosecutor's offices, causes or may cause different types of problems.

In the present financial situation of the administration of justice, when deciding about granting legal aid, courts, if forced to make savings, may be led by considerations not related to the merits but rather of a financial nature.¹⁹ It is obvious that at the present stage, the state cannot afford to guarantee legal aid to all who need it. However, the lack of standards in this respect, as well as lack of research and data, creates a situation in which we do not know who receives such aid and why. The only standards arise out of the provision of law – but as we indicate further in this report, they are not precise enough and result in discretionary granting of legal aid.

We should consider the establishment of a **separate legal aid fund**. It would be possible to determine standards for granting aid within specified funds – so that even if not all who need such aid receive it, at least it is clear who may apply for such aid, on what principles, and having fulfilled what criteria.

We should also consider establishment, as in other countries, of an **independent institution** administering such fund (e.g., a Legal Aid Board). Such a board could carry out a **planned policy**. It may search for sources of funding of legal aid – for example, the possibility of a partial contribution of represented persons to such costs could be considered. Knowing the capacity of the legal aid fund, the board could decide on detailed criteria for granting aid. It should also conduct surveys on the system's efficiency.

Introduction of such reform does not automatically have to involve an increase in costs. It is important, however, that expenses are incurred in a rational manner. Comparative surveys carried out in different countries suggest that, depending on the manner of spending, the same money may be used to provide more people with legal aid.

¹⁹ According to information obtained from some judges, the problem of the lack of funds and a postulate of persons managing courts to limit expenses, including expenses for legal aid, has been constantly present.

II.2. Number of cases supported by the state budget for legal aid

Although we know the amount of expenditures incurred by the state for *ex officio* legal aid, it is impossible to determine the number of cases in which such aid is granted. The only data on the number of cases comes from legal professions – the Legal Advisers and the Bar. The legal advisers' data seems to be relatively reliable, while the Bar's information, although published each year in *Rocznik Statystyczny GUS* (A Yearbook of the Main Statistical Office) as official, is not at all reliable.

The number of “private” and *ex officio* cases reported by attorneys²⁰

Year	1997	1998	1999	2000	2001	2002
Private	154,227	137,736	141,478	128,432	180,432	173,247
including						
criminal	45,957	39,129	36,101	36,844	46,461	47,547
civil	93,740	85,953	87,957	78,307	101,194	97,102
other	14,530	12,654	17,420	13,281	32,777	28,598
Ex officio	44,215	47,460	54,294	64,983	88,086	87,612
including						
criminal	37,449	40,335	46,229	52,053	75,858	77,174
civil	5,766	6,188	6,946	6,822	10,870	9,916
other	1,000	937	1,119	6,108	1,358	522
Total	198,442	185,196	195,772	193,415	268,518	260,859

This data was obtained in the following manner: each half a year, all professionally active lawyers within a particular region send information on the number of cases to Regional Councils of the Bar. Based on the received information, a list is prepared and sent to the National Council of the Bar.

The number of attorneys who filled in and submitted an information form is not known. Based on verbal information provided by representatives

²⁰ Data collected by the National Council of the Bar and published in the Statistical Yearbook: *Zestawienie statystyczne o działalności adwokatów w Polsce* (Statistical information on activities of attorneys in Poland); data for 2001-2002, prepared by the chief accountant of the National Council of the Bar, was made available by the Council's Presidium.

of the Bar, it can be assumed that about 60–70 percent of the attorneys all over the country filled in the surveys. It should be emphasized that such an official publication as the Main Statistical Office's yearbook has been **publishing unreliable data for years**, without any information on its adequacy. This data is later quoted and treated as accurate.

Resolution No. 42/01 of the National Council of the Bar of 3 March 2001, introduced an important change to the principles for practicing as an attorney, by providing that “an attorney practicing individually or in another form is obliged to submit to the Regional Council of the Bar information on the number of cases under civil, criminal or administrative law, with consideration for cases appointed *ex officio* and permanent or one-time contracts, within a month after the end of a calendar year.” The future will show whether this change brings the expected results; however, data for 2001 and 2002 is already fuller than in previous years.

On the other hand, it should be emphasized that in order to obtain an accurate picture of the situation, the **notion of an “ex officio appointed case” needs to be defined**. If several attorneys provide *ex officio* legal representation consecutively in the same case (in the same or different instances) and each of them reports the case, then the number of cases indicated by attorneys will not correspond to the actual number of cases in which legal representation was appointed *ex officio*.

The best data concerning the number of cases in which *ex officio* legal representation was appointed can be obtained from court statistics; however, although such statistical information is very detailed, it does not at present include any data on appointment of *ex officio* attorneys. We suggest changes in this respect.

It may be concluded from the collected data that the number of criminal *ex officio* cases increases every year. A similar tendency can be observed in civil cases, although their number dropped in 2000, only to increase significantly in 2001 and to drop again in 2002. It is not clear, however, whether these changes result from a more frequent appointment of *ex officio* attorneys or whether they are due to the fact that different numbers of attorneys report their cases in particular years.

The number of *ex officio* cases reported by legal advisers²¹

Years	1997	1998	1999	2000	2001	2002
Total <i>ex officio</i> cases	18	157	378	570	854	1,339

The possibility to appoint legal advisers in *ex officio* cases appeared in 1997. It is easier for the Regional Chambers of Legal Advisers to monitor the number of such cases as they appoint legal advisers themselves; besides, such cases are much less numerous than those conducted by attorneys. It is also important to remember that legal advisers cannot appear *ex officio* in criminal cases (except for misdemeanor cases and, of marginal importance, representation of a legal person) and family law cases.

The information of the National Council of Legal Advisers on the number of *ex officio* cases leads to a conclusion that appointment of legal advisers in this capacity is not very popular. The existing possibility, therefore, is not sufficiently used.

Although every year the number of cases in which legal advisers are appointed clearly increases, it seems that they could be appointed more often and, thus, relieve the Bar.²² This would not even require any legislative changes, but rather **changes in courts' practice** as courts decide whether an attorney or legal adviser is appointed to provide *ex officio* representation.

II.3. Courts' caseload and the number of persons tried in criminal cases

It is worthwhile to compare the number of cases conducted by attorneys (bearing in mind, however, that presented data is lowered) with an annual receipt of cases by courts.

²¹ Data obtained from the National Council of Legal Advisers.

²² Attorneys, whose opinions we obtained in the pilot survey, estimate that the number of *ex officio* cases exceeds their capacities, see below.

Cases examined in common courts (in thousand)²³

Cases in thousand	1997	1998	1999	2000	2001	2002
Remaining from last year	1,534	1,499	1,894	1,771	1,824	2,245
Received in a given year	5,018	6,446	6,614	7,415	8,392	8,697
Total cases examined	6,552	7,945	8,508	9,186	10,216	10,942

The above table demonstrates only the general scope of work to be carried out by courts in Poland, and indirectly the scope of legal aid that has to follow. The table reveals that the number of cases received by courts has been **consistently increasing** (as comparison, in 1991 there were 2,740 thousand, in 1992 already 4,191 thousand and in 2002 – 8,697 thousand cases received). In the same period, the number of attorneys and legal advisers has remained almost the same.

Receipt of cases by common courts according to their types (in thousand)²⁴

Cases in thousand	1997	1998	1999	2000	2001	2002
Criminal	762	849	881	1,081	1,543	1,862
Civil	2,781	3,339	3,532	3,903	4,018	4,198
Family law	830	873	886	925	964	945
Labor law	183	200	208	252	352	333
Social security	139	257	262	365	447	302
Commercial	322	927	846	888	1,069	1,058
Total	5,018	6,446	6,614	7,415	8,392	8,697

²³ Statistical Information, Organizational Department, the Ministry of Justice.

²⁴ Organizational Department, the Ministry of Justice.

The table reveals that there were over two million criminal and family law cases alone (in which only attorneys can act as representation) in the year 2000, which meant 364 cases of this type per attorney (assuming that 5,500 people practice this profession). On the other hand, courts receive twice as many civil cases as both criminal and family law cases taken together, i.e. almost four million (and it is worth remembering that both parties are entitled to representation in each case).

It is also useful to compare the above number with the number of *ex officio* representation in civil cases – attorneys declare that they were assigned to about 7 thousands of such cases in 2000 and almost 11 thousand in 2001. If we add one thousand *ex officio* cases reported by legal advisers, it turns out that *ex officio* representation was assigned in 0.3 % of civil cases in 2001.²⁵ There were significantly more criminal cases in 2001 and 2002 than in 2000; however, some of them were misdemeanor cases taken over by courts (and in such cases legal advisers may also provide defense).

Moreover, it should be remembered that in addition to common courts, also military courts and the Chief Administrative Court receive cases in which attorneys appear. The Chief Administrative Court receives an increasing number of cases each year – 55 thousand complaints were received in 1999, 65 thousand in 2000 and as many as 75 thousand in 2001.²⁶

In order to compare the number of lawyers who may represent parties and the number of cases received by courts, we should take into consideration legal advisers in cases in which they may appear. Currently, there are about 8 thousand legal advisers who may represent natural persons.

²⁵ Due to incomplete data this is, obviously, an estimation.

²⁶ *Information on activities of the Chief Administrative Court in 2001*, Warsaw, April 2002, table 1.

The number of persons tried by district courts in criminal cases²⁷

Year	1997	1998	1999	2000	2001	2002
Convicted (including)	230,882	225,696	211,941	240,290	332,457	357,376
imprisonment	26,637	26,412	24,233	33,313	39,296	37,514
conditional suspension of imprisonment	124,129	125,031	128,561	149,216	190,528	212,047
Acquittals and renouncements of punishment	10,522	10,913	10,682	10,970	10,241	10,756
					1,564	1,798
Conditional discontinuance:	21,284	21,448	25,442	23,347	26,905	30,075
Discontinuance:	17,796	17,732	15,995	14,995	14,087	15,555
Total tried:	280,484	275,789	264,060	289,602	385,401	415,560

The above data reflects only the number of criminal cases examined in district courts.

Cases pending in courts of higher instances should be added to that number. Regional courts received 240 thousand cases and appellate courts received 21 thousand cases in the year 2000.²⁸

²⁷ Organizational Department, the Ministry of Justice.

²⁸ Ibid.

The number of people tried by regional courts in criminal cases in the first instance²⁹

Year	1997	1998	1999	2000	2001	2002
Convicted (including)	7,509	8,372	8,621	9,864	11,014	10,864
– imprisonment	4,803	5,155	4,944	5,624	6,979	6,744
– conditional suspension	2,550	3,003	3,535	4,112	3,926	4,023
Acquittals and renuncements of punishment	568	583	509	442	452	488
			29	28	31	21
Conditional discontinuance	37	44	52	52	39	49
Discontinuance	103	101	75	135	107	64
Total tried	8,217	9,100	9,286	10,521	11,643	11,486

II.4. The number of attorneys and legal advisers

The above-presented data on the consistently increasing courts' caseload and the number of criminal cases tried should be compared with the number of attorneys and legal advisers.

The number of attorneys and attorney apprentices³⁰

Year	1997	1998	1999	2000	2001	2002
Attorneys	7,260	7,153	7,156	7,020	7,232	7,449
Apprentices	561	734	840	972	980	1,101
Total	7,821	7,887	7,996	7,992	8,212	8,550

²⁹ Organizational Department, the Ministry of Justice.

³⁰ The National Council of the Bar, *Zestawienie statystyczne o działalności adwokatów w Polsce* (Statistical information on the activities of attorneys in Poland).

The above-presented data indicates that **the number of attorneys has been basically stable** over the last few years. As comparison, twelve years ago, in 1990, there were 6,902 and in 1995 there were 7,277 attorneys.

On the other hand, at the end of the nineties, the number of attorney apprentices increased; in 1990 there were 407 of them in Poland, while in 1995 only 391. Obviously, judging by the number of apprentices, the number of attorneys will grow but it is doubtful whether it grows enough for the Bar to handle all cases, including *ex officio* ones.

Unfortunately, it is difficult to determine precisely the number of professionally active attorneys because obtained data includes both retired attorneys and persons registered with the Bar but not practicing their profession.

It is estimated that there are about 5,500 practicing attorneys.

Not all of them accept *ex officio* cases; 10 members of the National Council of the Bar and about 20 members of governing bodies of particular Regional Councils of the Bar are released from this obligation by the corporation.

Moreover, there is also a group of lawyers who, when appointed *ex officio*, find substitutes for these cases and sometimes, mostly in big cites, pay them an additional remuneration.³¹

There are finally lawyers who do not take *ex officio* cases for reasons that are not fully clear – they are not appointed by courts either because of their influences, or because judges are not satisfied with their work.³²

³¹ The so-called “selling of *ex officio* cases”.

³² The scope of this phenomenon has not been examined; information and opinions taken from discussions with attorneys and judges.

The number of legal advisers and their apprentices³³

Year	1997	1998	1999	2000	2001	2002
Legal advisers	20,038	20,197	20,326	20,343	20,226	20,580
– retired	2,668	2,435	1,557	2,630	2,505	1,854
– pensioners	955	630	699	721	749	527
practicing	14,037	15,689	16,426	16,645	16,733	16,762
– employed	7,345	8,032	10,012	7,969	9,371	9,467
– partnerships	2,377	4,594	5,256	4,748	6,091	7,713
– law offices	170	44	860	956	1,066	1,320
Apprentices	1,595	1,728	1,857	2,472	2,542	2,692
Total legal advisers and apprentices	21,633	21,925	22,183	22,815	22,768	23,272

As can be observed, **the number of legal advisers**, similarly to attorneys, is quite **stable** and increasing only slightly. On the other hand, the number of apprentices, who will increase the corporation's resources, has been growing.

Unfortunately, the above **data is not fully clear** and there are many instances when it is not possible to simply add up particular columns of the table.

From the point of view of *ex officio* legal aid, data on legal advisers practicing in individual offices or partnerships is particularly important since they may represent natural persons before a court.

³³ The National Council of Legal Advisers, *Informacja o ruchu kadrowym radców prawnych i aplikantów radcowskich* (Information on employment of legal advisers and apprentices).

II.5. Caseload increase vs. the number of attorneys and legal advisers

By comparing the above-presented data with the number of lawyers, we may attempt to make estimations and formulate certain conclusions.

The presented data reveals that the **number of cases received by courts has increased** over the last 10 years (1991-2001) from 2,7 to 8,4 million – this means an increase **by over 300 percent**. On the other hand, the **number of attorneys has increased only slightly**, by only 5 percent (from 6,9 thousand in 1990 to 7,2 thousand in 2001).

The number of legal advisers has also increased insignificantly. Since 1997, when the nature of legal adviser's profession was finally established as a public trust profession and, consequently, equated with attorney's profession (with certain differences maintained), the number of legal advisers has been almost the same. On the other hand, due to the fact that the professional role of legal advisers has changed, today they appear more often in court. They represent mostly entities conducting economic activities, the number of which has considerably increased since 1989, but what is important, some legal advisers may and do represent natural persons.

A huge disproportion between the caseload increase and the number of both professional groups is however apparent.

The number of people convicted in the first instance in criminal cases without a lawyer. As demonstrated above, the number of people convicted in criminal cases by district and regional courts of first instance totaled 250 thousand (and the number tried was 300 thousand) in the year 2000. The above-quoted data of the National Council of the Bar reveals that attorneys handled 88,897 criminal cases (total private and *ex officio*) in the year 2000. This number, however, does not fully correspond to reality. Assuming that only 60 percent of attorneys provided information, it can be estimated that attorneys handled criminal cases for 148 thousand clients; if the information provided by the National Council of the Bar is from 70 percent of the corporation's members, that would indicate that attorneys conducted criminal cases for about 127 thousand people.

In 2001, the number of convicted in the first instance clearly increased and amounted to 340 thousand (from among 393 thousand who were tried). In the same year, a significantly higher number of attorneys – although we do not know for certain what their percentage was – reported dealing with 122 thousand criminal cases. In 2002, over 368 thousand people were convicted in the first instance (from among 427 thousand who were tried), and attorneys reported dealing with over 124 thousand criminal cases. Therefore, **at least half of the people convicted in the first instance did not have an attorney’s assistance** in these cases. However, as a consequence of described deficiencies and defects of statistics kept by the Ministry and the corporation, a more precise determination of the number of people convicted without an attorney seems impossible. The number of people penalized with imprisonment who were deprived of a defender’s assistance is not known, either.

II.6. Opening of legal professions

The problem of limited access to legal professions seems to be directly linked to the disproportion between the courts’ caseload increase and the number of lawyers entitled to represent parties in court, as well as capacities of lawyers (particularly attorneys) concerning *ex officio* representation.

A comparison of the number of professionally active attorneys with the number of Polish citizens reveals that **there are much fewer lawyers in Poland than, for example, in the European Union or applicant countries**. For example, there are about 140 thousand attorneys working in Italy and Spain respectively, 116 thousand in Germany, 12 thousand in the Netherlands, 15 thousand in Belgium and 33 thousand in Portugal. In the Czech Republic and in Hungary there are 8 thousand attorneys respectively, and in Bulgaria there are 10 thousand.³⁴ “None of the European Union countries apply *numerus clausus* when admitting to the profession, either”.³⁵

³⁴ Data on the number of attorneys is collected by CCBE – Conseil des Barreaux de l’Union Européenne (Council of the Bars and Law Societies of the European Union) and is available at its Web site (www.ccbe.org/en/stat_en.htm).

³⁵ Quoted after Rupert Wolff, President (in 2001) of CCBE – the Council of the Bars and Law Societies of the European Union, the associated members of which include Polish Bar and Legal Advisers; Sofia, March 2002.

Hopefully, the recent criticism of the corporation's admission method, limiting the number of attorneys, and the present discussion on a greater opening of the Bar will bring changes also in this field.

Although issues related to the "closed legal professions" have been criticized and discussed for years, the debate concerning a bigger opening of the legal profession commenced on a big scale in 2002.

Media took an interest in the problem and many publications on the subject appeared.³⁶ The Ombudsman has repeatedly criticized the present principles of admission. The problem was proposed for consideration by non-governmental organizations (the Stefan Batory Foundation during the "Legal professions – crisis of public trust" debate in April 2002, the Helsinki Foundation for Human Rights during the Legal Aid Forum in the Polish Parliament in June 2002).

A student organization, ELSA, is also concerned with the openness of legal professions. During the Nationwide Days of Legal Education at the law departments, the "60,000 law students vs. the legal services market" debate was conducted at the Warsaw University. A question was considered whether the legal services market is already saturated with persons providing legal aid and whether such conclusion can be reached from the social point of view.

An article of a law graduate (M. Kłaczyński) not accepted for attorney apprenticeship and his complaint to the Chief Administrative Court provoked many publications and opinions. In December 2001, the case had been submitted for examination by an enlarged 7-person panel of the Court, which after a hearing in July 2002 decided to suspend the proceedings and refer a juridical question to the Constitutional Tribunal.³⁷ The Chief Administrative Court asked the Constitutional Tribunal whether Article 58, Section 12, letter j of the Act on the Bar, pursuant to which determination of principles for an attorney apprenticeship competition falls within competencies of the National Council of the Bar, and Article 40,

³⁶ Most publications devoted to this problem have been collected on a Web site created by young law graduates advocating changes in access to legal professions (www.fairplay.org.pl).

³⁷ Decision of the Chief Administrative Court of July 1, 2002, file No. OSA 1/02, was published in *Palestra* No. 9–10 of 2002, (www.adwokatura.org.pl).

Section 4, of the Law, which provides that the Bar's chambers are entitled to define the minimum and maximum number of their members, are consistent with the Constitution. The Constitutional Tribunal combined examination of this juridical question with proceedings initiated as a result of a similar question of the Chief Administrative Court concerning access to legal adviser apprenticeship. The Tribunal's decision in this case may influence the direction of changes in the system of recruiting attorney and legal adviser apprentices and thus, indirectly, the number of representatives of both professions.

The Bar's governing bodies reacted strongly to the criticism; advocates of the changes are said to fight the Bar and the proposed changes are treated as an attack at the Bar's independence. Representatives of the Bar have often voiced their opinions both in media and in the corporation's periodical "Palestra".³⁸

In reference to the above-mentioned case pending in the Chief Administrative Court, the President of the National Council of the Bar, attorney S. Rymar, "observed disturbing tendencies to limit professional autonomy. Errors in activities of other new professions constitute the basis for evaluation, as a rule incorrect, of professions with long-established traditions, and in particular the Bar. Some people from the ruling circles want to do business on populism and demagogy"³⁹.

According to the Disciplinary Prosecutor of the National Council of the Bar, attorney J. Naumann, "objections towards the professional bodies are usually raised with respect to imperfect procedures while, in fact, they are aimed at challenging the most important prerogative of attorneys, i.e. determination, application and execution of criteria for accepting into the Bar. If the possibility of shaping criteria is taken away from the Bar's self-management, the Bar will cease to exist".

Attorney Piotr Blajer acknowledged, for example, that "a model for the Bar's protection has to be developed, and he agreed with an opinion that law professors [...] create opinions and lobby for changes in the training of apprentices".

³⁸ Opinions of attorneys included here are quoted after *Palestra* No. 9–10 of 2002.

³⁹ *Palestra* No. 9–10 of 2002, also available at the Bar's Web site (www.adwokatura.org.pl).

Vice-president of the National Council of the Bar A. Kubas “proposed that the National Council of the Bar develop a program and strategies defining the principles, directions and methods for protection of the Bar’s interests before the Polish Constitutional Tribunal in relation to the complaint by M. Kłaczyński”.

The above-presented opinions show how sensitive the problem of admission to the profession is for the Polish Bar and what emotional reactions it evokes. This proves the need for a serious debate based on arguments and development of a socially advantageous solution.

It should be emphasized that the problem of admission to the profession cannot be treated as the Bar’s internal problem only. The issue relates not only to the access to the profession for many young lawyers but also access to professional legal assistance for all citizens who need it. This problem has a **social dimension**.

The problem of a bigger opening of the profession has anyhow been raised within the Bar repeatedly in the recent years; criticism by the corporation’s members has not led to any serious changes, however. Therefore, it seems that the Bar is not able to find a solution on its own.

