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“Strengthening the profession of advocate in line with European standards”

CROSS-COUNTRY REVIEW

**Systems of legal representations, including free legal aid and the monopoly of
advocates in
Armenia, Belarus, Georgia, the Republic of Moldova and Ukraine**

December 2020 – July 2021

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Table of Contents

List of Abbreviations.....	6
INTRODUCTION.....	7
APPLICABLE STANDARDS	8
A. Applicable standards in non – criminal proceedings	8
B. Applicable standards in criminal proceedings	10
ARMENIA	12
NATIONAL LEGAL FRAMEWORK	12
A. Legal framework of the advocate profession	12
B. Institutional framework	12
ANALYSIS OF THE SYSTEM OF LEGAL REPRESENTATION	13
A. Monopoly of legal services by advocates	13
B. Legal Aid	14
B1. Legal framework	14
B2. Eligibility	15
B3. Institutional framework	16
GOOD PRACTICES AND OUTSTANDING CHALLENGES	18
A. Good practices	18
B. Present legal and institutional gaps	20
C. Gender equality and youth participation	22
D. Ongoing or future initiatives in a pragmatic fashion	22
RECOMMENDATIONS	23
BELARUS.....	25
NATIONAL LEGAL FRAMEWORK	25
A. Legal framework of the advocate profession	25
B. Institutional framework	26
ANALYSIS OF THE SYSTEM OF LEGAL REPRESENTATION	27
A. Monopoly of legal services by advocates	27
B. Legal Aid	29
B1. Legal framework	29
B2. Eligibility	30
B3. Institutional framework	31
GOOD PRACTICES AND OUTSTANDING CHALLENGES	32

A. Good practices	32
B. Present legal and institutional gaps	32
C. Gender equality and youth participation	34
D. Ongoing and Future initiatives	35
RECOMMENDATIONS	35
GEORGIA	37
NATIONAL LEGAL FRAMEWORK	37
A. Legal framework of the advocate profession	37
B. Institutional framework	37
ANALYSIS OF THE SYSTEM OF LEGAL REPRESENTATION	38
A. Monopoly of legal services by advocates	38
B. Legal Aid	40
B1. Legal framework	40
B2. Eligibility	41
B3. Institutional framework	42
GOOD PRACTICES AND OUTSTANDING CHALLENGES	44
A. Good practices	44
B. Present legal and institutional gaps	44
C. Gender equality and youth participation	45
D. Ongoing and future initiatives in a pragmatic fashion.....	45
RECOMMENDATIONS	46
<u>THE</u> REPUBLIC OF MOLDOVA.....	47
NATIONAL FRAMEWORK	47
A. Legal framework of the advocate profession	47
B. Institutional framework of the legal profession.....	47
ANALYSIS OF THE SYSTEM OF LEGAL REPRESENTATION	48
A. Monopoly of legal services by advocates	48
B. LEGAL AID	48
B1. Legal framework	48
B2. Eligibility	49
B3. Institutional framework	51
GOOD PRACTICES AND OUTSTANDING CHALLENGES	52
A. Good practices