In the current situation, the Ministry of Justice should develop a **better model of recruiting** to the profession that would benefit the citizens. This should be done in cooperation with the Bar, scientific circles, and non-governmental organizations based on arguments and not emotions. The President of the National Council of the Bar, attorney S. Rymar, has in any case announced “undertaking discussions with the scientific world and representatives of the Helsinki Foundation for Human Rights”.

II.6.1. Opening of legal profession – the parties’ arguments

A detailed description and analysis of the problem of access to legal professions exceeds the scope of these comments. On the one hand, however, it is worthwhile to recall some of the arguments used in the debate, and on the other, to present the proposed solutions (without subjecting either to a detailed evaluation or analysis).

Both the insufficient number of attorneys and the very admission procedure are being criticized in the current system; below please find some of the **arguments used by advocates of the changes**:

- the very fact of limiting the number of attorneys results in restriction of citizens' access to professional legal assistance; this has been recognized by the Ombudsman and has also been an experience of many social organizations providing advice; it is also evidenced by the fact that 3 times as many cases are received by courts than 10 years ago while the number of attorneys remains the same;

- sometimes the possibility to select an attorney is also very limited, particularly in smaller centers where there are often not enough practicing attorneys – for example one or two – in a place with several thousand inhabitants (within a court district where there are, for example, 10 judges, only one or two attorneys have an office);

- attorneys' services are often too expensive and since there are so few attorneys they may pick and choose their clients;

- attorneys themselves complain about the excessive burden of *ex officio* cases claiming that there are too many of such cases and they are not able to handle them;

- attorneys take on too many duties and handle too many cases, hence constant conflicts of dates that impair effectiveness of the administration of justice;

- it is often impossible to find a lawyer to handle a case;

- it is most difficult to find an attorney who would agree to conduct a case against another attorney; due to professional solidarity and lack of competition, a certain social group (persons who want to sue a lawyer) is devoid of legal aid;

- competition among attorneys is very limited which has a negative impact on the prices and quality of services, and on ethics of attorneys who do not have to make an effort yet still have clients;

- procedure of admission to the profession is not objective;

-
- there are no unified admission criteria, exams are organized by regional chambers that determine the number of persons and principles of accepting into apprenticeship,
 - exams consist sometimes of two parts (a test and an oral exam) and sometimes are limited to the oral part only;
 - despite requirements of the by-laws, protocols from exams are not drawn up or are incomplete;
 - there are no clear procedures or social control over the admission procedure;
 - arbitrariness and nepotism (there are cases when examination boards and councils adopting resolutions on entering into the list of applicants include family members or patrons of candidates, who already promised them employment – although some of these persons do not participate in examination of the “related” candidate, they, however, evaluate his/her competitors).

Formal and legal arguments are being raised in addition to the above-listed objections as to the “merits”, concerning clear, objective and equal treatment of candidates and the general postulate of respect for public interest – also through increased competitiveness in the legal services market.

Regulating the legal situation of persons outside of the legal corporation with internal acts issued by its governing bodies causes doubts in view of accepting a closed catalogue of sources of the universally binding law in the Constitution. The Bar is also accused of exceeding the limits of a professional self-management’s competencies. Self-managements of the so-called public trust professions are to represent persons performing the profession and oversee “due performance of such professions in accordance with, and for the purpose of protecting, the public interest”.⁴⁰ Does overseeing due performance of a profession include limiting access to this profession – actions towards candidates for apprentices, hence persons not being members of the corporation?

⁴⁰ Article 17.1 of the Constitution of the Republic of Poland.

According to **representatives of the Bar's** governing bodies, the above-presented arguments of advocates of the profession's opening are either untrue or result from lack of understanding of the market situation, or their authors do not comprehend the essence of the Bar's autonomy. The Bar emphasizes that:

- due to the society's impoverishment, some of the Bar's members cannot find any employment or support themselves only with *ex officio* cases;

- a significant increase in the number of attorneys will create unhealthy competition in the market that will affect the quality of service and professional ethics;

- the Bar has no technical or financial capabilities to train more apprentices;

- requirements for future attorneys are very high and only the best are able to fulfill them;

- admission exams are objective and honest, their reliability is questioned by persons who do not fulfill substantial requirements;

- many apprentices have no family connections with the Bar and the objection of accepting "only attorneys' children" is not true;

- determining who will become an attorney results from independence of the Bar;

- only the process of admission and training within the corporation guarantees the high professional and ethical level of persons practicing the profession;

- profession of an attorney is a mission, it requires vocation and as such cannot be subject to "market principles".

However, as a result of the public debate and court cases (in particular, the above-mentioned question referred to the Constitutional Tribunal by the Chief Administrative Court), the Bar has joined the discussion and has undertaken certain new steps (work on the new by-laws of an apprenticeship competition).

In the opinion of the former President of the National Council of the Bar, attorney Cz. Jaworski, “the number of practicing attorneys should increase from about 5.5 thousand to at least 10 thousand. Every year, the number of admitted apprentices should be increased, contacts and discussions should be established with the Helsinki Foundation fighting against the Bar, we should discuss cooperation with consideration for differences in positions adopted. We should try to resolve the conflict between the Bar and universities’ law departments, and attempt to clarify and alleviate this conflict”.⁴¹

Greater transparency of admissions is also postulated - attorney Henryk Rossa recommends that “a proposal to invite law professors to our examination boards be considered”. On the other hand, “attorney J. Naumann argued against the proposal of attorney H. Rossa to invite university professors to participate in competitions for attorney’s apprenticeship. He asked: In what capacity would they participate? As censors, guards of our morality? He expressed an opinion that clear admission criteria would be enough and should resolve the problem of law professors creating negative opinions”.⁴²

II.6.2. Access to the legal advisers’ profession

It should be emphasized that although the above comments focus on access to the attorney’s profession, they nevertheless apply to a large extent to the profession of a legal adviser. It seems that **appropriate regulations should not differ**. On the other hand, for several reasons, less critical comments were directed at legal advisers during the public debate.

The legal advisers’ self-management accepts more apprentices – in 2001, the Bar educated 980 apprentices, while legal advisers two and a half times more – 2,542 (similarly in 2002, there were 1,101 attorney apprentices and 2,692 legal adviser apprentices).

Legal advisers as first resigned from the system of limiting the number of admissions. However, as in the Bar’s case, doubts are still raised by consistency of the corporation’s regulations, issued without a proper statutory delegation, with the Constitution, and by the threat to the exams’ objectivism.

⁴¹ Palestra No. 9–10 of 2002.

⁴² Ibid.

II.6.3. New regulations.

Despite replacing the previous limit of places with the limit of points, objectivism of admissions is not guaranteed. According to a declaration of the legal advisers' representatives, admissions are determined based on merit and each person who receives a specific number of points (at least 120 from 150 possible), is accepted into apprenticeship.

In the case of legal advisers, only half of the available points are of an objective nature (70 points maximum for the written test and 5 points for a mark on a diploma). However, the remaining points, which de facto determine who is accepted, are allocated more or less arbitrarily. Therefore, examiners are still able to limit places by appropriate determination of criteria of the competition's part **evaluated arbitrarily**. This system does not eliminate the risk of nepotism, either. Moreover, there is no nationwide standardization because questions are determined by regional councils and their level of difficulty may vary considerably.

The Bar has also recently taken this direction. Adoption of the draft new principles was announced during a debate at the Warsaw University in October 2002, and media were informed immediately afterwards.⁴³ However, at the end of December 2002, the author of the report received information from the National Council of the Bar that work on the principles is in progress and they cannot be made available yet. In the end, the new principles were adopted as a resolution of the National Council of the Bar of September 2002 and the new regulations' entry into force was set at 1 March 2003.⁴⁴ Similarly as with legal advisers, after passing the written tests, admission to the apprenticeship is decided based on points obtained during an oral part of the exam evaluated arbitrarily. Examination boards have not been extended, either; regional councils were only given a possibility to invite a representative of a university's law department as an observer (§5.5).

⁴³ See A. Stefańska, *Kto zda, ma się dostać. Adwokatura odchodzi od limitów na aplikację*, Rzeczpospolita, 30 X 2002 (www.rzeczpospolita.pl).

⁴⁴ See "Regulamin konkursu na aplikację adwokacką" (Regulations of examination for the attorney apprenticeship) adopted by the National Council of the Bar 28 IX 2002 (www.adwokatura.org.pl).

Regional councils are still responsible for preparing tests and questions. On the other hand, the Bar's newest study draft amendments to the Act on the Bar go much further;⁴⁵ they provide for standardization of questions and their generation by the National Council of the Bar (Art. 118) and for a completely different composition of examination boards, which, in addition to five attorneys (three from a regional council and two from the National Council of the Bar), would consist of a representative of the Minister of Justice and a representative of the scientific law circles (Art. 119).

Although the suggested regulations are admittedly a step forward in relation to previously binding procedures, they do not solve all problems raised in the debate on the closing of the profession.

II.6.4. The need for changes

Regardless of the public debate and the discussion within the Bar, the current situation requires definite changes developed with participation of the concerned entities.

Different solutions are possible and it is not our goal to provide a ready-made recipe. We can, however, indicate minimum conditions to be fulfilled when admitting to the professions and examples of proposed solutions.

Minimum requirements:

– **objective admission criteria** – since the goal of admission is to select the best candidates, criteria should be objective, the less unclear specifications the better, they should be straightforward and known to all candidates (a person who wants to join the Bar must know in detail, and several years in advance, what conditions he/she would have to fulfill);

– **standardization** – both criteria and procedures should be the same all over the country; otherwise candidates will not have equal chances and the level of admitted will be different (at present, both criteria, i.e. the required knowledge, and procedures, e.g. examination consisting of one or two parts, vary in particular chambers);

⁴⁵ The study draft of the Act on the Bar prepared by the Team working on the draft law, 11 IX 2003 (www.adwokatura.pl).

– **transparency** – admission procedure and criteria should be clear, documentation (e.g. examination protocols) should be drawn up conscientiously and should be made available, observers, for example from the academic world, other legal professions, social organizations, should be allowed during examinations

- **selection based on competencies** – these should replace quantity limits;
- **preparation of questions** and conducting examination should be entrusted to such persons that would eliminate accusations of partiality or nepotism.

Proposed solutions:

– it would be possible to introduce a model of apprenticeship fully organized by the state (German model);

– we could also consider introduction of the model of individual preparation for the profession (without apprenticeship classes) and limit selection to a professional exam (American model) or additionally introduce, as a condition for admitting to the professional exam, the requirement of a professional training within the administration of justice;

– another solution would be the admission and professional exams carried out by state commissions (in which attorneys would play an appropriate role, thus they would have influence on determination of criteria the candidates have to fulfill) while apprenticeship would be organized by professions;⁴⁶

– it is finally possible to leave exams to the profession (assuming standardized objective criteria, transparency and social control) but in a different form – for example, at the level of appellate court rather than local Bar chambers.

It should be emphasized that in a state governed by the rule of law the manner of admission to public trust professions should strengthen and not diminish or question such trust at the outset. The admission manner and

⁴⁶ This direction is adopted in the draft Law on the Bar, Law on Legal Advisers and Law on Notaries Public proposed by political party Prawo i Sprawiedliwość; the drafts assume admission and professional exams carried out by state commissions and apprenticeship by professional corporations. The drafts are therefore going in the right direction of objective criteria and clear procedures, see E.Siedlecka, *Prawnik dla każdego*, Gazeta Wyborcza of March 4, 2003 (available at www.gazeta.pl).

criteria of all exams should be therefore fully objective and carried out before a commission the impartiality of which is not questioned or least questioned.

II.7. Transcript from the “Legal Aid Forum”, June 7–8, 2002, the Parliament of the Republic of Poland

Magdalena Krzyżanowska-Mierzevska, legal adviser, Registry of the European Court of Human Rights; Strasburg

[...] If we compare Polish numbers with numbers from other countries, more or less 5% of persons who file a complaint with us in the first stage of proceedings are represented by any lawyer, whether an attorney, a legal adviser or anybody at all.

This number of 5%, it may be at most 6 or 7%, has not changed since I started to work for the Court, that is 9 years, and this – the number and the fact it has not been changing – somehow indirectly reflects also what is happening socially with respect to client’s access to an attorney. For some reason, this access has not been changing for years.

As far as other countries are concerned, let’s say Great Britain, 50% of suing persons (more or less, the numbers are from 40 to 50% but you see that the difference is substantial) are represented by a lawyer “straight away”, already with the first letter.

Attorney Jerzy Naumann, Disciplinary Prosecutor at the National Council of the Bar

Among accusations towards lawyers practicing law, a statement, or an accusation, about too few attorneys in Poland and the alleged closing of the way to join the Bar has been very popular recently. People formulating this statement forget, however, that the road to the attorney’s profession is completely open for judges, legal advisers and public prosecutors, as well as professors of law departments; it is enough to file an application for an entry into the list of attorneys and this horizontal flow is free from any restrictions. Persons formulating accusations forget, or simply do not know, that for several years we have been observing a violent drop in applications for entering into the list of attorneys from persons practicing other legal professions.

[...] What does this signify? This is not a good occasion to elaborate on the subject. The discussed phenomenon of the loss of attorney's profession's attraction in the eyes of other practicing lawyers cannot be omitted when analyzing the grounds for accusations against the Bar. In any case, if these demands were taken into consideration en bloc, the Bar would cease to exist. A public trust profession would be transformed into a group of fixers and bribers. This is not what we attorneys want. And this is not what the administration of justice wants, either. This is not what the state authorities and, luckily, not all of our clients want.

A thesis finding the basic reason of limited access to ex officio legal aid in the insufficient number of attorneys and legal advisers is based on a false prerequisite. A proper starting point for making such accusations, could only be a declaration of people who found it difficult to obtain help although they wanted or requested it. Meanwhile, all publications attacking the attorneys and legal advisers' corporations for limiting the number of new apprentices, take into consideration only opinions of those who would like to become members of the corporations. [...]

Surely, it is also worthwhile to replace shouting with exchange of substantial arguments, which particular circles of practicing lawyers have been asking for, so far, in vain.

Attorney Zofia Daniszewska, the Regional Council of the Bar in Białystok

I will speak no longer than for 2 minutes in such estimable gathering. I perceive this entire meeting organized by the Helsinki Foundation, in the following manner: the Foundation has tried to present the legal services market to us. From the President's speech, in which he reminded us that we have 12 thousand young people who graduate every year from law departments, [it follows] that they are willing to provide such services. In this room, there are representatives of corporations, I would say in their middle age, with excellent experiences and preparation that, it seems to me, could provide a model and guidance to this army of young people. Can we do anything about this?

Attorney Andrzej Kalwas, President of the National Council of Legal Advisers

Ladies and Gentlemen, we have introduced a very simple principle: there are no limits. [...] In any case, one thing is certain, I think that the Bar will follow in

our footsteps: only candidates who fulfill qualification criteria are accepted into apprenticeship. Very high qualification criteria. This even resulted in a situation that, when we resigned from any limits, we accepted fewer people than with limits established. Simply because qualification criteria are difficult to fulfill. Is it good or bad? Probably good.

Ladies and Gentlemen, this is not limiting admissions, but criteria of knowledge, healthy criteria of knowledge, that is, simply the best are accepted – these principles are and will be applied by us. Already in the beginning I will state that any attempts at restricting professional autonomy of attorneys or legal advisers will be unsuccessful. Not because we are such “daredevils”, and this is not any bragging on my part, either. Mandatory membership in the self-management is in the interest of the state and of the administration of justice

Attorney Claudia Frendler-Bielicka, legal adviser, Warsaw

As for the concept of a public defender office, ex officio defender office, and Legal Aid Board, we should consider benefits that may arise from establishment of such institutions for both corporations, namely it would be an excellent place where both corporations could educate apprentices, but I also think that this could be a place of training for prosecutor and court apprentices and due to the fact that costs of apprenticeship incurred by corporations and the administration of justice are high, some of the funds for opening such offices could constitute a form of financing for such training.

Michał Kłaczyński, Banking Law Center, the Jagiellonian University, Kraków

I would like to raise the issue of a deficit of lawyers in Poland. My question is – does any country and any legal system you represent encounter the problem that we have in Poland? I mean that the number of attorneys is not sufficient, as we may see when reviewing statistical data presented by Łukasz Bojarski in the report. The second issue is a question whether in any of your countries the numerus clausus principle is applied towards lawyers – are quantity limits of practicing lawyers established as in Poland where regional councils of the Bar every year determine the number of attorney apprentices admitted?

Peter van den Biggelaar, Director of the Legal Aid Board in Hertogenbosch, the Netherlands

In Holland, everyone may study law at a university and then become a member of the Bar after a 3-year supervised practice period. The numerus clausus system does not seem to be a good instrument, because, for one, it disturbs the market of legal services and a certain competition among lawyers. We have an appropriate number of lawyers in the country – 11,600 attorneys per about 16 million of residents.

Moshe Hacohen, Public Defender for the Region of Jerusalem, the Ministry of Justice – Public Defender Office, Israel

Over the last decade, we have witnessed a revolution – before we had a very similar situation and now the total number of lawyers in Israel is very high – 25 thousand per 6 million of residents. Previously, there was an invisible limitation introduced by the Bar involving a very rigorous exam enabling to practice the profession. In practice, only graduates of state universities were admitted to practice. As a result, many young Israelis went to study abroad and subsequently they had to undergo a complicated process of recognizing education – exams from Israeli law and finally a Bar exam. Later, revolutionary changes were introduced – in connection with privatization of the entire economy and introduction of market principles, about 6 years ago private law schools were created, and the legislator forced the Bar to accept the increasing number of attorneys. As currently the number of attorneys searching for work has been increasing in the market, we can act more and more freely, since we are an institution performing an important role in the labor market for lawyers, the profession supports our existence.

Linas Sesickas, attorney, adviser to the Constitutional and Legislative Policy Institute „COLPI” for Access to Legal Aid Reform in Lithuania

As for the second question – we have never had numerus clausus in relation to lawyers but, it has to be admitted, the access to the Bar was always very complicated. Only in the last 5 years, the number of the Bar’s members doubled from 500 to 1,000 persons. I would say that presently we have a rather liberal

system. As far as the number of lawyers is concerned, we have about 1,000 members of the Bar, 200 apprentices and about 1,000 lawyers employed in law offices for 3.5 million of residents

Rangita de Silva – de Arwis, Director for International Programs,
The Spangenberg Group – West Newton, Massachusetts, USA

No limits are imposed on the number of attorneys in the USA. Our research conducted in the state of Georgia reveals, however, that in some rural areas there are only 10–12 practicing attorneys, hence a judge is forced to appoint defenders for poor people from among them. This causes dissatisfaction among lawyers if e.g. a specialist in property or bankruptcy law is forced to handle a rape case. They complain of emotional discomfort but the judge forces them to handle the case therefore, according to them, the implementation of the Sixth Amendment to the Constitution is threatened. In other regions, we encountered a situation when part-time judges are at the same time part-time defenders. In my opinion, the shortage of lawyers may create unacceptable problems and our research in the state of Georgia proves that this leads to infringement of the American Bar Association's standards and professional ethics principles.

Prof. Andrzej Rzepliński, attorney, the Helsinki Foundation for Human Right

Obviously I would like to repeat what I said yesterday: reforms can by no means be aimed at undermining principles of legal professions' autonomy; this is an important achievement of the post-communist Poland, which should be strengthened and cultivated but – as with everything else – freedom obviously costs: it requires more responsibility, more openness. Otherwise, those who are not satisfied with the way professional corporations use this freedom, will more and more loudly advertise the return to what was before and what we do not want: the system of management, of commanding. Therefore, in our professional corporations we have to bring ourselves to use the freedom we have appropriately for our own benefit and for others and I repeat, equally for others and us.

PART III

LEGAL AID PRACTICE IN THE OPINIONS OF ATTORNEYS AND LEGAL ADVISERS

During a pilot survey carried out in October 2001 among the legal professions, we collected opinions on the legal aid system from 23 attorneys from the Kraków and Wałbrzych chambers, and from 19 legal advisers from various towns of Poland.

A more extensive survey would be required to obtain representative opinions of attorneys and legal advisers. The Bar and Legal Advisers' profession may conduct such survey themselves. Both corporations possess excellent instruments, namely their **professional periodicals**, "Palestra" and "Radca Prawny" respectively, in which a discussion on the legal aid system could be initiated and questionnaires could be published. The questionnaire developed by us could become a starting point for such work. Information thus gathered would allow gaining reliable knowledge about the problems and about functioning of *ex officio* legal aid within different chambers, which is very important. Problems and opinions of lawyers vary depending on the country's region and the size of a town in which a lawyer is practicing.

Although not representative, opinions of attorneys and legal advisers gathered by us are worth analyzing to identify the basic problems encountered by attorneys who handle *ex officio* cases.

III.1. The load of *ex officio* cases

All of the 23 interviewed attorneys have conducted *ex officio* criminal cases. Twenty persons in the sample have conducted *ex officio* civil, and only two attorneys – *ex officio* administrative cases.

On the average, *ex officio* cases constitute 30% of all cases conducted by attorneys (although differences between particular attorneys are rather significant – from 5% to 70%, the most frequent answers were close to or somewhat lower than the average).

The interviewed attorneys handle, on average, 40 *ex officio* cases a year (from 15 to 100, most often 30–40).

Two persons declared the ability to handle more cases; three said their caseload was exactly right; and as many as 18 stated that they had too many *ex officio* cases.

We also asked attorneys how many *ex officio* cases they would be prepared to conduct every year. Three persons had no opinion. Among the 18 attorneys who answered this question, the average number of cases was 27, which is precisely two-thirds of the attorneys' actual average caseload. Eleven persons in the sample declared readiness to conduct only up to 15 cases a year.

Among the 19 legal advisers in the sample, only 4 persons have ever conducted *ex officio* cases in their career (3 persons handled one case each, and one person handled three cases).

Legal advisers declare readiness to conduct *ex officio* cases, as declared by 15 out of 19 interviewed persons. In answer to the question about the number of such cases they could conduct per year, the interviewed indicated 7 cases at average (the answers ranged from 3 to 12 cases).

III.2. Remuneration for *ex officio* cases

Only two persons (one attorney and one legal adviser) did not have any problems in 2001 with obtaining remuneration for *ex officio* cases they conducted. The rest of the sample complained about considerable delays in payments – from several months to almost two years.

Some of the interviewed attorneys found it difficult to obtain remuneration for *ex officio* legal aid from all courts, while others argued that there were courts where the payments are made without delay.

Rates for *ex officio* cases and the procedure for calculating remuneration

Criminal cases. Every third interviewed attorney is satisfied with the current rates for conducting *ex officio* criminal cases while two-thirds consider the rates unsatisfactory.⁴⁷

As regards the procedure for calculating fees, almost half of the respondents find it satisfactory, and over a half voice the opposite opinion. The grounds for dissatisfaction mentioned most often by attorneys include: the court's failure to give due consideration to the attorney's work input in a specific case, lack of individual approach and always applying the minimum rates. Attorneys suggest the following changes:

- individual calculation of fees depending on the time actually spent on a case;
- introduction of hourly rates;
- remuneration based on a cost specification;
- payment of advances on remuneration;
- increasing the rates two or three times over the current minimum rates.

Civil cases. Two-thirds of interviewed attorneys found the rates for *ex officio* civil cases unsatisfactory; one-third were satisfied with the current rates.

The same number of interviewed legal advisers were satisfied and dissatisfied with the rates.

The procedure for calculating remuneration in civil cases is unsatisfactory in the opinion of over three-fourths of the attorneys and most legal advisers.

Comments and postulates are the same as pertaining to criminal cases: the suggestion that work input be taken into account when calculating fees, cost specification, introduction of hourly rates, increase of fees two or three times over the current minimum rates, and additionally, taking into account

⁴⁷ The survey was conducted in October 2001. At present, minimum rates providing basis for calculation of fees for *ex officio* cases have been raised by 20%, but at the same time, the upper limit of adjudicated remuneration has been lowered – previously, a court could adjudicate 200% of the minimum rate, currently up to 150%.

the number of hearings (each hearing paid for separately), the length of hearings and complexity of a case.

III.3. Procedure of appointment to *ex officio* cases

As follows from cases referred to the Helsinki Foundation for Human Rights, attorneys are sometimes reluctant to conduct *ex officio* cases because they specialize in a branch of law different than that involved in the case. Civil, commercial or financial law specialists are appointed to conduct complex criminal cases, while criminal attorneys receive civil cases. This results from a traditional approach, rather unrealistic today, that an attorney is seen as a versatile professional who can handle any case.

Asked about the procedure for appointment of an *ex officio* attorney, a considerable number of both attorneys and legal advisers spoke for modification of the current solution.

Over two-thirds of the interviewed attorneys were in favor of appointment from lists of attorneys/legal advisers who volunteered to conduct *ex officio* cases, and from lists of specialists in different branches of the law. Only one-fourth were for preservation of the current system (appointment from a list of all members of the profession according to their position on the list).

III.4. Appraisal of the quality of work in *ex officio* cases

Attorneys were asked to compare the quality of work of their colleagues in private and *ex officio* cases according to several criteria.

Despite a psychologically difficult situation, as attorneys were to evaluate the quality of work of their colleagues, over half of the interviewed stated that in terms of the number of meetings with a client, the quality of work in *ex officio* cases is inferior to work in private cases. One-fourth of the attorneys considered that quality lower in terms of procedural activity, frequency of substitutions, and other professional actions. Also as regards the reading of the case files, one-third of respondents were of the opinion that attorneys' activity is lower in *ex officio* cases.

III.5. Opinions and suggested changes formulated by attorneys and legal advisers

We asked attorneys and legal advisers to provide their comments on the law and practice of the current system of *ex officio* legal aid.

III. 5.1. Postulates as to the law

a) Attorneys

The interviewed attorneys proposed the following changes:

- Mandatory defense should be limited to persons whose sanity raises justified doubts, and granted by operation of law only to those in whose case the doubts are confirmed by expert opinions (the suggestion was mentioned by several respondents).

- A deadline for payment of a fee for *ex officio* defense and the right to default interest should be specified.

- Remuneration should be paid within one month of the completion of proceedings before a specific instance, and not after a judicial decision becomes final and valid, which often occurs much later.

- Higher rates for *ex officio* cases should be introduced.

b) Legal advisers

The interviewed legal advisers proposed:

- Attorneys and legal advisers' compulsory assistance should be introduced, leading to an extension of the duty to provide *ex officio* legal aid for the indigent (opinion expressed by several persons).

- All legal advisers should be obliged to conduct *ex officio* cases.

- A principle should be introduced that *ex officio* lawyers are appointed from the Bar and legal advisers' corporations in proportion to the number of members of these corporations.

- Mechanisms for supervising the quality of *ex officio* representation should be introduced.

- Rates for *ex officio* cases in labor and social insurance matters should be raised.

III. 5.2. Criticism of the current practices

a) Attorneys

The interviewed attorneys listed the following shortcomings of the present legal aid system in Poland:

- Frequent unjustified refusals by courts to grant an *ex officio* attorney, especially to the indigent in civil cases; on the other hand, appointment of an *ex officio* attorney without detailed verification of a given client's financial standing.

- Unequal *ex officio* caseload for attorneys.

- A court's failure to take into consideration an attorney's specialization and load of other cases.

- A lack of court's justification for an appointment of a given attorney (incidentally, the court has no such obligation).

- Too infrequent appointment of legal advisers to provide *ex officio* representation.

- The practice of informing attorneys that they have been appointed to provide *ex officio* defense without supplying the client's address and particulars as to his / her detention.

- A court's efforts to persuade an attorney, in the presence of the parties, to resign from remuneration from the State Treasury, which, in the opinion of interviewed persons, should be treated as a professional misconduct.

b) Legal advisers

Legal advisers listed the following:

- Too infrequent appointment of *ex officio* representation by courts, while this could reduce the cost and length of proceedings.

- Too infrequent appointment of legal advisers in *ex officio* cases.

- Unfair (careless) treatment of *ex officio* cases by attorneys and legal advisers.

III.6. Conclusions

Need of surveys. Opinions of attorneys and legal advisers, people who commonly provide *ex officio* legal aid, are of great importance and should be taken into consideration in any works concerning potential changes. A questionnaire distributed through corporations' periodicals would provide representative findings indicating both shortages of the system and suggestions of its changes. Such thorough survey would also show differences within individual chambers, as there are chambers where attorneys treat *ex officio* cases as "heavy burden", but there are also some regions where the level of affluence is low enough for some attorneys to base their practice on *ex officio* cases.

Problems with remuneration. As follows from opinions gathered from attorneys, their *ex officio* caseload is considerable and, at average, accounts for 30% of the respondents' professional activities. It is meaningful to relate this caseload to the fact that attorneys have been encountering problems in obtaining remuneration for such cases for many years. Outstanding payments have grown immensely. Consequences of such outstanding payments were severe for some attorneys: in one of the Regional Courts we have been told that, pursuant to an agreement with the court, as soon as funds became available, they were paid first of all to those attorneys indicated by the Regional Council of the Bar, who found themselves in dramatic financial circumstances as a result of outstanding payments for *ex officio* cases.

Funds for fees for *ex officio* cases are not separated and constitute a component of a broader, as discussed in part 2 of the report, category of expenses in the courts' budget. Courts are allocated specific funds from the state budget within the broad category of expenses and have no discretion to move funds from one category to another. In the event of financial difficulties, expenses under the heading "costs of judicial and prosecutor's proceedings", which include remuneration for legal representation, are among the **first to be cut down**. Information shows also that in some courts there are no delays in payments while in others they are significant. Reduction of expenses for legal aid has a variety of serious social consequences. On the one hand, as revealed by presidents of courts and judges, reductions

drive courts to limit granting of *ex officio* defense and representation where they are needed, hence diminishing access to legal aid for poor people. On the other hand, such reductions result in the lack of payment of attorneys' fees, which in some cases affects their living standard and makes them naturally reluctant to take up *ex officio* cases.

Legal aid fund. The above-listed reasons seem to justify our postulate to separate expenses for free legal aid as a budget category. We should also consider a proposal to establish a separate legal aid fund as in other countries. One of the problems of the current system is the lack of differentiation in fees depending on work input and cost specification of an *ex officio* attorney. A guaranteed legal aid fund would make it possible to differentiate fees, and making fees dependent on work input would be an obvious incentive to provide better quality services.

Caseload. The standards established within the European Union and the Council of Europe concerning an obligation to provide legal aid in criminal and civil cases, as well as the noticeable need to provide such aid to persons with insufficient means, require that the number of *ex officio* cases be increased. A question arises whether attorneys are able to handle more cases. Most interviewed attorneys consider their current load of *ex officio* cases as excessive. On the other hand, the legal advisers' corporation seems to have an unexploited potential in this area, and interviewed legal advisers declared their readiness to take up *ex officio* cases. The problem of increasing openness of legal corporations, discussed in part 2 of the report, is also significant for the possibility of extending legal aid's scope.

Public Defender Office. The effectiveness of the present system has to be considered as well. The findings of research conducted in several countries show considerable differences in the effectiveness of spending general funds on legal aid. Amounts spent by a state on legal aid within the traditional *ex officio* defense model (where all attorneys from the list are appointed for *ex officio* cases) are spent less effectively than the same amounts spent in models where attorneys are hired to conduct only such cases (e.g. a public defender office). In the latter solution, an average cost of a case is lower and more cases involving free legal aid may be conducted.

It seems that a Public Defender Office could potentially improve the situation, in particular in big centers where there are often problems with finding attorneys willing to handle big criminal cases. It would be also worthwhile to consider combining such an Office with **apprenticeship** – young lawyers supervised by experienced attorneys could gain professional experience in this way. It is also argued that the quality of service is better in the “staff attorneys” model, particularly because it is subject to special control mechanisms. Such attorneys do not have a problem with dividing clients into those “by choice” and “*ex officio*”. An introduction of a pilot Public Defender Office in one court district would allow evaluating its effectiveness, advantages and defects.

Information provided by the Bar’s team appointed to develop the Bar’s proposal of changes in the *ex officio* legal aid system, reveals that the model of a Public Defender Office is not taken into consideration by the team and other solutions are being examined instead. It seems, however, that particularly at the stage of surveys and study work, various solutions should be taken into consideration without limiting the range of interests.

Lists of specializations. Within the current model, it seems relatively simple to change the procedure for appointing attorneys and legal advisers to handle *ex officio* cases, so that their specialization and declared readiness to take up such cases are taken into consideration (most of the interviewed were in favor of such a solution). Of course, it might turn out that there are not enough volunteers; however, this problem can be solved with a system of lists: the lawyers willing to provide *ex officio* legal aid would be appointed as first, and only if their number is insufficient, would a list of all practicing the profession be referred to (in both events with consideration for specialization).

III.7. Transcript from the “Legal Aid Forum”, June 7-8, 2002, the Parliament of the Republic of Poland

Marek Nowicki, President of the Helsinki Foundation for Human Rights

Our intention was to search for such methods, such legal solutions and shape practice in a manner that would be better for everyone. Therefore, we have asked attorneys and persons of other legal professions, as well as clients, about what they want. We did not want to discuss anything that would cause a blockage by any of the professional groups. Hence constant questions: “what would be good for you”, “what would make you happy?” Thus, e.g. the proposal appeared to “draw up a list according to specializations”, as here clearly intensions of both parties meet and it seems to be sensible. In general, we did not want to present any proposals that we intend to “lobby for”. In this report, if comments are made on whether something could be done, they should not be treated as certain solutions that we intend to force. These are rather thesis for discussion, for provoking a discussion on what should be done to be reasonable. It is by no means the Foundation’s position that we would push in this direction.

Prof. Andrzej Rzepliński, attorney, the Helsinki Foundation for Human Rights

But since it is absolutely obvious that there are serious gaps in the legal aid system in Poland, sensible changes are required. Our conference, particularly in its international part, offered you proposals that were implemented in different countries; a Public Defender Office, contracting legal services, or a Legal Aid Board are institutions that could be considered. We do not have to re-invent the wheel [...] taking into consideration our traditions and our needs, and obviously taking into consideration the state budget but also the fact that most probably in a year and a half we will become a member of the EU, and probably already then the European constitution will be binding not only in the form of a declaration but in the form of a convention. [...]

Before I give you the floor, I would like the other panelists to speak briefly; as I understand, at least part of the Polish Bar may be expected to support, first of all, attempts at introduction of a possibility of attorneys’ specialization, so that they are not burdened with representation in cases in which they do not feel specialists

– in view of a really fast growing specialization and expansion of legal regulations. And secondly, as I understand, they would support a sensibly formed institution of a Legal Aid Board.

Attorney Zofia Daniszewska, the Regional Council of the Bar in Białystok

Other problems that we perceive: lack of transparency when granting such cases as signalized by some of the legal circles locally (I am not familiar with the Warsaw market or Bar), lack of control and evaluation – we know that we are talking about big money and nobody, even the Bar, has any influence on the way it is allocated. We realize that this is an extremely weak point of the current system; attorneys in the regions recognize it and alert us.

Personally, I favor the idea of a Legal Aid Board but I would see all professions in such a Board: judges, prosecutors, who receive our services equally with clients, I would also see professors and universities. I think that then we would grant such aid more justly.

Another problem, not last and perhaps the most important, is the quality of such services – and repeatedly proposed lists of specialists signalized but not worked out; it seems that in this respect, I may ask for help on how to create such lists - I find it hard to imagine that it would be fine if we enter ourselves in the lists at our discretion – I would expect certain problems here.

Attorney Emilia Nowaczyk, Poznań

I have been specializing in civil law, including commercial law, for 30 years and my experience will obviously influence the nature of my speech. [...]

I would like to refer to the proposals of improving the current situation raised here. My biggest concern is caused by the fact that the majority of ex officio cases relate to criminal law. Every time, a new ex officio case is received, and in my case there are several every month, I have a huge dilemma since I am not a specialist in criminal law. I cannot responsibly take such a case since, as I have mentioned, for 30 years I have been specializing in civil law. Therefore, I look for one of my colleagues who would like to replace me in this duty, I enter into an agreement, of course against payment, and pay for the service; every year,

this amounts to about 15 thousand PLN – these are expenses I incur for my substitution for ex officio cases, I receive a reimbursement from substitution of 2-3 thousand per year, the rest is my cost.

That is why I was very happy to see the proposal concerning specialization; obviously, if a task is to be allocated and carried out in a proper manner, it has to be directed to a specialist in a given field of law. [...] It so happens that the Bar has been afraid of specialization for many years; I think this is a problem it must resolve internally; life is becoming increasingly more complicated with respect to legal regulations and the issue of specialization is one of the elements of the proper delivery of services, and a problem that undoubtedly has to be resolved. Anyway from the point of view of an entity spending money on legal aid and of a person entitled to such aid, clearly he/she is entitled to a specialist, thus all regulations in this direction are in my opinion most accurate.

As for the presented solution of a Public Defender Office or a similar institution, it seems useful because division of these activities among various institutions (attorneys' corporations, courts) results in a situation that there is no body that would look at the issue from the point of view of function and the goal to be reached, or from the point of view of supervision. I think that creation of such institution would be most purposeful.

Igor Dzialuk, Vice-Director of the Department for International Cooperation and European Law, the Ministry of Justice

I came up with another idea to combine two things, namely a Public Defender Office and specialized lists of attorneys. This could provide seeds of a sort. If there are willing persons who are specialists and who are happy to specialize in ex officio cases, then why not? Although, we should check whether they could live on such cases and whether there would be enough of them. Experiences of the Warsaw Regional Council of the Bar indicate that [there are] attorneys who support themselves practically only from ex officio cases and who quite willingly substitute in such cases for their colleagues – civil law specialists [...]

Is it the same in criminal cases? Probably not exactly. As for criminal cases, we should also consider, particularly in the context of attorneys who provide ex officio legal aid, whether there is an interest in creating such a specialized team

– if yes, let us call it a Public Defender Office perhaps initially at the National Council of the Bar or at regional councils of the Bar. I understand that if we manage to create such group, the form of payment by the state for such services is a secondary issue; whether on current basis or later contracting them with some lump sum or other remuneration – this could be done.

Prof. Andrzej Rzepliński, attorney, the Helsinki Foundation for Human Rights

As you remember from yesterday's debate, leaders of the Polish Bar are not overjoyed with postulates of changes in the current system that we intend to direct to the Polish legislator and politicians; the thought of any changes, perceived as contradictory to their interests and to autonomy of the profession, evokes great reluctance of the Bar's representatives. What arguments were used in countries that you represent to convince the main representatives of the Bar and its leaders, to not undertake any activities against legislative reforms? We all know how strong legal professions are – we heard yesterday from one of the speakers from the Ministry of Justice that lawyers are able to block any initiative, in their opinion, contrary to their interests. What were the Bar's reactions after the reform? How, in practice, did the main representatives of the Bar, the "top" professionals, react to the appearance of various types of legal aid financed with public funds?

Peter van den Biggelaar, Director of the Legal Aid Board in Hertogenbosch, the Netherlands

The Bar's position is always very difficult. My first impression is the necessity to stimulate solutions alternative to the Bar. In our country, the Bar is privileged – its members have an exclusive right to represent clients in court, however this privilege was granted to them by the Minister of Justice provided they actively support the legal aid system. As for the first issue, a series of meetings with regional and national authorities of the Bar, the purpose of which was to make them aware of responsibility that lawyers bear, played a very important part. In my opinion, it is crucial to carry out such consultations with representatives of professional bodies also in your country. Yesterday, I learnt that you have two separate legal professions – take advantage of this to create a certain competi-

tion between them. You may also search for support among university students. Before 1974, we had no Legal Aid and Advice Centers in Holland and in the following 3 years, such Centers were created in each bigger city. This initiative may also come from academic circles – in the cities that have universities – I am deeply convinced that there are people in those circles interested in participation in legal aid programs

Moshe Hacoheh, Public Defender for the Region of Jerusalem, the Ministry of Justice – Public Defender Office, Israel

As far as the first question is concerned – how to convince the legislator against the position of legal self-managements, I have to admit, that our decision to create the Public Defender Office system was accepted only when it turned out that the Bar is not able to provide, on current principles, legal aid within the scope corresponding with social needs. Very few lawyers undertook cases of poor people knowing that the state would not pay the full market price for their services. A question was therefore asked on how to break this vicious circle? We have accomplished this by including the Bar into the emerging system, declaring that we want to significantly extend the number of cases in which assistance of an attorney would be necessary, which of course requires finding funds for the legal aid system that should be provided by the state. At the same time we said – “we want to maintain the Bar’s independence, transferring most of the cases to attorneys practicing privately” – and this, in fact, is the current structure of our system. I have to emphasize, however, that the delicate balance between independence of the Bar and securing high quality of services has to be changed, since as the main purchaser of attorneys’ services we had an influence on improving the quality of their services, and this required introduction of certain control and management mechanisms opposed by the Bar. It seems to me, however, that we have managed to reach a balance and after the new system had come into force it turned out that attorneys prefer to cooperate rather than fight with us.

Linas Sesickas, attorney, adviser to the Constitutional and Legislative Policy Institute “COLPI” for Access to Legal Aid Reform in Lithuania

With respect to the first issue, our assumption that the Bar will oppose the reform, fortunately, turned out to be false. We were actively supported by the President of the national Bar’s self-management who was in favor of the changes. Convincing other members of the self-management took some time and we were always coming across the following arguments “why should we deal with this issue, this is a task for state administration, the Ministry of Justice should do their job and not involve the Bar instead”. Finally, the Bar’s self-management became one of the founders of the Public Defender Offices in Siauliai and Vilnius, playing in my opinion an important partner’s role in the introduction of changes to the system of legal aid guaranteed by the state. A year ago, the Bar’s self-management entered into an agreement with the Ministry of Justice, pursuant to which it is responsible for nominating coordinators whose task is to appoint lawyers for all ex officio cases in the country, while the Ministry covers costs of this administration system (in the amount of 40 thousand dollars). This example shows that the Bar’s self-management makes an effort to participate in the entire process.

PART IV

LEGAL AID IN CRIMINAL CASES

IV.1. Right to counsel

Each and every defendant in a criminal proceeding has a **constitutional right to defense** at all stages of such proceeding. In particular, such person may hire a defense counsel of his or her choice or have one appointed *ex officio* according to principles specified by the law.⁴⁸

Pursuant to the Code of Criminal Procedure, every accused person has the right to defense, including the right to be assisted by a defense counsel, and should be instructed of this right.⁴⁹ As a rule, the right to defense is granted at all stages of a criminal proceeding. Only an attorney may appear in criminal proceedings in the capacity of a defense counsel.⁵⁰ The possibility of defense in a petty offence case by a legal adviser authorized to represent a natural person is a deviation from this rule.⁵¹ A defendant may choose a defense counsel (attorney) at his or her discretion.⁵²

Arrest. In the case of arrest, an arrested person may, upon demand, contact and personally consult with one attorney.⁵³ The agency performing the arrest may reserve the right to be present during such conversation.

⁴⁸ Article 42, point 2, of the Constitution of the Republic of Poland: “Anyone against whom criminal proceedings have been brought shall have the right to defense at all stages of such proceedings. He may, in particular, choose counsel or avail himself—in accordance with principles specified by statute—of counsel appointed by the court”.

⁴⁹ Article 6 of the Code of Criminal Procedure.

⁵⁰ Article 82 of the Code of Criminal Procedure.

⁵¹ Article 24, section 1, of the Code of Procedure in Petty Offence Cases, in force since 17 October 2001.

⁵² Article 83 of the Code of Criminal Procedure.

⁵³ Article 245, section 1, of the Code of Criminal Procedure.

With respect to the arrested person, if he or she has not been interrogated and does not yet enjoy the right to defense or to be assisted by a defense counsel, the agency is not obliged to secure that person's contact with an attorney – even if conditions for future mandatory defense exist.

By law, however, the arresting authority is **obliged to instruct** the person as to his or her right to contact an attorney and to consult with the attorney personally.⁵⁴ The arrested person must also be informed of the grounds for arrest.

Arrested persons have the right to file a **petition against the arrest** within seven days, thereby demanding examination of its justification and the means by which it was executed.⁵⁵ If the arrest was not ordered by the court, the complaint or petition is handed over to the district court and examined immediately.

If, in the meantime, a defense counsel can be hired or appointed, he or she may draw up the complaint against the arrest and submit it to the court.

However, the actual use of legal advice during and immediately after the arrest is **rare in practice**. For legal advice to be granted in such circumstances, the person concerned must get help from others, and must know how to contact a lawyer (available twenty-four hours a day, Sundays and holidays included) who could come to the site of detention and talk directly to the arrested person. Few of those arrested seem to be able to actually contact an attorney. The rest are utterly incapable of exercising the right specified in Article 245 of the Code of Criminal Procedure.

In the case of **juveniles**, a prosecutor is obliged⁵⁶ to immediately approach the president of the court with a motion for appointment of *ex officio* counsel, unless the case file includes information that the suspect (or suspect's guardian) has already hired an attorney.

⁵⁴ Article 244, section 2, of the Code of Criminal Procedure.

⁵⁵ Article 246, section 1, of the Code of Criminal Procedure.

⁵⁶ Ordinance of the Minister of Justice of 11 April 1992, Internal Rules of Operation of General Organizational Units of the Prosecutor's Office; see Journal of Laws No. 38, 1992, item 163, with subsequent changes; section 111, p.2.

Detention. With respect to an arrested person suspected of a crime, it is possible to apply preventive measures, the most severe of which is a pre-trial detention imposed for a specified period of time or conditionally until bail can be paid.⁵⁷

The decision to detain a person during preparatory proceedings is made by the court at a prosecutor's motion. Before imposition of this measure, the court is obliged to hear the suspect.⁵⁸ This obligation does not apply to public prosecutors who move for imposition of pre-trial detention. Thus, the motion for detention and the motion for appointment of *ex officio* defense counsel even in mandatory defense cases are not always submitted simultaneously. In addition, it rarely happens that the motion for appointment of *ex officio* counsel for an indigent suspect is actually submitted before the date of the hearing concerning the imposition of detention.

The decision to impose pre-trial detention is made at a hearing conducted by a single judge. The appointed defense counsel may take part in the hearing if he or she is present. Under Article 249, section 3, of the Code of Criminal Procedure, notification of the defense counsel about the date of the hearing "is not obligatory." However, if the suspect asks for notification, the court either notifies the defense counsel or refuses the motion. The court might refuse the motion if, in the court's opinion, such notification would result in a delay preventing a decision to impose detention within twenty-four hours of the suspect being placed at the court's disposal. The time runs from the hour when the prosecutor made the motion to the court.

Therefore, the **defense counsel's appearance** is possible only as a result of his or her own initiative or upon an explicit request of the suspect.

On the other hand, provisions of section 360 of the Internal Rules of Procedure of Common Courts of Law⁵⁹ impose on the judge the duty to notify not only the prosecutor but also the defense counsel, if he or she has already been appointed and has reported participation in judicial actions, about the hearing concerning pre-trial detention.

⁵⁷ Article 257, section 2, of the Code of Criminal Procedure.

⁵⁸ Article 249, section 3, of the Code of Criminal Procedure.

⁵⁹ Journal of Laws No. 38, 1987, item 218, with subsequent changes.

It follows, therefore, that **access to legal advice by individuals deprived of liberty is limited during the first stage of proceedings**. In the case of mandatory defense, that access depends on how promptly the prosecutor lodges an appropriate motion for appointment of a defense counsel. In the case of *ex officio* defense requested by the detainee, it depends on whether that person is informed about the possibility of applying for *ex officio* defense counsel. Also important is the amount of time before a defense counsel can be appointed, and before the counsel, once appointed, actually undertakes actions aimed at personally contacting the detainee.

Even if appropriate motions are filed without delay (the prosecutor makes the motion for appointment of *ex officio* defense counsel, or the duly instructed suspect draws up his or her application adequately demonstrating an inability to bear the costs of defense), the counsel appointed by the court may not undertake actions immediately. The court has to notify the appointed counsel, in writing, of the professional duty of his or her appointment. Appointed counsel must receive the **letter of appointment** (which may not take place immediately, as the letter is sent by post, not to mention a possible vacation or sick leave of the lawyer). The court also provides particulars of the appointed defense counsel to the prosecutor, who can thus duly notify the defense counsel of procedural actions that require his or her participation.

From information provided by prosecutors and by individuals addressing the HFHR with requests for help, we have learned that in many cases the suspect's **first personal contact** with his or her defense counsel takes place after preparatory proceedings are concluded, and during the action of the final review of the case files with the suspect before the indictment is presented to the court – an action in which the defense counsel's participation is obligatory in mandatory defense cases specified in Article 79 of the Code of Criminal Procedure.⁶⁰ In other cases, information indicates, a suspect's first contact with defense counsel often takes place only during the first court hearing.

⁶⁰ Last Changes to the Code of Criminal Procedure (in power as of 1 July 2003) limited even this possibility, as the final review of the case file in the presence of a defender would no longer be obligatory. This solution aiming at speeding up the procedure might thus cause a situation in which the first contact between a client and a lawyer would take place during the first court hearing, with no contact or common preparation for the case.

Trial. From the beginning of the trial stage, the defendant has the right to defense at all stages of the procedure, including hearings in court of first and second instance, the filing of an appeal, the filing of a cassation, and hearings before the Supreme Court.

In certain instances, exercising the defendant's rights requires the participation of an attorney. For example, to file an appeal of the judgment of a regional court as a court of first instance, the defendant must be represented by an attorney. The filing of a cassation must also be performed by an attorney.

In the above-mentioned stages, exercising the indigent person's right to defense depends on the appointment of an *ex officio* defender by the court.

If the defendant did not have an attorney before the court of first instance, he or she may submit a motion for appointment of an *ex officio* attorney for filing an appeal and for representation in the court of second instance. In theory, if the defendant has been granted an *ex officio* attorney in the court of first instance, the same attorney continues to represent him or her through all appeals, until the final judgment is delivered.

However, in cases of *ex officio* defense, the defendant is often represented by a **different attorney**. The courts of second instance, especially appellate courts, may be located very far from the first attorney's place of residence. Therefore, it often happens that the court appoints a different attorney only for appearance before the court of second instance, even though the appeal was filed by the first attorney. The presence of an attorney at hearings in the court of second instance enables the court to conduct the hearing in the absence of the defendant if he or she remains under pre-trial detention. The court decides whether to bring the defendant to the hearing. In practice, it happens that:

- **a defendant does not know** his or her **attorney** who was appointed to participate in the appellate hearing and may not have had contact with the attorney in person;

- the defendant does not take part in the hearing;

- the attorney that represents the defendant is not the author of the appeal. The attorney's preparation for the hearing is limited to reading the case files (if the attorney treats his or her duties seriously). Often, the newly appointed

attorney's participation in the appellate hearing is **purely formal** and is limited to a statement that the attorney "sustains the statements in the appeal".

The judgment of the court of second instance is legally valid. The cassation submitted to the Supreme Court is an extraordinary measure and is permitted only in exceptional situations – e.g., gross violation of the law. The cassation must be filed by an attorney. The indigent defendant must submit a motion for appointment of an *ex officio* attorney for preparing and filing the cassation.

The attorney appointed is not obliged to file a cassation, but if the attorney declines to do so, he or she must inform both the court and the client about the decision. Filing a manifestly frivolous cassation is a violation of rules of professional ethics.

In practice, however, the court does not appoint an attorney to examine the possible grounds for cassation. The indigent defendant may therefore be deprived of the opportunity to utilize such a measure. In addition, appointed attorneys often refuse to file a cassation, arguing that there are no grounds for it. It is hard to verify the truth of these statements, because it is very unusual that after such a refusal the court would appoint a second attorney to examine these grounds again.

Legal aid for victims of crimes. The principles of legal aid on a motion also apply to other people who appear in the case as parties to proceedings,⁶¹ such as an auxiliary or private prosecutor or claimant in criminal proceedings. Thus, if the victim decides to become a party and not just the witness in the trial, he or she may apply for legal aid.

However, this right of the victim is **not clearly and directly stated in the law**. One needs advanced legal knowledge and skills to interpret the relevant provisions.⁶² In addition, the Charter of the Victims Rights (a compilation of existing rights of victims), created to assist victims, does not clearly state their right to legal aid.

⁶¹ Article 87 of the Code of Criminal Procedure.

⁶² Article 87 of the Code of Criminal Procedure, in connection with Article 88, in connection with Articles 77 and 78 of the Code of Criminal Procedure.

In practice, it happens very seldom that the victim of the crime is represented by an *ex officio* lawyer.

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

Minors. Article 20 of the Act on Procedure in Minors' Cases provides that within the scope of granting legal representation to minors, the Code of Criminal Procedure is applied *mutatis mutandis*. In the court's clarifying proceedings or childcare proceedings, a minor must have a counsel if his or her interests conflict with the interest of the minor's parents or guardians.⁶³

In case of indictment for criminal conduct, a minor must always be represented by a counsel before the court, as well as during earlier stages if he or she was placed in a minors' shelter.⁶⁴ Participation of counsel in the hearings is always mandatory.⁶⁵ If the court finds that a minor suffers from mental disorders, is mentally handicapped, or is addicted to alcohol or other agents, the decision to place the minor in a psychiatric hospital, caretaking center, or social welfare house must be issued with participation of a counsel.⁶⁶

Mentally disabled. In proceedings before the "caretaking court" in cases based on the Act on Protection of Mental Health, the court may appoint a counsel for the person even without his or her motion, if such a person is not able to file the motion and the court finds the participation of a counsel to be necessary.⁶⁷

Convicted persons. In civil proceedings, a prison inmate does not have any special rights. He or she may hire an attorney or request the appointment of *ex officio* counsel like any other party.⁶⁸ There are no special provisions on legal aid or legal advice in cases of complaints by prison inmates against prison administration.

⁶³ Article 36, section 1, and Article 44 of the Act on Procedure in Minors' Cases.

⁶⁴ Article 49 of the Act on Procedure in Minors' Cases.

⁶⁵ Article 51, section 2, of the Act on Procedure in Minors' Cases.

⁶⁶ Article 49 of the Act on Procedure in Minors' Cases (Article 56 in connection with Article 12 of the act).

⁶⁷ Article 48, paragraph 1, of the Act on Protection of Mental Health.

⁶⁸ See material in section 5 on access to legal aid in civil cases.

Foreigners violating immigration laws. A foreigner appearing before the court that decides placements in “pre-deportation arrest” or “guarded foreigners centers” seems not to have the right to legal aid. Although in theory the general rules of the Code of Criminal Procedure apply to cases involving foreigners, information received from lawyers working with foreigners indicates that the right to *ex officio* counsel is not applied to such cases.

Drunken persons. In the case of drunken persons who have been detained in “sobering centers”, there is no right to defense or to judicial review of the legitimacy of the detention. Such a review may take place after the release, on the motion of the person detained.

Alcoholics. Article 26.2 of the Act on Education in Sobriety and Combating Alcoholism of 26 October 1982 provides for a decision on enforced treatment. The decision is made by a district court where the rules of the Code of Civil Procedure on non-dispute proceedings apply; therefore, a person whom the decision concerns has the right to legal aid just as in civil matters.

Drug addicts. According to Article 17 of the Act of 24 April 1997 on Combating Drug Addiction, enforced treatment is possible only in cases involving minors. In these cases, the procedures provided in the Act on Procedure in Minors’ Cases are applicable (see “Minors”, above).

IV.2. Eligibility criteria for granting legal aid in criminal cases

IV. 2.1. Substantive criteria

In general, there are three possibilities for receiving *ex officio* legal aid:

- where **mandatory defense** is applicable (if a person does not have a lawyer, the president of the court will assign one);
- **on the motion** (demand) of the accused; in these cases, assignment of a lawyer is at the discretion of the judge and there is no possibility to appeal that decision;
- where the court decides *ex officio* that a person needs defense counsel, “if the court finds it necessary due to circumstances hampering the defense”;

this is a new provision (adopted in the Code of Criminal Procedure in 1997), and while there is not enough jurisprudence on it yet to make an assessment, some say that it is not used frequently.

In several instances,⁶⁹ a defendant is required to have a defense counsel whether or not he or she wants one. This **mandatory defense** applies in the following situations:

- if the defendant is a juvenile;
- if the defendant is deaf, blind, or mute;
- if the defendant does not speak Polish;
- if there are reasonable doubts as to the defendant's sanity;⁷⁰
- if the court finds it necessary in view of circumstances that may hamper the defense;
- if the proceeding is pending in the first instance before a regional court, and the defendant is charged with a felony (acts punished with the statutory penalty of at least three years' imprisonment) or is deprived of liberty (detained or serving a term for another offense).

In such instances, having ascertained that the defendant does not have a defense counsel of his or her choice, the court's president will appoint an *ex officio* counsel.

As noted above, Polish law provides that a defendant must have a defense counsel (mandatory defense) if, for example, he or she has been charged with a felony.⁷¹ Defendants charged with less serious criminal offenses (where the minimum statutory penalty is less than three years of imprisonment) do not have the right to mandatory defense. Polish criminal law, however, sets

⁶⁹ Specified in Article 79, sections 1 and 2, and Article 80 of the Code of Criminal Procedure.

⁷⁰ Last Changes to the Code of Criminal Procedure, new section 4 in Article 79 (in power starting 1 July 2003), limited the scope of mandatory defense in these cases. Previous regulations meant that if there were doubts as to the defendant's sanity resulting in a medical examination on the motion of the court, mandatory defense applied even when the medical examination did not confirm those doubts. The new solution limits the scope of the mandatory defense only to the "doubts of sanity" proven by a medical examination. The result of this change would be an obvious increase in the number of criminal defendants not being represented in court.

⁷¹ Article 80 of the Code of Criminal Procedure.

out many less serious criminal offenses that involve a maximum statutory penalty of, for example, five, ten, or even twelve years of imprisonment. Thus, a person can be lawfully sentenced to a long prison term (of up to twelve years) without defense counsel.⁷²

Some situations involve “**obligatory assistance**” by an attorney when access to a court depends on access to a lawyer. The Code of Criminal Procedure provides for obligatory assistance in the following cases:

- private indictment,⁷³
- appeal to the Court of Appeal of a judgment passed in the first instance by a regional court,⁷⁴
- cassation filed before the Supreme Court,⁷⁵
- motion for reinstatement of procedure.⁷⁶

IV.2.2. Financial criteria

If a defendant does not have sufficient means to hire a defense counsel of his or her choice, he or she may apply to the court for appointment of an *ex officio* defense counsel. Under Article 78, section 1, of the Code of Criminal Procedure, the applicant is obliged to “**adequately demonstrate**” his or her inability to pay the attorney’s fees. In theory, as soon as the defendant demonstrates this fact, the president of the court shall appoint an *ex officio* defense counsel.⁷⁷

Article 78, section 1, of the Code of Criminal Procedure provides that “[a] defendant who does not have a defense counsel of his or her own choice **may demand** to have an *ex officio* defense counsel appointed, provided that

⁷² The less serious offenses (misdemeanors) for which the Penal Code provides for penalties of up to 12 years of deprivation of liberty are specified, e.g. in the following Articles: 154, section 2, 156, section 3, 163, section 3, 165, section 3, 166, section 1, 173, section 3, 185, section 2, 197, section 3, 207, section 3, 228, section 5, 229, section 4, 280, section 1.

⁷³ Article 55, section 2, of the Code of Criminal Procedure.

⁷⁴ Article 446, section 1, of the Code of Criminal Procedure.

⁷⁵ Article 526, section 2, of the Code of Criminal Procedure.

⁷⁶ Article 545, section 2, of the Code of Criminal Procedure.

⁷⁷ Article 81 of the Code of Criminal Procedure.

he or she adequately demonstrates that he/she cannot bear the costs of defense without detriment to support and maintenance for himself/herself and family”.

The requirements to be met by the defendant applying for an *ex officio* defense counsel have not been stated with **sufficient precision**. As a result, it is unclear exactly what evidence can be treated as reliable (e.g., official certificates from the tax office or local social welfare center, the applicant’s own statement, etc.). The present regulations make it possible for the court to refuse legal aid without clearly stating the grounds on which the decision is based – and, it should be stressed, there is **no possibility to appeal** that decision.

Letters written by HFHR asking for information about court practices resulted in the following responses:

– The vice president of one of the district courts has reported that decisions on whether to grant defense counsel are made **individually** in specific cases based on specific circumstances. This, in his opinion, made it **impossible to quote any generally applicable criteria**. He stated only that applicants are obliged to document the circumstances they refer to in the application.

– The chairman of the Criminal Division of another district court asserted that when he is handling an application for *ex officio* defense, the applicants are called upon to provide certificates stating their own and their family’s income. The chairman further stated that the court takes cognizance of established facts concerning the applicant’s family and financial situation based on the case files. When appointing *ex officio* counsel, the basic criteria include the applicant’s income as well as that of his or her family (parents, spouse or unmarried partner, and grandparents).

It is not known precisely how a person applying for legal aid should document the application. This allows the court to make **arbitrary decisions**. Moreover, although by law the court’s president makes decisions on granting legal aid, often he or she transfers this power, and the decision is instead made by a chairperson of the Criminal Division or, in what seems to be a problematic situation, by the presiding judge.

Costs of *ex officio* counsel are covered by the State Treasury. However, if the defendant is found guilty, he or she may be charged with costs of *ex officio* counsel. If the defendant was granted *ex officio* attorney due to lack of funds, the court charges the State Treasury with the costs. In situations of mandatory defense, if the defendant was granted an *ex officio* attorney, the court may charge the convicted defendant with the costs. This rarely happens in practice, however, the actual scope of the phenomenon is not known.

IV.3. Procedure for granting legal aid

Under Article 16, section 1, of the Code of Criminal Procedure, if the agency in charge of proceedings is obliged to instruct participants as to their rights (as well as duties), then the absence of such instruction or its erroneous content cannot have negative procedural effects for the person concerned. According to section 2 of that article, information should be provided as need arises, even in situations where the law does not explicitly provide for the relevant duty.

The suspect is to be instructed, before the first interrogation, of his or her right to defense and to be assisted by a defense counsel, in addition to other rights, by the agency in charge of pre-trial proceedings.

Under the provision of Article 300 of the Code of Criminal Procedure, the **instruction** is drawn up in writing and provided to the suspect, who must acknowledge its receipt with his or her signature.

The standardized forms of the records of the interrogation mention both the legal grounds and the contents of the right or duty concerned. However, they **fail to indicate** in a detailed and self-evident manner how the “right to be assisted by a defense counsel” can be exercised in practice, or how a person deprived of liberty can give a lawyer the power of attorney in the case. Nor is a suspect who is ignorant of legal provisions provided with written information about the possibility of applying to the court for appointment of *ex officio* defense counsel at this stage of proceedings.

Pursuant to the regulations, the prosecutor has special powers and responsibilities in the area of deciding whether the suspect is capable of bearing the costs of defense. If the prosecutor forms an opinion that a

person cannot bear the costs of proceedings, he or she is obliged to instruct that person as to the right to demand appointment of *ex officio* counsel.⁷⁸

This arrangement means that at the **prosecutor's discretion**, specific categories of suspects will – or will not – be informed about the conditions, procedure, and right to avail oneself of the opportunity to request legal aid, under Article 78, section 1, of the Code of Criminal Procedure. It seems unjustified to relate the provision of information about a person's rights to the circumstances of a specific case. The knowledge of those circumstances is gathered over a period of time and supplemented gradually in the course of investigation or inquiry. Yet, while writing down a person's personal data during the first interrogation, the prosecuting agencies are acquiring information about his or her income, financial status, and number of dependants, as well as other data that make appropriate conclusions possible.

As to the procedure for appointment of an *ex officio* defender on demand of the indigent client, section 350, point 1, of the Internal Rules of Procedure of Common Courts of Law provides that “if the defendant who applies for appointment of an *ex officio* defense counsel in his or her case fails to adequately demonstrate his or her inability to cover the costs of defense, chairman of the court division shall set a **time limit for supplementation of the application**. If the time limit expires without effects or there are doubts as to the manner in which the defendant has demonstrated his or her inability to cover the costs of defense, the case shall be brought before the court for the application to be examined as to the merits.”

As *Code of Criminal Procedure – Commentary* states: “If the application is insufficiently documented, the president of the court should call upon the defendant to supplement that application with evidence (documents) reflecting his / her current material and family situation”.⁷⁹

From the practice of the HFHR, however, it appears that **courts often do not apply** that provision and simply refuse appointing *ex officio* defense counsel without too much explanations as to the grounds of such a decision. It is unclear what can be done if the court violates this provision. Refusal

⁷⁸ Section 111, point 1, of the Internal Rules of Operation . . . (see footnote 56).

⁷⁹ P. Hofmański (ed.) et al., Warsaw 1999, v.1, p. 366.

to appoint *ex officio* defense counsel cannot be appealed. The limitations on the right to defense may, of course, be mentioned in the person's appeal. However, individuals affected by the above provision are those who have been deprived of legal aid by the court. The chances are slim that such people would be able to raise the appropriate objections even if they lodge an appeal.

Although provisions speak of appointment of an *ex officio* attorney by the court's president, such decisions are in fact taken not only by the chairmen of court criminal sections but also by judges who decide in specific cases. This raises concerns over the question of **judicial impartiality**. As a rule, the applicant does not appear before the judge who makes the decision and is informed of it by a court's secretariat. However, when the decision is made by the presiding judge, the applicant does, in fact, appear before him or her.

As a rule, an attorney is chosen from the court list of all attorneys, and the appointments are made in numerical order. In practice, however, there are departures from this rule, and judges appoint attorneys according to their choice. In general, the applicant does not have influence over the choice of an attorney, although the defendant's request for the appointment of a specific attorney may be respected by the court.

In practice, defense counsel may also be **appointed *ad hoc*** when there is an urgent need and that counsel is in court at the moment. In such cases, the right to defense is certainly not respected – attorneys appointed *ad hoc* have no time to prepare for their duties in the case.

IV.4. Application of the legal aid norms in practice

As noted above, the current regulations requiring an “adequate demonstration”⁸⁰ of the lack of means due to indigence are overly vague. The Code of Criminal Procedure contains no detailed requirements to state reasons for a decision concerning legal aid. However, the Supreme Court has, in several of its judgments, stated generally that decisions issued by courts should be provided with **comprehensive grounds**. However, no explicit

⁸⁰ Article 78 of the Code of Criminal Procedure.

duty of the court to provide detailed grounds for its decision follows from the discussed provision.

In the case of Mr. Arkadiusz Ś., the court merely stated that “the defendant failed to document his financial situation”; in another case, that defendant “failed to demonstrate adequately”.

In the case of Mr. Jarosław P., the grounds for the district court’s decision read as follows: “No prerequisites would justify the appointment of *ex officio* counsel for the defendant. The defendant states that he did have a source of income before his detention, having worked casually; therefore, he was in the position to hire a counsel”.

In the case of Mr. Leszek W., both the defendant and his wife were unemployed. The court, however, refused to appoint an *ex officio* defense counsel, stating that the defendant could bear the costs of his defense as the recipient of a permanent allowance of 401 PLN (about 100 euros) per month.

The discussed provision states that an *ex officio* counsel should be provided to a defendant who “adequately demonstrates” that he or she “is not” (present tense) in the position to bear the costs of defense. Yet in practice, in appraising the applicants’ situation, courts refer to their previous lifestyle and spending habits rather than analyzing the current situation – even though applicants’ financial standing may have changed dramatically in the meantime, often as a result of detention.

In the case of Mr. Robert O., a part of the reasoning reads: “The application does not deserve to be approved. The defendant’s personal situation is not exceptional to the extent justifying the appointment of an *ex officio* defense counsel. Criminal proceedings in his case were instituted as early as January 2001. Thus the defendant himself or his family should have been prepared for the need to secure the means required to hire a defense counsel. . . . [U]ntil his detention, the defendant owned the company X; this means that he had a regular source of income which he did not dispose of until his detention. In the Court’s opinion, the defendant himself or his family had enough time to save adequate funds for this purpose. This would have provided him with resources designed to cover the costs of his defense”.

In other cases, the courts have similarly tended to evaluate not the defendants' current financial situation but their resources from before the detention.

IV.5. Conclusions

In conclusion we may state that the **lack of a clear specification** on how an indigent person is to "adequately demonstrate" that he or she is not able to bear defense costs in practice limits access to legal aid. Applicants do not know how to do so and often think that the very declaration of the lack of means is sufficient. Imprisoned persons are in a particularly difficult situation.

An introduction of a detailed "means test", including an instruction on how to fill it in and what documents to attach, would significantly improve this situation, and would, specifically, make the criteria for granting an *ex officio* defense counsel more objective.

In a situation when courts do not receive sufficient funds, appointing *ex officio* defenders or attorneys may be seriously limited – as a "secondary" expense for the court itself. This may lead to a situation in which compliance with the right to a fair court trial is too dependent on the current situation of the state finances.

We propose considering the introduction of a possibility to **appeal** against a refusal to appoint an *ex officio* defender, in particular in the case of discretionary, to a large extent, criteria for such appointment. Such possibility exists both in the civil and administrative procedure and differentiating the situation of an applicant for *ex officio* legal aid in this respect is not justified. The lack of legal aid may be obviously raised as one of the arguments during an appeal, however, a person deprived of such aid has a limited ability to use such arguments.

Regulating the problem of **who decides** about granting a defender should also be considered. Although regulations provide for the appointment of an *ex officio* attorney by a court's president, in reality, such decisions are made not only by departments' chairpersons, that is functional judges, but also by judges adjudicating in a given case, which undermines the objectivism and partiality of their evaluation.

Making granting of a defender contingent on the financial means of a family, and in particular distant relatives (in a response received by us from a court, e.g. grandparents of an accused are mentioned), may also raise doubts. First of all, criminal responsibility is several. Second of all, in practice family may help the accused but sometimes it may cut him or her off.

Some of the justifications of decisions to refuse *ex officio* legal aid leave much to be desired. It happens that a court simply states generally that the accused failed to adequately demonstrate that he or she is not able to bear defense costs. Other justifications refer to past situations and do not evaluate the present financial abilities of the accused.

As indicated above, distinctive problems are connected with obtaining legal aid at the preliminary stage of proceedings – in particular during arrest and pre-trial detention. What solutions can be attempted to resolve these problems? We propose **drafting** simple, clear and understandable **instructions** on possibilities and manners for exercising the right to defense in all cases – private, *ex officio* and mandatory – as well as an **application form** for appointment of an *ex officio* defender, instead of providing only general information on the right to defense.

A possibility of establishing, as in other countries, of the institution of “duty lawyers”, **providing legal aid in urgent situations** for persons qualified to receive legal aid paid for by the state, should be also considered.

Another solution would be **the creation of a “Public Defender Office”** in which attorneys employed to handle only *ex officio* cases would be more available than attorneys appointed from lists and could additionally conduct duties referred to earlier.

It would be also worthwhile to consider the possibility of **partial exemption from costs** of *ex officio* legal aid in criminal cases. Making the system of legal aid more flexible in this respect would benefit both the state budget and applicants.⁸¹

We propose changes in the **statistical report forms** developed by the Ministry of Justice so that they include information on the fact of

⁸¹ Compare comments on this subject in part V of the report, as far as civil and administrative proceedings are concerned.

a defendant's representation by a defender. Thanks to such reports it will be possible to determine how many persons in criminal proceedings are deprived of legal aid, how many of them are sentenced to imprisonment and what is the **scale of needs** in this respect.

Based on the recorded decisions of the Court of Human Rights in Strasbourg, an amendment to the penal law should be considered, eliminating the possibility of sentencing to **imprisonment** without the participation of a defender in the case.

And finally we propose to **synchronize the work** on access to legal aid in particular proceedings (mainly in criminal, civil, and administrative proceedings), which would allow to consider the problems in overall, and introduce, where possible, unified and clear criteria and procedures, as well as allow to avoid unnecessary differences.

PART V

LEGAL AID IN CIVIL AND PUBLIC (ADMINISTRATIVE) CASES

V.1. Right to counsel in civil cases

The **Constitution** of the Republic of Poland preserves the right to a hearing in court, but **does not contain any provisions on legal aid** in civil cases.⁸²

The Code of Civil Procedure does not provide for mandatory representation in any kind of cases. The only legal action that must be performed by an attorney or legal adviser in civil cases is the filing of a cassation.⁸³

V.2. Eligibility criteria for granting legal aid in civil cases

V.2.1. Substantive criteria

Article 212 of the Code of Civil Procedure requires that: “The judge presiding [...] gives **instructions and advice** to the parties if necessary, and according to circumstances draws their attention to the usefulness of hiring a legal representative”. However, the Code of Civil Procedure does not include an explicit duty of the court to inform the parties about the possibility of applying for an *ex officio* lawyer. The *ex officio* attorney may be granted only to individuals who have been **exempted from court costs** in whole or in part.

The law exempts plaintiffs in affiliation proceedings or alimony claims, and employees in cases arising under labor and social insurance law from

⁸² Article 45, point 1, of the Constitution of the Republic of Poland: “Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court”.

⁸³ Article 393, section 2, of the Code of Civil Procedure.

court costs.⁸⁴ Other parties must apply to the court in order to be exempted from court costs.

The **party who has been exempted from court costs** on his or her own motion, or granted the statutory exemption from costs in whole or in part, **may apply to have an ex officio lawyer** appointed.⁸⁵ Depending on the type of civil case involved, this function can be performed by an attorney or a legal adviser.⁸⁶ The application should be in writing or announced for the record in the court where the case is pending or will be instituted.⁸⁷

The court – in fact, most often the presiding judge – shall grant the motion if it finds the participation of a lawyer or legal adviser to be needed in the case. The law does not clarify what criteria should be applied to evaluate the “need” of professional representation in the case.

According to the commentaries and jurisprudence, those criteria include legal or factual complexity of the case as assessed by the court, and helplessness of the applicant. The “need” to involve an attorney may also stem from principles of an adversarial trial system when one party is assisted by an attorney and the other is not.

Legal aid for foreigners. Legal aid is available both to Polish citizens and to foreigners – there are no provisions on the different status of foreigners in the procedure.

Legal aid for those with particular difficulties. In the commentaries to Article 117, section 1, of the Code of Civil Procedure, it is said that participation of *ex officio* lawyers may be justified if the party is helpless or imprisoned, or if the case is legally and factually complicated. Indeed, in one of its judgments,⁸⁸ the Supreme Court stated that a court might consider the difficulties of a party in communication with the court as a motion for appointment of an *ex officio* lawyer. However, in each case it depends on the court’s opinion; it is always left to the judge’s discretion.

⁸⁴ Article 111, section 1, of the Code of Civil Procedure.

⁸⁵ Article 117, sections 1 and 2, of the Code of Civil Procedure.

⁸⁶ Article 4 of the Legal Advisers Act excludes the legal adviser’s participation in family law and guardianship cases.

⁸⁷ Articles 114 and 117 of the Code of Civil Procedure.

⁸⁸ II PZ 46/64.

V.2.2. Financial criteria

According to the Act on Court Costs in Civil Cases,⁸⁹ court costs include filing fees and office fees. The amounts of the filing fees are determined by the Decree of the Minister of Justice on Amounts of Filing Fees in Civil Cases.⁹⁰ The filing fee may be fixed or set as a percentage of the claim. The percentage fee depends on the value of the dispute and may vary from 30 PLN to 100,000 PLN.

Existing court costs, especially in civil and commercial cases, are considered to be very high and may block access to the court (a standard fee is 8 percent of the value of the claim). Currently, work is in progress on new regulations to lower court costs.

Nevertheless, the number of civil cases brought to Polish courts each year shows that many parties can afford to cover the costs and that, if necessary, the procedure for exemption of court costs helps them.

Under Article 113, section 1, of the Code of Civil Procedure, the application for exemption from court costs (on which the eventual granting of an *ex officio* attorney is contingent) may be filed by natural persons who simultaneously submit a written statement indicating that they are **unable to bear these costs without causing detriment to their own or their family's necessary subsistence**. The application for exemption from court costs is itself exempt from a court fee.⁹¹

A person who applies for exemption from court costs is obliged to submit a statement containing **detailed data** about his or her family situation, property, and income. The court determines whether the statement is sufficient to grant an exemption. The court may order an investigation if it has doubts as to the applicant's financial situation. Although the provision of Article 113, section 1, of the Code of Civil Procedure mentions only the duty to submit the statement, the reading of section 127 of the Internal Rules of Procedure

⁸⁹ Of 13 June 1967; see Journal of Laws No. 24, item 110, with subsequent changes.

⁹⁰ Of 17 December 1996, amended.

⁹¹ Article 10, point 1, of the Act on Court Costs in Civil Cases, 13 June 1967; see Journal of Laws No. 24, item 110, with subsequent changes.

of Common Courts of Law indicates that the person who applies for exemption is obliged to adequately document his or her financial and family situation, and thus to provide not only the statement but also evidence in support of its truth.

Under section 127 of these rules, the clause related to dismissal of the application, the chairman of a court division may set a deadline for submission of documents concerning the person's financial and family situation. Paragraph 127, point 2, regulates the details of the investigation mentioned in Article 116, section 1, of the Code of Civil Procedure, stating that in the course of actions aimed at establishing the facts concerning the applicant's personal and material circumstances, the court approaches the competent state or social organizational units with requests for relevant information.

The court may refuse exemption from court costs if the party's claim or defense is found to be glaringly unjustified.⁹²

Unlike the problem with the interpretation of "adequate demonstration" of a person's inability to bear the costs of defense in criminal cases, provisions regulating exemption from court costs that leads to the appointment of *ex officio* representation in civil cases have been written in much greater detail. There are instructions as to the requirement for submitting information about a person's family situation, property, and income.

V.3. Procedure for granting legal aid

Upon granting the application, the court issues an **order of appointment** of an *ex officio* attorney or legal adviser. Under Article 118 of the Code of Civil Procedure, the issue of such a decision is tantamount to a grant of the power of attorney in the proceedings.

Next, according to law, the court is supposed to send its order to the competent Regional Council of the Bar or Regional Council of Legal Advisers for appointment of a **particular lawyer** to conduct the case *ex officio*. The Council duly appoints a specific lawyer or legal adviser.

⁹² Article 116, section 2, of the Code of Civil Procedure.

A refusal to exempt a person from court costs as well as a refusal to assign an *ex officio* lawyer **can be appealed**.⁹³

Exemption from court fees can, in principle, be granted at **all stages of proceedings**, including the appeal or the motion for cassation. If the application is lodged for the first time in appeal or cassation proceedings, the court may hand it over to the first-instance court for examination.⁹⁴

The exemption from court costs granted to a party at the stage of examination of a civil case, or an exemption granted by law, is also valid for execution proceedings.⁹⁵ In such cases, the “execution documents” should include an appropriate clause informing about a valid exemption from court costs.⁹⁶

The exemption from court costs may be **withdrawn** at any time. The grounds for such decision of the court, as well as its effects, are specified in Article 120, sections 1, 2, and 3, of the Code of Civil Procedure. If there were, in fact, no original grounds for exemption, or these grounds ceased to exist, the court may withdraw its decision to appoint an *ex officio* attorney, as well as possibly order payment of the fees. Or, if the grounds for exemption no longer exist, the court may burden the party with a portion of the costs only.

One point of concern is the way an *ex officio* lawyer may obtain his or her fee after the trial. This process is actually much easier if the lawyer loses the case. “In a civil case where the costs of proceedings have been imposed on the opponent of the party assisted by an *ex officio* lawyer, the costs referred to in section 21 are granted by the court provided that **impossibility of execution** of such costs can be established.”⁹⁷ However, if the party represented by the *ex officio* attorney loses the case, the lawyer’s or legal counsel’s remuneration is paid directly from the State Treasury, under a motion for the grant of costs of unpaid legal aid.

⁹³ Article 394, section 1, of the Code of Civil Procedure.

⁹⁴ Article 115 of the Code of Civil Procedure; this is sometimes indispensable to make it possible for the higher-instance court to examine the complaint.

⁹⁵ Article 771 of the Code of Civil Procedure.

⁹⁶ Section 217 of the Internal Rules of Procedure of Common Courts of Law.

⁹⁷ Paragraph 23 of the Ordinance of the Minister of Justice on Fees for Attorneys and Legal Advisers of 12 December 1997; see Journal of Laws No. 159, 1998, item 1013, with subsequent changes.

V.4. Application of the right to legal aid in practice

Ex officio legal aid applies to **all stages of court proceedings**, from the first to the last instance. A person may apply for appointment of an *ex officio* attorney in litigious and non-litigious proceedings, as well as in a motion for securing the evidence or the claim. Thus, the lawyer can be appointed even before the claim is actually filed. In practice, legal aid in civil cases includes representation before a court.

Legal aid in civil cases is **very narrow** in its scope. According to data given by the Bar and Legal Advisers, legal aid was granted in only about 12,000 (2002), 13,000 (2001) non-criminal cases, out of more than 4 million civil cases brought to courts per year, not to mention family, labor, social security, and commercial cases (another 2.8 million). Thus, legal aid is granted in about 0.17-0.18 percent of the non-criminal cases.⁹⁸

Some **judges** report that they **feel uncomfortable** deciding to grant or to refuse legal aid. On the one hand, they realize the need; on the other hand, they are well aware of the courts' financial constraints. The presidents of courts admit that they repeatedly warn judges to be extremely careful with appointing *ex officio* attorneys and experts. According to one president of a district court, the effects are already noticeable in his district: the number of exemptions from costs has gone down and the incidence of partial exemptions (as opposed to full exemptions) is much higher than before.

Sometimes the situation becomes absurd. According to one judge, the president of a district court summoned all of the court's judges and presented them with alternative solutions: either they grant *ex officio* lawyers and hear cases in chilly courtrooms, wearing coats over their gowns during winter; or the court purchases coal to heat the courtrooms – in which case each of the judges may grant legal aid in only one case per month.

An old statement of the Supreme Court⁹⁹ remains typical: a party who intends to lodge a claim should be prepared for specific necessary expenses,

⁹⁸ It is obviously just an estimate, as data provided by the legal professions might be not reliable.

⁹⁹ Judgment of the Supreme Court of 5 March 1959, 4CZ25/59 Nowe Prawo 1960 No. 7–8.

and should save funds for this purpose by reducing the expenditure on current needs. “It is only in situations when such saving would result in an explicit detriment to the party’s and his or her family’s necessary subsistence that grounds for exemption can be found to exist”. For more than forty years now, Polish courts have cited this judgment when refusing to grant an exemption from court costs.

According to law, the court, after deciding on legal aid, should send its order to the Regional Council of the Bar for appointment of a particular lawyer. In reality, what was revealed in the HFHR’s research is that many judges decide themselves on a particular lawyer in such cases, informing him or her directly about the appointment and without including the Council in the decision. Judges’ explanation of this **unlawful practice** is that once they have decided to grant legal aid, they want to ensure that the party has diligent and competent representation. Leaving the decision to the Council, these judges say, would put a party at the risk of collaboration with an incompetent lawyer.

A person who applies for exemption from court costs is required to submit a statement containing detailed data about his or her family situation, property, and income. However, the civil procedure **lacks a uniform “means test”** that would facilitate the procedure and make it more objective. The need for such a test is beyond all doubt. The courts do develop appropriate forms for their own use. However, these forms are not standardized, and different courts have developed a variety of different forms.

Judges have also reported that the task of handling applications for exemption from court costs and the appointment of an *ex officio* lawyer consumes much of their time, requires extensive correspondence to establish the applicant’s exact financial situation, and distracts them from their primary role as adjudicators.

The court appoints an *ex officio* lawyer if it finds the participation of a lawyer necessary in the case. It is the judge presiding over the case who decides about granting an *ex officio* counsel – and a **judge’s impartiality** in this issue may be questioned (in realizing the need of a party while at the same time being aware of the court’s own financial difficulties).

What seems controversial is the regulation from which it follows that a **lost case shortens the road** to remuneration for an *ex officio* attorney. If the case is won, the attorney must handle the execution of the remuneration on his or her own.

V.5. Legal aid in public (administrative) cases

There is no legal aid granted for appearance before international tribunals.

In cases of individual constitutional complaints, indigent persons may apply to the district court for an *ex officio* lawyer. Relevant rules of the Code of Civil Procedure are applicable.¹⁰⁰

In **administrative cases**, the right to free legal aid appears only during court procedure before the Chief Administrative Court. There is no scheme for receiving legal aid during the first two administrative instances before organs of public administration.

In administrative cases before the Chief Administrative Court, rules of the Code of Civil Procedure are applicable *mutatis mutandis* until 1 January 2004, with the appointment of *ex officio* lawyer depending on an exemption from court costs and on the court's opinion as to the need.

The new Act on Procedure before Administrative Courts (in effect as of 1 January 2004) provides that the "right to assistance" (complete or partial) may be granted to parties. The act does not make appointment of an *ex officio* lawyer conditional on the court's opinion on whether it is necessary. Rather, in Article 247, it provides only that a party does not have the right to assistance if his or her complaint is manifestly unfounded. Under Article 246, section 1, it also provides that persons entitled to the complete right to assistance are those who demonstrate that they cannot bear any costs of the proceedings; persons entitled to a partial right to assistance are those who demonstrate that they cannot bear all costs of the proceedings.

According to Article 258 of the new Act on Procedure before Administrative Courts, the decision to grant or refuse assistance is made by the court

¹⁰⁰ Article 48, section 2, of the Act on the Constitutional Tribunal of 1 August 1997.

(judge) or court registrars in camera. However, under Article 259, such a decision **may be appealed** before the regional administrative court.

In both the present rules (based on the Code of Civil Procedure) and Article 253 of the new act, after the order of the court, the individual representative is appointed by a local Council of the Bar or local Council of Legal Advisers or the National Council of Tax Advisers or the National Council of Patent Agents.

Working on the concept of courts reform, a team that formed within the Chief Administrative Court developed **draft solutions** containing provisions on legal aid provided to the indigent. The suggestions were as follows:

- Adoption of a solution whereby the party chooses the lawyer himself or herself or approaches the association of lawyers or legal advisers for the appointment of legal representation. According to authors of this provision, in the future this could lead to the emergence of a group of lawyers specializing in administrative cases.

- Creation of the possibility of partial remuneration to lawyers who provide legal representation at the moment of taking up the case and not, as is the current practice, only after the case has been completed.

- Remuneration from special separated funds of the administrative court established for this purpose.

- Organization of special funds for securing the right of indigent persons to exemption from court fees. Half of the fees would be transferred to the state budget account as takings, and the other half would be transferred to a separate account holding funds for legal aid to the indigent. An additional source would be the annual payments made by lawyers' and legal advisers' associations on the motion of the president of the Chief Administrative Court.

- Performance of some actions in proceedings by court officials (registrars) to grant indigent persons the right to legal aid.

All but the last proposition have been rejected in the final version of the Act on Procedure before Administrative Courts. Currently, the Act (together with the new Act on the Structure of Administrative Courts) awaits entry into force, which is due on 1 January 2004.

V.6. Conclusions

Within the scope of work on the reform of administrative courts, many **innovative postulates** were formulated; so far, they have been the only evidence in the Polish practice of a deep reflection of state authorities on the functioning of the legal aid system.

Activities of the **Civil Law Codification Commission** that is working on the new law on court costs in civil cases, is another important and promising phenomenon.¹⁰¹ Within the scope of the Commission's work a decision was made on partial regulation of the issues of access to court and to legal aid.¹⁰² According to the Commission's members, in particular the provisions concerning court costs, including the procedure of exemption from them, required urgent regulation. On the other hand, the problems of appointment of an *ex officio* attorney, although considered by the Commission, have not yet been included in the draft amendments to regulations. The Commission intends to deal with the *ex officio* representation in the future.¹⁰³

In the adopted model of legal aid in civil cases, applying for and obtaining an *ex officio* attorney is contingent on an earlier exemption from court costs (in full or in part). It should be considered whether this is a good solution. We could introduce a possibility of appointing an attorney for persons who can afford to bear court cost but cannot afford to pay for a lawyer. It is difficult to find a rational justification for combining these two institutions. It seems that making regulations more flexible and **separating the issue of court costs from representation** would serve both the parties and the State. In current situation, the State covers the cost of an appointed attorney but, at the same time, resigns from income in the form of court fees. On the

¹⁰¹ The Civil Law Codification Commission is affiliated with the Minister of Justice under the supervision of Prof. Zbigniew Radwański. Draft legal acts are available at the Web site of the Ministry of Justice (www.ms.gov.pl).

¹⁰² Information obtained from a member of the Civil Law Codification Commission, Supreme Court's judge Katarzyna Gonera, 24 II 2003.

¹⁰³ Work of the Commission in the previous term focused mainly on problems of the substantive law reform, mainly as a result of adjusting the law to the requirements of the European Union. In its present term, the Commission intends to focus on civil procedures, including changes in the problems of legal aid.

other hand, parties intending to apply for *ex officio* legal aid know that they have to obtain an exemption from costs first, and, thus, they apply for such exemption although, theoretically, they could pay such costs.

As concerns the standards of access to legal aid, this postulate becomes also important in relation to the change of regulations on court costs. The proposed changes reduce such fees (which is a positive development, as court costs in Poland are very high) and often introduce fixed and lump sum fees instead of percentage fees (contingent on the value of the subject of litigation). It will be, therefore, easier for a party to pay court costs – which, however, will exclude the possibility of applying for an *ex officio* attorney.

The possibility of introducing **partial exemption from fees for representation** is another important issue. In the present regulatory environment, an *ex officio* attorney's fee is fully covered by the State budget. It would be worthwhile to consider the possibility of the party covering some of the costs of lawyer's remuneration. Such solution has several advantages: it seems to be more just; it seems to reduce the financial burden on the State budget; it strengthens the relation between the client and the lawyer, positively affecting their cooperation and quality of representation; finally, it encourages the parties to use the *ex officio* attorney institution in a more responsible way. The Civil Law Codification Commission reflected on this subject briefly and hopefully it will return to it in further work.

It is also very important who decides about appointing of an *ex officio* attorney. A situation in which a decision is made by a presiding judge raises doubts. Is a judge always objective in such a situation? Would not it be better if a decision on granting an *ex officio* attorney were made by an **independent body** that does not resolve the case as to its merits? Finally, would this not reduce the troubles with lengthiness of proceedings, relieving judges, so that they could devote more time to their main duties, i.e. adjudicating? The introduction of extra-judicial evaluation of a party's ability to bear court costs or legal aid costs would require more serious systemic changes. However, if such evaluation is left to the court, it should be postulated that division officials take over these competences. Such solution was adopted in administrative courts.

The evaluation of whether indigence criteria are fulfilled and a decision on granting legal aid could be “taken out” of courts. As public defender offices in criminal cases, institutions dealing with granting legal aid to the indigent could be established also for civil and administrative cases. It would be easiest to do so at the level of Poviats, where “Poviat’s family assistance centers” and “Poviat’s consumer rights spokesmen” already exist (see part 7 of the Report). Such **Poviat’s legal aid centers** could fulfill many functions, synchronizing and focusing the State’s efforts. It would be easier for them to verify the means criteria of applicants, and especially as Starostwa (administrative units within Poviats) already have knowledge in this respect. They could coordinate granting legal aid by attorneys and legal advisers and, thus, relieve the courts. They could also deal with pre-trial and extra-judicial legal assistance. Explaining his / her legal situation to an interested person, providing simple information, indicating measures often leads to resignation from bringing the case to a court. Moreover, the needs of the indigent persons are not limited to representation in court – and this is, actually, the only element guaranteed (and to a very limited extent in practice) by the present system of *ex officio* representation. The establishment of a network of Poviat’s legal aid centers would also help to develop unified standards of work, create training programs for centers’ employees, draft information and educational materials for citizens. The centers would cooperate with practicing lawyers and a part of the apprentice training for all legal professions could be also carried out at the centers. Finally, what is very important, the centers would employ their own appropriately trained employees – law graduates. Many, if not most, of the cases with which the indigent approach various organizations do not require assistance of an attorney or a legal adviser. Judge J. Żuralski proposes that employees of such centers be entitled to represent the client in court in smaller cases and that work in the center offer one of the “paths” enabling to obtain rights to practice traditional legal professions.¹⁰⁴ These are good proposals.

¹⁰⁴ See J. Żuralski, *Powinność powiatu lub gminy. Przyszłość obrony z urzędu i pomocy prawnej dla najuboższych*, Rzeczpospolita, 5 II 2003.

As demonstrated above, “**means tests**” are needed both in criminal and in civil proceedings; such tests would facilitate formulating an application for an attorney and its evaluation by a court. The fact that courts, independently, have developed the mentioned forms proves such necessity. This need was also noticed during work on the reform of administrative courts; as a result, more detailed requirements with respect to demonstration of inability to cover costs of proceedings and applications for legal aid filed on an official form were introduced.

It seems that an appropriate form, to be developed by the Council of Ministers based on a statutory authorization, could be used also (with small legislative changes) in civil and criminal proceeding. It would be useful if already today, before its development, the authors took this postulate into consideration. Particularly that the draft amendment to the act on court costs in civil cases also provides for a statutory authorization for the Minister of Justice to issue an ordinance specifying an appropriate form in the civil proceedings. This situation enables at least partial **synchronization of works and standardization of the model for granting legal aid** within various legal regimes.

PART VI

QUALITY OF FREE LEGAL REPRESENTATION

There are **no studies** or data related to the quality of legal aid, and there is **no system of evaluation** of the legal aid system. There are no special mechanisms to determine the quality of legal representation in *ex officio* cases or to monitor the legal steps taken by a lawyer. There are **no standards of conduct** related to *ex officio* cases, and there is no system of quality control, either. All responsibility lies with professional bodies (of disciplinary procedure), which have been widely criticized as not fulfilling this task properly. The state, though legally capable of doing so, does not use its power in this respect.

The Helsinki Foundation for Human Rights receives complaints about different kinds of attorney conduct, with most clients complaining about *ex officio* lawyers. HFHR often receives complaints after the complaint was lodged with the disciplinary board but then was insufficiently explained or even ignored, the applicant believes; in some instances, the complainant received no answer at all.

As follows from the experiences of the HFHR, the quality of legal services and the oversight of the profession constitute a subject that hardly enjoys any interest at all. No surveys are conducted in this area. The professional corporations may settle disciplinary cases at their absolute discretion, which sometimes leads to overlooking the unprofessional conduct of the lawyers.

The judges we interviewed were generally of the opinion that it made no sense for them to lodge complaints with local councils of the Bar, as the councils tend to ignore them. A president of one of the regional courts told

us that he tried to persuade judges of his court that the lawyers' professional bodies should be informed about professional transgressions of their members even if there is no actual response to such complaints. In most cases, however, the judges consider such actions pointless.

In procedures before common courts, in cases of infringement of procedural duties by attorneys or legal advisers that cause delays in the proceedings (such as unjustified absence during hearings, or non-performance of orders from the court within a set time), the president of the court should notify the chairperson of the local council of the Bar or Legal Advisers.¹⁰⁵ However, such notification does not oblige the bodies of legal profession to take any action against the lawyer.

Generally, judges do not discipline lawyers who do not fulfill their obligations. The only recourse for unsatisfied clients includes a motion to the court for a change of lawyer, or a disciplinary complaint to a professional body. The judge's decision whether to replace the lawyer is discretionary, and approvals do not happen often. The disciplinary procedure is also often ineffective. As the procedure is still secret (this is also true for disciplinary hearings), there exist no means of ensuring transparency and accountability to civil society or the media regarding the process. The disciplinary procedure, in fact, is widely criticized for its ineffectiveness.

In one of the cases brought to HFHR, a defendant confined to pre-trial detention approached the Foundation, complaining about the conduct of his *ex officio* defense counsel. Throughout the criminal proceedings, the lawyer never contacted the defendant, failed to answer his phone calls and letters, and did not even once bother to appear in person at any of the six court hearings. We suggested that the man complain to the Regional Council of the Bar. He did so, describing his case and asking about the institution of *ex officio* defense in view of the fact that his counsel did nothing in his case.

¹⁰⁵ Section 91 of the Decree of the Minister of Justice of 19 November 1987 on Internal Rules of Procedure of Common Courts of Law; see also Article 20 of the Code of Criminal Procedure, which states that in cases of gross violation of procedural duties by lawyers, prosecutors (during pre-trial proceedings) and judges (during trial) should notify the lawyers' professional body.

In response, he received a short letter from the dean of the Regional Council of the Bar, summarizing the Council's opinion in two paragraphs. The letter began with this statement:

Responding to your letter . . . I would suggest that you should address your question [“what is *ex officio* defense for?”] directly at the legislators, as it has been they who, in provisions on criminal procedure, burdened lawyers with **that undoubtedly toilsome [difficult] duty**.

In the second paragraph of the letter, the Regional Council of the Bar does admit, though not directly, that the lawyer concerned failed to handle the defense properly. Thus, the dean informs the defendant:

Today, I talked to your *ex officio* defense counsel . . . ; having read your letter, he promised to pay you a visit at the remand prison to discuss issues related to your defense in the proceedings.

The groups interviewed by the HFHR in courts and penitentiaries were asked about the course of their cooperation with their legal representative and the aspects, if any, with which they were satisfied.

Respondents' opinions on cooperation with their attorney
(both criminal and civil cases)

	Parties in courts		Inmates in penitentiaries		Total represented (courts and prisons)	
	Hired	<i>Ex officio</i>	Hired	<i>Ex officio</i>	Hired	<i>Ex officio</i>
“Satisfied” or “rather satisfied”	80%	55%	45%	45%	70%	50%
“Dissatisfied” or “rather dissatisfied”	15%	35%	50%	50%	25%	40%
“Difficult to say”	5%	10%	5%	5%	5%	10%
Total persons	131	111	55	73	186	184

The opinions of the prison inmates about hired versus *ex officio* defense counsels are much the same: given the time passed and their conviction respondents rate the two types of defense similarly.

In the case of the group interviewed in court, whose cases were still pending, the level of satisfaction with cooperation by an *ex officio* lawyer was lower.

There is also a noticeable difference between the reasons for satisfaction with a hired attorney versus an *ex officio* one (respondents could indicate up to three reasons).

The three most cited reasons for satisfaction with a hired attorney were:

- “Tries hard/ shows commitment”,
- “Is well acquainted with my case and the case file”,
- “Tells me what is going on in the case”.

The three most often cited reasons for satisfaction with an *ex officio* attorney were:

- “Comes to hearings”,
- “Is nice/ polite”,
- “Is well acquainted with my case and the case file”.

Can it be concluded that the clients have different expectations of the *ex officio* attorney, and that the very fact of the *ex officio* attorney’s presence at hearings is worthy of praise?

In addition, attorneys interviewed by the HFHR were asked to compare the quality of their colleagues’ work in private and *ex officio* cases, according to several criteria (see part 3.4 of the Report).

Those who approach the Foundation by letter are at a loss as to what to do in situations of faulty cooperation by their attorneys, especially *ex officio* lawyers. We decided to test the respondents’ knowledge as to the possibilities available in addressing the situation of an incompetent or dishonest lawyer. The entire sample of 809 persons was interviewed. We asked whether the respondents were aware of the existence of written principles of the legal professions, so-called codes of professional ethics. Precisely half of the respondents had heard about the special **rules of professional conduct**;

30 percent were able to quote specific examples. It is worth noting that this knowledge in many cases (30 percent) had been derived from the media.

Asked whether they knew that lawyers and legal advisers had to take out obligatory **malpractise insurance**, and that damages can be obtained from that insurance if the lawyer is negligent in his or her duties and thereby causes harm to the client, somewhat less than 15 percent answered in the affirmative.

Asked if they knew what to do if a lawyer fails in his or her duties, only 40 percent said yes. Those who did, usually said that the lawyer should be replaced (40 percent), slightly less than 35 percent were aware of the possibility of complaining to the Bar's bodies, and 5 percent were aware of the possibility of lodging a civil claim against the lawyer.

The respondents who had legal representation in their case (370 persons) were also asked whether they had inquired about the lawyer's actions and checked what he or she was actually doing. Only 40 percent of respondents had made such inquiries to their lawyer.

Among those who did not ask the lawyer about his or her actions in their case (60 percent of respondents), the following proportions stated that this was because the lawyer told them everything without their asking:

- courts (represented by hired lawyers), 25 percent;
- courts (represented by *ex officio* lawyers), 5 percent;
- penitentiaries (represented by hired lawyers), 10 percent;
- penitentiaries (represented by *ex officio* lawyers), 0 percent.

This demonstrates that relations are better between clients and lawyers of their own choosing.

VI.1. Conclusions

The above-described examples of the reaction of disciplinary authorities are obviously extreme. Their existence, however, indicates the need for a closer examination of disciplinary procedures. It is difficult to agree with the Bar's position¹⁰⁶ – that disciplinary procedures are an internal issue of

¹⁰⁶ Expressed, for example, by a disciplinary prosecutor of the National Council of the Bar during Legal Aid Forum.

professional corporations – as they serve to protect clients against unreliable lawyers. They cannot be replaced with criminal or civil liability, either.

The basic role of corporations' courts is to take care of the profession's quality, of its compliance with the established high performance standards. The goal of a disciplinary procedure is not only to punish or provide moral compensation to an injured person (if such exists) but also, which should be emphasized, **to protect all potential future clients** of a lawyer.

The Helsinki Foundation for Human Rights has been formulating postulates concerning disciplinary procedures for years. We support, among others, making disciplinary proceedings open to the public so that they may be under social control, in accordance with Article 45 of the Constitution of the Republic of Poland and Article 6 of the European Convention of Human Rights.

If disciplinary courts remain within corporations, a possibility to appeal against decisions of disciplinary courts to **common courts** should be introduced. The existing procedure enabling, in exceptional cases, to bring cassations of decisions of higher disciplinary courts to the Supreme Court is not sufficient.

State bodies should not remain **passive**, either. The Department of the Bar and the Legal Advisers of the Ministry of Justice should undertake actions aimed at making disciplinary responsibility real. The Minister of Justice has certain supervisory powers towards the legal professional corporations, which he does not use in practice. Thus, the failure of the Ministry of Justice to undertake actions is not a result of the lack of statutory powers or lack of issues to be dealt with, but rather of the lack of will to act. It is worth remembering that in *ex officio* cases the State is an employer of lawyers and should be interested in the quality of services paid for with public funds and in the control of efficiency of their spending.

The study conducted by the Foundation reveals that many persons do not ask their lawyer about the case's progress, do not know what to do if the lawyer fails to fulfill his or her duties, and only some of them are aware of the mandatory malpractice insurance. Especially the indigent persons, less educated, i.e. potential clients of *ex officio* attorneys, do not have sufficient

knowledge of the above issues. Clients of *ex officio* lawyers evaluate their cooperation with the lawyer more negatively than persons who hired one.

It seems that it would be sensible to develop more **detailed standards** of *ex officio* legal aid: the list of duties of a lawyer hired by the State for an indigent person. The existing principles of professional ethics are too general and refer to reliability, conscientiousness, but not, for example, directly to the duty to contact the client before the trial, or the duty to keep case files for each client. These issues are obvious for many attorneys but not for all of them. Developed standards are also to be used by a client or an institution administering the system of *ex officio* legal aid to evaluate a lawyer's work. The Polish state "hires" an *ex officio* lawyer, pays him or her remuneration and does not control the quality of service in any way. For example, in the Netherlands or Great Britain, also clients of lawyers provide information on cooperation by filling in especially prepared questionnaires.

There are many possible actions that should be undertaken to ensure high quality of legal aid. We should also convince the professional corporations that proposals concerning the development of work standards, work quality control or, finally, the reform of disciplinary procedures, **are not an attack** on their corporate independence, but rather an expression of care for high quality of services and professional prestige. Conscientious reckoning with dishonest members of corporations may only help and not hurt them.

PART VII

ADDITIONAL POSSIBILITIES OF RECEIVING LEGAL AID

The model of legal aid in Poland is based on *ex officio* appointments granted by courts and involves representation before the court almost exclusively. There are no staff lawyers or contracting systems. There is no general state scheme of granting pre-trial legal advice.

Apart from the system of *ex officio* representation by attorneys and legal advisers, there are some auxiliary forms of legal aid provided by the Ombudsman's Office, public prosecutors, Poviats' centers for family assistance and Poviats' consumer rights spokesmen, non-governmental organizations, and media.

VII.1. Ombudsman

For violations of rights and freedoms described in the Constitution and other legal acts, citizens and foreigners may approach the Ombudsman. A motion to the Ombudsman is free of charge and does not demand any special form.¹⁰⁷ The only necessary contents are personal data (name and surname) and the address of the applicant.

The Ombudsman may inform the applicant about legal measures to which the applicant is entitled.¹⁰⁸ If the Ombudsman finds a violation of constitutional rights and freedoms, he may take the case himself or pass it on to relevant organs. If, after examining the case, the Ombudsman finds no violations, he informs the applicant of the findings.

¹⁰⁷ Article 10 of the Act on the Ombudsman, 15 July 1987 (unified text, Journal of Laws No. 14, 2001, item 147).

¹⁰⁸ Article 10 of the Act on the Ombudsman.

If the Ombudsman recognizes a need for action regarding the problem, he may undertake legal action on behalf of the individual or a group of persons. The Ombudsman may demand the filing of a civil claim and take part in it, in which case the Code of Civil Procedure regulations on the participation of a public prosecutor are applicable. The Ombudsman may also demand initiation of other proceedings, whether administrative, criminal, or disciplinary. If a petty offence is found, the Ombudsman may submit a motion for punishment. The Ombudsman is also entitled to file cassations, extraordinary appeals from judgments of the Chief Administrative Court, and complaints to the Constitutional Tribunal in individual cases.

In 2002, the staff of the Ombudsman's Office saw a total of 3,611 clients and conducted 13,539 telephone conversations giving explanations and advice.¹⁰⁹ In that year, 37,810 new individual cases were examined. Proceedings were completed in 15,005 of the cases taken up by the Ombudsman. A satisfactory solution was achieved in 19.3 percent of those completed cases. The term "satisfactory solution" means that an individual problem was solved in accordance with the applicant's expectations.

VII. 2. Public prosecutor

The prosecutor may demand institution of proceedings in every case. He or she may institute an action or file a motion if this action aims to remedy a faulty state of affairs that threatens the rule of law or is dictated by the need to protect a social interest or the citizen's right. The prosecutor may also join pending proceedings.

The provisions also permit the prosecutor's participation in the case; the prosecutor is bound by the time limits set for the parties. The prosecutor's legitimization under substantive and procedural law to take part in a civil case comes from Article 7 of the Code of Civil Procedure and from Article 3, section 1, point 2, of the Prosecutor's Office Act.¹¹⁰

¹⁰⁹ See www.brpo.gov.pl/informacja_za_2002.html.

¹¹⁰ Decree of the Minister of Justice of 11 April 1992, Internal Rules of Operation of General Organizational Units of the Public Prosecutor's Office.

The table below shows the prosecutors' exercise of their due powers in civil proceedings. The data covers the first six months of consecutive years.

The prosecutor's involvement in civil, economic, and social insurance cases: district, regional, and appeal offices¹¹¹

Specification	1st half-year of 1999	1st half-year of 2000	1st half-year of 2001	1st half-year of 2002
	Absolute numbers			
The prosecutor instituted civil action	1,745	1,754	1,714	1,804
Motions for institution of non-litigious proceedings submitted	3,290	3,698	3,652	3,623
Concerning family relations	1,041	1,127	1,165	1,050
For legal incapacitation	432	511	560	510
To the court for institution of proceedings against excessive drinkers	1,791	2,042	1,894	2,057
Number of civil cases examined with the prosecutor's participation	8,725	9,641	9,629	9,843
Number of actions instituted by the prosecutor and examined by the court	1,459	1,481	1,480	1,412
Including actions admitted:	1,380	1,415	1,397	1,337
Absolute numbers				
Proportions	94.6%	95.5%	94.4%	94.7%
Number of the prosecutor's motions examined by the court in non-litigious proceedings	2,724	2,910	2,906	2,876
Including motions granted in whole or in part:	2,498	2,666	2,612	2,512
Absolute numbers				
Proportions	91.7%	91.6%	89.9%	87.3%

¹¹¹ Ministry of Justice, *Informacja statystyczna o działalności powszechnych jednostek organizacyjnych prokuratury w I półroczu 2001 r.* (Statistical information on activities of general organizational units of the Public Prosecutor's Office in the first half of 2001), Warsaw, 2002.

VII.3. Powiat's family assistance centers and consumer rights spokesmen

According to Article 10a of the Social Welfare Act, social welfare duties performed by Powiat's family assistance centers include providing information about relevant rights to individuals and families, and providing assistance in taking care of official matters and other important living issues. Persons mentioned in Article 3 of the act are entitled to such assistance. They include: the poor, orphans, homeless, disabled, persons with chronic diseases, and former prisoners. Among those entitled are also incomplete families and those with many children, alcoholics and drug addicts, and victims of natural or environmental pollution disasters.

In order to receive legal advice, one does not have to meet the income criteria required for other benefits. Each citizen and permanent resident or refugee may apply for legal advice. The heads of Powiat's family assistance centers may file lawsuits in alimony cases and may submit motions to relevant organs for establishing the level of disability. In court proceedings, the head of a center has the status of a public prosecutor. Social welfare assistance and legal assistance can be provided on request of an interested individual or *ex officio*.

Unfortunately, there is no data showing the scope of legal assistance provided by the centers. The data shows only what is the main task of the centers – financial and material humanitarian help granted by the centers. However, it also lists “specialized advice” (including psychological and legal) provided in 2000 to 134,000 families, as well as help in dealing with official and other matters provided to 280,000 families.¹¹²

Powiat's consumer rights spokesmen. Powiat's consumer rights spokesmen offices are public administration organs established to provide legal advice on consumer protection issues. Their competencies include: providing free legal advice and information about consumer rights, and initiating and taking part in court proceedings in the name of consumers.

¹¹² Data obtained from the Web site of the Ministry of Labor and Social Politics: http://www.mpips.gov.pl/pliki_do_pobrania/Statystykapomocypolecznejw2000roku.rtf.

In 2001, Poviát's consumer rights spokesmen gave advice, information, and explanations in 64,000 cases. They initiated court proceedings in 865 cases.¹¹³

VII. 4. Non-governmental organizations

There are many specialized non-governmental organizations that, apart from other activities, provide free legal information, advice, and sometimes representation. There have already appeared programs of supporting legal advice provided by social organizations, the purpose of which is, among others, to strengthen the role of such advice, its quality, exchange of information among organizations, joint trainings etc. The Stefan Batory Foundation and the Polish-American Freedom Foundation conduct special programs within which they support organizations providing legal aid for the indigent.

Citizen Advice Bureaux.¹¹⁴ The services of the twenty-eight local Citizen Advice Bureaux cover a very broad range of issues, from labor law through divorces, legacies, and social welfare benefits, to refugees' rights, consumer protection, and patients' rights. Their services are free of charge and there is no means test; everybody may receive advice. Citizen Advice Bureau's advisers do not provide any "ready-to-use" solutions; everybody chooses his or her own path once equipped with the information necessary for a self-reliant and efficient manner of solving the problem. Advice is not given by lawyers, and it is not defined as legal advice but rather as citizens' advice and information.

University law clinics. There are about fifteen privately funded university law clinics, where law students provide advice to the indigent. A clinic's work is divided into sections supervised by the faculty teachers and practitioners, e.g., sections of civil law, administrative law, labor law, criminal law, refugee law, and women's rights. In addition, students work with prisoners. Students' work includes: written opinions, written statements, applications, appeals, claims, complaints and interventions.¹¹⁵

¹¹³ "Office for the Competition and Consumer Protection—Functioning of the Poviát's consumer rights spokesmen in 2001," Warsaw, September 2002 (unpublished).

¹¹⁴ Citizen Advice Bureaux Web site (www.zbpo.org.pl/).

¹¹⁵ Information about clinics may be obtained from the Web site of the Law Clinics Foundation (http://www.fupp.org.pl/index_ang.html).

Several non-governmental organizations provide assistance to **victims of crimes**, and they usually provide some form of legal aid as well.

Women's organizations provide some forms of legal assistance, mainly for victims of domestic violence and unemployed women. The Women's Rights Center is the biggest organization of this kind, having six branches in different parts of the country.¹¹⁶

The largest consumer NGO is the Federation of Consumers, which has about fifty local branches providing legal advice in consumer cases.

Legal advice is usually also provided by **trade unions**, which employ legal advisers to provide advice for trade union members in labor cases.

In addition, **local media** in many cases hold free consultations with lawyers on a regular basis.

VII.5. Lawyers pro bono work

Poland has no tradition of providing pro bono legal aid. There are obviously both law offices and individual lawyers who provide such assistance, however, it is not organized in any manner, and no public debate in this respect is ongoing. It seems, however, that this situation has began evolving, as several initiatives that may initiate changes appeared.

Attorneys got actively involved in providing free legal aid to victims of crimes within the scope of the action initiated by the Ministry of Justice in the last week of February 2003.

University Law Clinics Foundation is in the process of organizing a "Pro bono Lawyer" competition.¹¹⁷ The competition is supposed to propagate the idea of pro bono work, propagate good models, help to identify persons and law offices providing such assistance, and to support the prestige of legal professions.¹¹⁸

¹¹⁶ Women's Rights Center Web site: <http://free.ngo.pl/temida/contents.htm>.

¹¹⁷ According to information obtained from the President of the Foundation, F. Czernicki, (4 VIII 2003) the idea met with favorable reaction of the authorities of the bar and legal advisers self-managements.

¹¹⁸ The Foundation has also organized, with the Law Department of the Warsaw University, a scientific seminar "Prawnicy w działalności *pro publico bono*" (Lawyers in *pro bono* activities), 6 V 2003, the Warsaw University.

The activities of university law clinics, in turn, involve making future lawyers aware of the idea of helping the indigent. There is a serious chance that those who begin providing such aid already during their studies would provide it naturally also in their future work.¹¹⁹

Following the example of other countries, the Polish Section of the International Commission of Lawyers intends to implement the project of encouraging and engaging retired lawyers in pro bono work. The project assumes that their help would be used by social organizations and non-commercial institutions.¹²⁰

VII.6. Conclusions

Institutions and organizations presented in this chapter are, clearly, of a diverse nature. Their common trait is that thanks to their activities it is possible to obtain legal aid in a manner other than appointment of an ex officio attorney.

Legal aid at the trial stage and of the nature of representation in proceedings can be also obtained from the **prosecutor's office**. Evidently, however, the prosecutor's office is established for other tasks and providing legal aid or bringing actions on behalf of citizens constitute only a marginal part of its activities. Although we could consider the prosecutor's office taking on a bigger responsibility in this respect, it seems unrealistic at present due to its current workload.

The Ombudsman is also entitled to initiate cases of individual persons, however, it is difficult to treat the core of its activities as providing legal aid. The Ombudsman is rather the proverbial "last resort" and most often gets involved in a case where the rights and freedoms are violated by authorities. On the other hand, as the presented data reveals, the Ombudsman's Office in reality often provides basic advice and legal information. Although it is most frequently just simple information on the possible legal means in

¹¹⁹ See Ł.Bojarski, *Zapomniany etos prawnika*, *Klinika* 2000, nr 1, s.59.

¹²⁰ An international working group International Senior Lawyers Project conducts work in this field. See e.g. *Biuletyn Informacyjny Polskiej Sekcji Międzynarodowej Komisji Prawników*, marzec 2002.

a case and has no nature of an in-depth analysis or legal aid, its role is of course very important.

The remaining institutions and organizations, on principle, do not provide legal aid of the nature of representation in proceedings (it happens rarely, e.g., by hiring a lawyer for a party). It is, however, possible to obtain from them some legal aid both at the court trial stage and pre-trial stage, and in cases where litigation is not necessary.

The number of cases brought to various institutions and organizations shows the enormous scale of needs in this respect – the scale not fully determined. This applies to persons appearing in courts without an attorney and searching for help in their case, and to persons dealing with all sorts of problems outside of a court. Since the problem of representation was discussed in greater detail in conclusions to the chapters devoted to *ex officio* defense and representation in criminal and civil cases, in this section we shall concentrate on legal aid of a different nature.

We have presented above public institutions and non-governmental organizations from which it is possible to obtain legal aid, as well as other means for reaching this goal. When reading this, one may form an impression that a person looking for legal aid may receive it from many sources. An obvious conclusion, however, is the dispersion of existing possibilities of obtaining legal aid and lack of any coordination of activities of particular entities. Moreover, the disproportion of possibilities of obtaining help depending on the nature of needs is very clear – for example, noticeably bigger possibilities are afforded to people searching for help in cases of consumer rights violations. Although there exist state institutions dealing with selected fields, such as consumer rights spokesmen or Poviats' family assistance centers, the State has no comprehensive policy of providing legal aid to the indigent.

It is therefore imperative to create a system, a network of places providing legal aid, for example, **Poviat's legal aid centers**, which could take advantage of experiences gained so far by family assistance centers and consumer rights spokesmen offices operating in Poviats.

Currently, granting legal aid to the indigent remains within the sphere of non-governmental organizations. Contrary to the State policy in this respect, the non-governmental sector has observed the need to consolidate activities, exchange information and experiences, and develop common standards for granting legal aid. The cooperation within the network of citizens' advice bureaux, establishment of the Non-Governmental Advice Platform, or activities of the University Law Clinics Foundation are a proof of this. The University Law Clinics Foundation is finalizing¹²¹ the work on the draft law on university law clinics.

Hopefully, the **exchange of experiences** and joint work in the non-governmental sector continue. Many organizations are developing good methods of operation, drafting professional information materials, manuals, and databases, or developing training programs for persons providing aid. Some of these activities are being copied. Good cooperation will allow making activities of this sector more professional. It will also help the non-governmental sector to come into contact with legal corporations.

Above we have mentioned programs connected with pro bono legal aid provided by students and retired lawyers. It would be also worthwhile to interest authorities of legal corporations in providing such help, so that they include it as a mandatory element of apprentice training of future lawyers. Attorney or legal adviser apprentices, but also others, could within the apprenticeship spend some time in non-governmental organizations providing legal aid to the indigent. In this way they would help persons in need, gain professional experience and become more sensitive to this type of social needs, which could incline them to continue such work in their future practice. This, obviously, requires cooperation between district councils of the Bar and legal advisers and local organizations dealing with legal aid to the persons in need, development of standards of cooperation (such as, who receives such aid, or division of duties between an organization and the applicant), and ensuring administrative services for lawyers within the organization. Experiences from the current cooperation of some organizations with practicing lawyers indicate that it is possible. The non-governmental

¹²¹ As of 25 VIII 2003.

advice sector's efforts could help in setting up such cooperation – constant and on a national scale.

Legal corporations could also consider the introduction into the professional ethics regulations of the duty or at least encouragement for apprentices, and also regular members of corporations, to devote a specific number of hours per year to provide pro bono legal aid to the indigent (individually or within an organization providing such aid). Several dozen or even several hours committed by all lawyers every year would help to include a big group of people into the legal aid system.

It is also the State's role to make legal corporations aware of the needs of the indigent and to promote provision of legal aid to them. The appeal of the Ministry of Justice directed to the lawyers and asking them to provide victims of crimes with aid for a week was a good example.

Specialized non-governmental organizations providing legal aid, in particular to especially suffering social groups, operate today and will continue to operate. We cannot forget, however, that it is the State's responsibility to create the system of access to legal aid for the indigent and also the system of competent, clear information available to all citizens – for example, sample motions, manuals, leaflets etc. Such activities of the State can in any case partially help in relieving the burden of courts, which is at present the basic problem of the administration of justice.

To work on systemic solution of the indicated problems, the State bodies should create a working team and invite representatives of the Ombudsman's Office, non-governmental organizations and legal corporations to participate in it. Using the existing achievements and experiences of social partners will help to develop a better model of access to information and to legal aid.

PART VIII

ATTACHMENTS

Questionnaires

Below are some of the tools that the Helsinki Foundation for Human Rights used in its research:

- questionnaire for a person not represented by an attorney/legal adviser;
- questionnaire for a person represented by an attorney/legal adviser;
- questionnaire for attorneys – examination of opinions of the legal professions’ representatives;
- questionnaire for organizations.

The first two questionnaires were used both in a pilot survey and, after improvements, in the main survey. Attorneys and non-governmental organizations were surveyed only in the pilot project, and these tools appear in the original, unchanged, version.

The range of tools (additional ones were used to survey opinions of legal advisers, prosecutors, and judges) shows our approach in the project: we wanted to gain information and opinions from a variety of people and, based on this, to build a more complete general picture. We also hoped that some research would be continued by us or by other institutions in the future. We proposed, for instance, that the Polish Bar and Legal Advisers conduct representative surveys within their professions, using professional journals to distribute improved questionnaires.

One more issue needs explanation: There are two separate independent legal professions in Poland – advocates (called “attorneys” in these tools) and legal advisers. The main differences between them are as follows: legal

advisers may not represent clients in criminal cases (with the exception of misdemeanors) or family law cases; legal advisers may be employed on labor contracts, but in such cases they may not represent private clients.

VIII.1. Questionnaire for a person not represented by an attorney/legal adviser

(Separate questionnaires were used for persons surveyed in courts and in penitentiaries. For the purposes of this publication, surveys have been unified, with differences between questionnaires used in courts and in penitentiaries marked).

Good morning/afternoon. I would like to talk to you about certain issues connected with legal aid in your case. This survey is being conducted by the Helsinki Foundation for Human Rights in Warsaw. The purpose of this survey is to determine the extent to which persons appearing in courts are provided with legal aid. This survey is anonymous. Its results will be used only in a collective form.

1. Did you have one or several cases in court?

1. one case 2. several cases

If answer 1.2: Could we talk about the most recent case (or if several cases are/were pending simultaneously, please select the one most important for you)?

Time of the beginning of the interview:

Obtaining legal aid

2. Have you attempted to find an attorney/legal adviser in your current case?

1. yes (*omit questions 4.1 and 4.2*)
2. no (*go to question 4.1 and omit questions 7–12*)

3. If yes, then in what way?

1. I submitted an application (I asked the court)
2. at an attorney's/legal adviser's office
3. through family or acquaintances
4. in court
7. in a different manner (how?)

[in surveys for persons in penitentiaries, additional answers: 5. through others imprisoned, 6. through a tutor]

4. 1. If no, then why? (please select no more than 2 answers)

1. I did not know how to find one
2. I do not need one (I am managing on my own)
3. it is "said" to be too expensive
4. other reasons what?

4.2. If no, would you like to have assistance of an attorney/legal adviser during the case?

1. yes why?
2. no why?

5. Are you aware that people who cannot afford to hire a lawyer may apply to court and obtain a so-called ex officio attorney, remunerated by the state?

1. yes 2. no

6. If yes, where did you learn about it?

(only one answer can be selected – where the respondent heard about it for the first time)

1. court 2. family, acquaintances 3. reading materials (book, leaflet, etc.)
4. social organization 5. public prosecutor 6. curator
9. other source what?

[in surveys for persons in penitentiaries, additional answers: 7. tutors, 8. other imprisoned]

7. If you had attempted to hire an attorney/legal adviser privately, why were you unsuccessful?

1. he or she did not want to take the case why?
2. he or she was too expensive 3. other reasons?

8. On what basis did you apply for an ex officio attorney/legal adviser (what arguments did you use)?**9. What information/documents did you have to attach to an application?**

1. none, application was enough
2. additional verbal explanation before a court
3. certificate of the Fiscal Office 4. certificate on income
5. certificate from welfare 7. other what?

[in surveys for persons in penitentiaries, additional answer: 6. certificate from the penitentiary on lack of employment due to lack of work]

10. Did the court require additional documents or information?

1. yes 2. no 3. I don't know // I don't remember

11. If yes, then what type and in what manner?

12. Why did the court refuse to grant an ex officio attorney/legal adviser – what arguments did it use?

All respondents

Additional legal aid

13. Have you tried to obtain legal advice or assistance in a different manner?

1. yes
2. no (omit questions 14 and 15) why?

14. If yes, then where?

1. social organization which?
2. state institution which?.....
3. acquaintances or family 4. leaflets, books, codes
5. other ways what?

If answer 1. or 2. to question 14:

15. With what result? (provide the name of an organization or institution)

1. refused assistance what justification?
2. did not respond to a letter 3. provided advice
4. provided advice with drafting a letter 5. other what?

16. Do you know that attorneys and legal advisers have written principles for performing their professions (so-called professional ethics principles)?

1. yes
2. no (*go to question 19*)

If answer 16.1:

17. Could you give any examples of such principles?

1. yes
2. no

If answer 16.1:

18. Could you say where you heard of such principles?

.....

19. Do you know that attorneys and legal advisers have to be insured and that if, when conducting a case, they neglect their duties and harm a client, that client may receive compensation from such insurance?

1. yes, I know of such insurance
2. no, I have not heard of such insurance

- 3. enough for everyday expenses, but we have to save for bigger ones
- 4. we are well off, we can afford a lot

28. Education

- 1. incomplete elementary 2. elementary 3. professional
- 4. high school 5. incomplete higher 6. higher

29. Which case before a court in which you appear as a party is it? [in surveys for penitentiaries: Which case in which you were a defendant was it?]

- 1. first 2. second 3. third 4. fourth (or more)

30. Would you like to add anything else concerning issues discussed in this survey?

Thank you for the conversation and for your answers.

Time of the completion of the interview.

Annex for the inquirer

1. Date of the interview:

2. Duration of the interview (in minutes):

3. Attitude of the respondent toward the interview:

- 1. favorable 2. indifferent 3. reluctant
- 4. comments.....

4. Were questions understandable?

- 1. yes, all were understandable 2. no, all were not understandable
- 3. some were not understandable which?

5. Comments of the inquirer (issues not included in questions that arose during a conversation, interesting issues, other)
.....

Full name of the inquirer

Signature of the inquirer.....

VIII.2. Questionnaire for a person represented by an attorney / legal adviser

(Separate questionnaires were used for persons surveyed in courts and in penitentiaries. For the purposes of this publication, surveys have been unified, with differences between questionnaires used in courts and in penitentiaries marked).

Good morning/afternoon. I would like to talk to you about certain issues connected with legal aid in your case. This survey is being conducted by the Helsinki Foundation for Human Rights in Warsaw. The purpose of this survey is to determine the extent to which persons appearing in courts are provided with legal aid. This survey is anonymous. Its results will be used only in a collective form.

1. Did you have one or several cases in court?

1. one case 2. several cases

If answer 1.2: Could we talk about the most recent case? (Or, if several cases are/were pending simultaneously, please select the one most important for you.)

2. Did you have an attorney or a legal adviser in this case? [only in surveys conducted in courts]

1. an attorney 2. a legal adviser

If more than one lawyer appeared in the case, we would like to talk about the first one.

Time of the beginning of the interview:

Obtaining legal aid

3. How did you obtain an attorney / legal adviser?

1. by choice – hired privately (*omit questions 7–10*)
2. by choice – because court denied my application for an ex officio attorney
3. ex officio – on my application (*due to lack of funds for an attorney*)
(*go to question 5*)
4. ex officio – mandatory defense (*e.g., if treated by a psychiatrist or a case in first instance before a Regional Court in case of imprisonment*)
(*go to question 5*)
5. ex officio – in a different manner (*e.g., proposed by a court, curator applied to court*) (*go to question 5*)

what manner?.....

.....

4. If an attorney/legal adviser is by choice – how have you selected him or her:*(please select one answer)*

1. at an attorney's/legal adviser's office 2. through family or acquaintances
 3. in court 6. in a different way (how?)

*[in surveys for persons in penitentiaries, additional answers: 4. through other imprisoned, 5. through a tutor]***5. Did you have any problems with finding (obtaining) an attorney/legal adviser?**

1. yes what? 2. no

6. Are you aware that people who cannot afford to hire a lawyer may apply to court and obtain a so-called *ex officio* attorney, remunerated by the state?

1. yes 2. no

6.1. If yes, where did you learn about it?*(only one answer can be selected – where the respondent heard about it for the first time)*

1. court 2. family, acquaintances 3. reading materials (book, leaflet, etc.)
 4. social organization 5. public prosecutor 6. curator
 9. other sources (what?)

*[in surveys for persons in penitentiaries, additional answers: 7. tutors, 8. other imprisoned]**Questions 7–10 apply only to an ex officio attorney***7. On what basis did you apply for an ex officio attorney/legal adviser (what arguments did you use)?.....****8. What information/documents did you have to attach to an application? (several answers may be selected)**

1. none, application was enough
 2. additional verbal explanation before a court 3. certificate of the Fiscal Office
 4. certificate on income 5. certificate from welfare
 7. other (what?)

*[in surveys for persons in penitentiaries, additional answer: 6. certificate from the penitentiary on lack of employment due to lack of work]***9. Did the court require additional documents or information?**

1. yes 2. no 3. I don't know /I don't remember

10. If yes, then what type and in what manner?

All respondents**Quality of work of an attorney/legal adviser****11. Were/are you satisfied with cooperation with an attorney/legal adviser?**

1. I am satisfied (omit questions 14 through 18)
2. I am quite satisfied (omit questions 14 through 18)
3. I am rather unsatisfied
4. I am unsatisfied.....
5. it's difficult to evaluate

12. What are you most satisfied with? (please select no more than 3 answers)

1. he or she is involved in the case, is doing his or her best
2. he or she is very familiar with the case and the files
3. he or she informs me of what is happening in the case
4. he or she has meetings with me regarding the case
5. he or she agrees the line of conduct with me
6. he or she is present during hearings
7. he or she actively participates in the proceedings
8. he or she is nice/polite 9. I won the case 10. other reasons what?

13. What are you most dissatisfied with? (please select no more than 3 answers)

1. he or she is not involved in the case, does not do his or her best
2. he or she is not familiar with the case or the files
3. he or she does not inform me of what is happening in the case
4. he or she does not hold any meetings with me regarding the case
5. he or she does not agree the line of conduct with me
6. he or she is not present during hearings
7. he or she does not actively participate in the proceedings
8. he or she is not nice/polite 9. I lost the case 10. other reasons what?

14. If you were/are rather dissatisfied with the cooperation, have you done anything in this respect?

1. yes 2. no (go to question 18) 3. difficult to say

15. Please specify what you did:

1. had a conversation with an attorney/legal adviser (go to question 19)
2. filed a complaint 3. other (go to question 19) (what?)

If answer 15.2:

16. Whom did you file a complaint with?.....

17. What was the result of your action?

18. If you have not taken any action, why?

19. Do you know that attorneys and legal advisers have written principles for performing their professions (so-called professional ethics principles)?

1. yes 2. no (go to question 22)

If answer 19.1:

20. Could you give any examples of such principles?

1. yes 2. no

If answer 19.1:

21. Could you say where you heard of such principles?

.....

22. Do you know that attorneys and legal advisers have to be insured and that if, when conducting a case, they neglect their duties and harm a client, that client may receive compensation from such insurance?

1. yes, I know of such insurance 2. no, I have not heard of such insurance

23. Do you know what to do if an attorney/legal adviser fails to perform his or her duties?

1. yes (what?) 2. no

24. How did your attorney/legal adviser conduct the case?

1. personally (go to question 27) 2. through substitutes – deputies
3. partly personally and partly through substitutes

25. How many substitutes (deputies) were there? (how many people?)

1. one 2. two 3. three 4. four or more

26. Were deputies prepared for the proceedings?

1. yes, all of them 2. some yes, some no 3. no, none of them
4. difficult for me to evaluate

27. How many hearings total were there in the case?

1. 1–3 2. 4–6 3. 7–10 4. more than 10

Costs

(if a private attorney/legal adviser, we ask questions 28 through 35; if an ex officio attorney/legal adviser, go to question 36)

28. If attorney/legal adviser by choice – do you think the fee for an attorney/legal adviser for the case was/is?

1. too high 2. appropriate for the type of case *(go to question 30)*
3. too low *(go to question 29.2)* 4. difficult to say *(go to question 30)*
5. refuse to answer *(go to question 30)*

If answer 28.1:

29. 1. Please explain why too high? (discuss costs)

If answer 28.3:

29. 2. Please explain why too low? (discuss costs)

30. Could you specify how much and for what you paid?

(We do not insist on an answer.)

31. Did/does an attorney/legal adviser give you evidence of payment (bills, invoices) when he or she receives fees?

1. yes 2. no 3. yes, but only for some of the services
4. different solution *(what?)*

32. Did you ask for a bill?

1. yes *(omit question 34)* 2. no *(go to question 34)*

33. If you asked for a bill, what was the response of an attorney/legal adviser?

.....

34. If you did not ask for a bill, then why? (you may select more than 1 answer)

1. it was not necessary to ask, the attorney/legal adviser provided the bill himself or herself
2. I did not know that a lawyer should give such bills
3. it is not proper 4. I do not need a bill 5. other *(what?)*

35. How are you paying to an attorney/legal adviser?

1. for particular actions 2. one time in advance
3. agreed sum at the end of the case
4. other *(how?)*.....

36. Ex officio defense /representation – did an attorney/legal adviser suggest that you should pay him or her, or did he or she demand money?

1. yes 2. no

36.1. If yes, then how much, for what and in what manner?

All respondents

Inspection of the work of an attorney/legal adviser

37. Have you asked your attorney/legal adviser about his or her activities in the case, or checked what he or she did?

1. yes (why?) 2. no why? (no more than 2 answers)
 3. I have confidence in him or her 4. it is not proper
 5. I don't know how 6. other reasons (what?)

If answer 37.1:

38. If yes, does an attorney/legal adviser respond, explain?

1. yes, he or she explains everything 2. yes, but not precisely
 3. he or she puts me off 4. he or she does not respond at all
 5. other (which?)

Additional legal aid

39. Have you tried to obtain legal advice or assistance in a different manner?

1. yes 2. no (*omit questions 40 and 41*) why?

40. If yes, then where?

1. social organization (which?) 2. state institution (which?)
 3. acquaintances and family 4. leaflets, books, codes
 5. in a different manner (what?)

If answer 1. or 2. go to question 40:

41. With what result? (provide the name of an organization or institution)

1. refused assistance (what justification?)
 2. did not respond to a letter
 3. provided advice
 4. provided assistance with drafting a letter
 5. other (what?)

42. In what court was your case initiated?

1. District Court in
2. Board judging petty offenses in

[question 42 in the survey for persons in penitentiaries: Do you have access to books on law, codes, etc., in prison?

1. yes 2. no comments

43. Court's division in which the case is pending

1. civil 2. criminal 3. criminal and civil 4. family and juvenile
5. labor 6. economic 7. land and mortgage register 8. registry

[question 43 in the survey for penitentiaries: what article(s) were you accused under (type of offense) – please specify whether of the old or new Penal Code

44. Nature of the case (e.g., for inheritance, alimony)

[question 44 in the survey for penitentiaries: what sentence was awarded?

1. below 1 year 2. from 1 to 3 years 3. over 3 to 6 years
4. over 6 to 10 years 5. over 10 years]

45. In what capacity are you appearing in the case?

1. plaintiff 2. defendant 3. accused 4. auxiliary prosecutor
5. private prosecutor 6. applicant 7. intervener

[question 45 in the survey for persons in penitentiaries: in what court was your case initiated?

1. District Court in 2. Regional Court in

Specification**47. Sex**

1. female 2. male

48. Age

1. up to 30 years of age 2. 31–40 3. 41–50 4. 51–60
5. more than 60 years of age

Financial status [only in surveys in courts]**49. What is your family's income sufficient for?**

1. not enough even for everyday expenses
2. hardly enough for everyday expenses

- 3. enough for everyday expenses, but we have to save for bigger ones
- 4. we are well off, we can afford a lot

50. Education

- 1. incomplete elementary 2. elementary 3. professional
- 4. high school 5. incomplete higher 6. higher

51. Which case before a court in which you appear as a party is it? [*in surveys for penitentiaries: Which case in which you were a defendant was it?*]

- 1. first 2. second 3. third 4. fourth (or more)

52. Would you like to add anything else concerning issues discussed in this survey?

Thank you for the conversation and your answers.

Time of the completion of the interview:

Annex for the inquirer

1. Date of the interview:

2. Duration of the interview (in minutes):

3. Attitude of the respondent to the interview:

- 1. favorable 2. indifferent 3. reluctant 4. comments

4. Were questions understandable?

- 1. yes, all were understandable 2. no, all were not understandable
- 3. some were not understandable (which?)

5. Comments of the inquirer (issues not included in questions that arose during a conversation, interesting issues, other)

Full name of the inquirer.....

Signature of the inquirer.....

VIII.3. Questionnaire for attorneys – examination of opinions of the legal professions’ representatives

1. Do you conduct cases as an ex officio defender or attorney?

1. yes – criminal 2. yes – civil 3. yes – administrative

4. I don't conduct ex officio cases because:

1. I am released 2. substitutes do 3. other reasons

2. What percentage of all cases do ex officio cases currently constitute in your section? %

3. How many ex officio cases do you conduct on average every year?..... cases

4.1. Did you have any problems this year with obtaining fees for ex officio work?

1. yes 2. no (please omit questions 4.2, 4.3, and 4.4)

4.2. If yes, what type of problems? (e.g., delays – how significant, other)

4.3. If yes, when did this happen?

4.4. If yes, in which court?

5.1. Is the manner for determining fees for ex officio criminal cases satisfactory?

1. yes (please omit question 5.2) 2. no

5.2. If no, what way would be satisfactory for you? (please justify, provide comments and potential proposals)

6.1. Are rates for ex officio criminal cases satisfactory?

1. yes (please omit question 6.2) 2. no

6.2. If no, what rates would you consider satisfactory? (please provide examples of amounts – for an entire case or for particular activities)

7.1. Is the manner for determining fees for ex officio civil cases satisfactory?

1. yes (please omit question 7.2) 2. no

7.2. If no, what way would be satisfactory for you? (please justify, provide comments and potential proposals)

8.1. Are rates for ex officio civil cases satisfactory?

1. yes (please omit question 8.2) 2. no

8.2. If no, what rates would you consider satisfactory? (please provide examples of amounts – for an entire case or for particular activities)**9. How, in your opinion, should appointment for ex officio criminal cases be carried out?****9.1. Appointing body**

1. appointment by a court's president
2. appointment by a Regional Council of the Bar after granting of an *ex officio* representation by a court
3. other body which?

9.2. Manner of appointment

1. appointment from a list of all attorneys in order on the list
2. appointment from a list of all attorneys according to specialization indicated by attorneys
3. appointment from a list of attorneys who volunteered to conduct *ex officio* cases
4. appointment from a list of attorneys who volunteered to conduct *ex officio* cases with consideration for specialization indicated by an attorney
5. other manner what?

10. How, in your opinion, should appointment for ex officio civil cases be carried out?**10.1. Appointing body**

1. appointment by a court's president
2. appointment by a judge presiding over the case
3. appointment by a Regional Council of the Bar after granting of an *ex officio* representation by a court
4. other body which?

10.2. Manner of appointment

1. appointment from a list of all attorneys in order on the list
2. appointment from a list of all attorneys according to specialization indicated by attorneys

3. appointment from a list of attorneys who volunteered to conduct *ex officio* cases
4. appointment from a list of attorneys who volunteered to conduct *ex officio* cases with consideration for specialization indicated by an attorney
5. other manner what?

11. In your practice, the number of *ex officio* cases:

1. could be higher than currently (you would have enough time to conduct more *ex officio* cases than currently)
2. is just right 3. is too high 4. no opinion

12. How many *ex officio* cases could you conduct in total every year? cases.

13. Please express your opinion on whether, according to you, work of attorneys from your chamber in *ex officio* cases (on average) is of the same high quality as in private cases with respect to:

13.1. Number of meetings with a client

1. yes 2. no 3. no opinion

Comments and opinions

13.2. Frequency of substitution

1. yes 2. no 3. no opinion

Comments and opinions

13.3. Activity during proceedings

1. yes 2. no 3. no opinion

Comments and opinions

13.4. Reading of the files

1. yes 2. no 3. no opinion

Comments and opinions

13.5. Other professional activities

1. yes 2. no which?
3. no opinion

Comments and opinions

14. What other comments (problems) do you have in connection with the current legal aid paid for by the State Treasury?

14.1. Concerning law

14.2. Concerning practice

14.3. Any other comments connected with the system of legal aid paid for by the State Treasury

specification

15. What chamber are you a member of?

16. Form of performing profession:

1. private office 2. law partnership 3. law office

17. How many years have you been an attorney (excluding time of training)?

1. up to 3 2. 4–6 3. 7–10 4. 11–20 5. over 20

18. Sex

1. female 2. male

19. Age

1. up to 30 years of age 2. 31–40
3. 41–50 4. 51–60 5. 61 and more

Thank you very much for spending some time filling in this survey.

VIII.4. Questionnaire for organizations

Please print (or fill in on a computer and send via e-mail)

Information about the organization

1. Name of the organization

2. Legal status (please mark or specify in case of answer 3)

1. association 2. foundation

3. other what?

3. Year of establishment

4. Address

5. Telephone no.

6. Facsimile no.

7. E-mail

8. WWW address.....

9. Does your organization have local branches? (If yes, please provide information only from one branch in this survey.)

1. yes 2. no

Please provide addresses of the branches.

.....

Information about activities of the organization

10. Does your organization provide legal aid (understood widely – as, for example, advice and/or opinions, agency services, representation, etc.) (please mark an appropriate box with an X)

1. yes 2. no

11. For how long have you been providing legal aid? For years.

12. Type of cases in which you provide legal aid (please mark an appropriate box with an X and in the case of “other” also specify; you may mark more than one answer)

1. civil 2. family 3. criminal 4. administrative

5. other (what?)

13. Type of activities undertaken by you (please mark an appropriate box with an X and indicate the number of particular activities in the last full month)

- | | | |
|---|--------------------------|-------|
| 1. verbal legal advice (meetings) | <input type="checkbox"/> | |
| 2. telephone legal advice | <input type="checkbox"/> | |
| 3. written legal advice | <input type="checkbox"/> | |
| 4. assistance in drafting official writs | <input type="checkbox"/> | |
| 5. assistance in drafting pleadings | <input type="checkbox"/> | |
| 6. hiring of an attorney or legal adviser | <input type="checkbox"/> | |
| 7. observation of court proceedings | <input type="checkbox"/> | |
| 8. participation in proceedings in the capacity
of a social representative | <input type="checkbox"/> | |
| 9. other | <input type="checkbox"/> | |
| (what?) | | |

14. Do you cooperate with other entities when granting legal aid? (please mark an appropriate field with an X)

1. yes 2. no

14.1. domestic organizations (please mark an appropriate field with an X, and if the answer is “yes,” also specify)

1. yes which?
2. no

14.2. foreign organizations (please mark an appropriate field with an X, and if the answer is “yes,” also specify)

1. yes which?
2. no

14.3. offices (please mark an appropriate field with an X, and if the answer is “yes,” also specify)

1. yes which?
2. no

14.4. Other (please mark an appropriate field with an X, and if the answer is “yes,” also specify)

1. yes which?
2. no

15.1 Is assistance provided paid for? (please mark an appropriate field with an X)

1. yes 2. no (*omit question 15.2.*)

15.2. If yes, what activities are paid for and in what amount? (please specify)

15.3. Does a client reimburse costs incurred by your organization if a case is won (e.g., reimbursement of a registration fee)? (please mark an appropriate field with an X)

1. yes 2. no

comments

Information about personnel (current situation)

16. Who provides legal aid? (please mark an appropriate field with an X and indicate the number of persons in each category; you may select more than one answer)

- | | |
|--|--------------------------|
| 1. employees of the organization | <input type="checkbox"/> |
| 2. members of the organization | <input type="checkbox"/> |
| 3. persons from outside of the organization
employed for this purpose | <input type="checkbox"/> |
| 4. volunteers | <input type="checkbox"/> |
| 5. other persons | <input type="checkbox"/> |

17. Professional training of advisers (please mark an appropriate field with an X and indicate the number of persons in each category; you may select more than one answer)

17.1. Lawyers:

1. practicing lawyers

what profession?

- | | | |
|--------------------|--------------------------|-----------------|
| 1. attorneys | <input type="checkbox"/> | how many? |
| 2. legal advisers | <input type="checkbox"/> | how many? |
| 3. judges | <input type="checkbox"/> | how many? |
| 4. prosecutors | <input type="checkbox"/> | how many? |
| 5. notaries public | <input type="checkbox"/> | how many? |

2. trainees how many?

type of training:

- | | | |
|-------------------|--------------------------|-----------------|
| 1. attorneys | <input type="checkbox"/> | how many? |
| 2. legal advisers | <input type="checkbox"/> | how many? |
| 3. judges | <input type="checkbox"/> | how many? |

4. prosecutors how many?

5. notarial how many?

3. Lawyers without a training

1. how many?

2. what professions?

4. Retired practicing lawyers

1. What professions were they performing earlier?

1. attorneys how many?

2. legal advisers how many?

3. judges how many?

4. prosecutors how many?

5. notaries public how many?

17.2. How many lawyers commenced, and how many terminated, work in your organization last year? (please indicate the number next to an answer)

1. number of people who began work

2. number of people who terminated work

17.3. Non-lawyers (please mark an appropriate field with an X and provide the number of people in each category; more than one answer may be selected)

1. law students

which year?

1. first how many?

2. second how many?

3. third how many?

4. fourth how many?

5. fifth how many?

2. other

1. how many?

2. what education do they have?

17.4. Did advisers/non-lawyers participate in any training? (please mark an appropriate field with an X, and if the answer is "yes," please also provide the number of persons participating in trainings and describe their subjects)

1. yes

1. how many advisers?

2. in what training?

2. no

17.5. Are advisers/non-lawyers supervised by a lawyer? (please mark an appropriate field with an X, and if the answer is "yes," please specify)

1. yes in what form?

2. no

17.6. Do advisers/non-lawyers have an opportunity of a consultation with a lawyer? (please mark an appropriate field with an X, and if the answer is "yes," please specify)

1. yes in what form?

2. no

18. How often (how many times a week) do such persons provide assistance; do they have regular duty times?

18.1. Number of duty hours per week (what days and hours?) (please specify)

18.2. Comments

19. How do you select persons providing legal aid? (please mark an appropriate field with an X, and if the answer is "yes," please specify; you may select more than one answer)

1. private contacts

2. volunteers

3. announcements

4. other manner

what?

Statistics and reporting

20.1. Do you maintain a case register?

1. yes 2. no (*omit questions 20.2 and 20.3.*)

20.2. If yes, what type? (please specify)

20.3. If yes, how many cases have been entered since the beginning of 2001?

.....

21.1. Do you keep statistics concerning legal aid?

1. yes 2. no

21.2. If yes, what type?

22. Source of financing of activities with respect to legal aid within last year (please mark an appropriate field with an X, and specify the percentage; more than one answer may be selected)

- | | | |
|---|--------------------------|---------|
| 1. grants from private foundations | <input type="checkbox"/> | % |
| 2. grants from intra-governmental organizations (e.g., the European Union)" | <input type="checkbox"/> | % |
| 3. own funds (membership fees, income from economic activities) | <input type="checkbox"/> | % |
| 4. donations | <input type="checkbox"/> | % |
| 5. grants from local governments | <input type="checkbox"/> | % |
| 6. sums adjudicated by courts | <input type="checkbox"/> | % |
| 7. other | <input type="checkbox"/> | % |
| what? | | |

23. What educational tools do you have? (please mark an appropriate field with an X, and if the answer is "yes," also specify)

23.1. Legal reference library

- | | | |
|--------|--------------------------|-----------------------|
| 1. yes | <input type="checkbox"/> | how many books? |
| 2. no | <input type="checkbox"/> | |

23.2. Computer databases and software for lawyers

- | | | |
|--------|--------------------------|--------------|
| 1. yes | <input type="checkbox"/> | which? |
| 2. no | <input type="checkbox"/> | |

23.3. Other

- | | | |
|--------|--------------------------|-------------|
| 1. yes | <input type="checkbox"/> | which?..... |
| 2. no | <input type="checkbox"/> | |

24. What tools are available to clients? (please mark an appropriate field with an X, and if the answer is "yes," also specify)

24.1. Legal reference library

- | | | |
|--------|--------------------------|-----------------------|
| 1. yes | <input type="checkbox"/> | how many books? |
| 2. no | <input type="checkbox"/> | |

24.2. Computer databases and software for lawyers

- | | | |
|--------|--------------------------|-------------|
| 1. yes | <input type="checkbox"/> | what? |
| 2. no | <input type="checkbox"/> | |

24.3. Information or leaflets prepared by your organization

1. yes (please attach a copy)
 2. no

24.4. Information or leaflets from other institutions (e.g., the ombudsman)

1. yes what?
2. no

24.5. Other

1. yes what?.....
2. no

Problems related to activities and expectations**25.1. Do you encounter any problems when providing legal aid?**

1. yes
 2. no (omit question 25.2)

25.2. If yes, what do these problems concern? (please specify)

1. assistance as to the merits (lawyers)
2. finances
3. equipment (e.g., computer, legal literature)
4. training
5. other
- what?.....

26.1. Would you like a lawyer (e.g., a trainee) to work socially in your organization – e.g., provide advice?

1. yes
 2. no (omit question 26.2.)

26.2. If yes, would you be able to create and equip a place of work for a lawyer?

1. yes
 2. no
 3. Comments, proposals

27. Representatives of which social groups, category of persons, apply to you most often?

.....

28. Do you select cases you are dealing with?

1. yes in what manner?
2. no

29. What type of activities carried out by your organization do you prefer? (more than 1 answer may be selected)

1. verbal legal advice (meetings)
2. telephone legal advice
3. written legal advice
4. assistance in drafting official writs
5. assistance in drafting pleadings
6. hiring of an attorney or legal adviser
7. observation of court proceedings
8. participation in proceedings in the capacity of a social representative
9. other
- (what?)

30. What activities carried out by your organization seem to be most effective? (please select no more than 2 answers)

1. verbal legal advice (meetings)
2. telephone legal advice
3. written legal advice
4. assistance in drafting official writs
5. assistance in drafting pleadings
6. hiring of an attorney or legal adviser
7. observation of court proceedings
8. participation in proceedings in the capacity of a social representative
9. other
- (what?)

31. What actions have you undertaken in the last five cases in which your organization provided legal aid? (other than legal advice – e.g., accession to proceedings, complaint to a public administration body)

.....

.....

32. What proposals of changes in particular procedures do you have that would facilitate your activities as a non-governmental organization (concerning, e.g., participation of a social representative, access to files)

- 1. criminal procedure
- 2. civil procedure
- 3. administrative procedure
- 4. other

33. Based on your experience, what problems with access to legal aid do you see? What positive or negative phenomena have you encountered?

.....

34. Person fulfilling the questionnaire and manner of contact

.....

35. Date of filling in the questionnaire

36. How much time did you spent on filling in this questionnaire?

VIII.5. Program of the Polish Forum on Legal Aid

Polish Legal Aid Forum, 7–8 June 2002, Warsaw, Poland

Houses of Parliament

Friday, 7 June

12.00 – 12.30 Opening ceremony

Welcome – Chairman of the Parliamentary Commission on Justice and Human Rights – Grzegorz Kurczuk

Opening statements:

Marek Nowicki, President of the Helsinki Foundation for Human Rights

Ed Rekosh, Executive Director, Public Interest Law Initiative, Columbia Law School, New York–Budapest;

Sylweryusz Królak, Undersecretary of State, Ministry of Justice

12.30 – 14.30 Part I International obligations and standards

Moderator: Borislav Petranov, Interights, London.

Right to free legal assistance as an element of the right to a fair trial, as guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms – the case-law of the European Court of Human Rights and its relevance for the Polish practice – Magda Krzyżanowska-Mierzewska, legal counsel, lawyer at the Registry of the European Court of Human Rights, Strasbourg

Legal aid standards from the perspective of the Council of Europe – Andrew Drzemczewski, Director of the Monitoring Department of the Council of Ministers,

EU standards – Safeguarding the rights of suspects and defendants in criminal proceeding (consultation paper); **Legislative developments in civil matters** (draft directive) – Thomas Ljungquist, European Commission, Justice and Home Affairs Department, Judicial Cooperation in Criminal Matters,

Discussion

15.30 – 18.00 Part II Access to legal aid in Poland

Moderator: Prof. Zbigniew Hołda, Jagiellonian University, Kraków, HFHR Board member;

Helsinki Foundation for Human Rights – presentation of research report and suggestions of changes and reform: Łukasz Bojarski

the Ministry of Justice – reactions and standpoint: Marek Sadowski, Director of the Legislative Department of the Ministry of Justice

National Council of the Bar – reactions and standpoint: Jerzy Naumann, Disciplinary Prosecutor, National Bar Council of the Bar

National Council of Legal Advisers – reactions and standpoint – Andrzej Kalwas, National Council of Legal Advisers, President,

Discussion**18.30 Reception** (Restaurant in the Houses of Parliament)

Saturday, 8 June

9.30 – 11.30 Part III Different legal aid delivery systems

Moderator: Ed Rekosh, Public Interest Law Initiative, New York – Budapest

Overview of Legal Aid Delivery Models – Ed Rekosh

Public Defender Office

Legal Aid Board

Contracting

Specific experience of various countries – panel of experts:

- Peter van den Biggelaar (Executive Director, Legal Aid Board – Hertogenbosch, the Netherlands)
- Moshe Hacoen (District Public Defender of Jerusalem; Ministry of Justice, Office of the Public Defender – Israel)
- Rangita de Silva–de Alwis (Director of International Programs, The Spangenberg Group – Massachusetts, USA),

- Linas Sesickas (expert of the Constitutional and Legislative Policy Institute “COLPI” on reform of the Access to Legal Aid system in Lithuania)

Discussion

12.00 – 14.00 Part IV Possibilities of reform of legal aid system in Poland

Moderator: Prof. Andrzej Rzepliński (Warsaw University, HFHR Board member)

Arguments for and against proposed changes

Panelists:

Zofia Daniszewska-Dek –advocate

Igor Dzialuk – Ministry of Justice

Claudia Frenkler-Bielicka - legal adviser

Edmund Łój – judge, Chief Administrative Court

Łukasz Bojarski – Helsinki Foundation for Human Rights

Discussion

Closing of the Forum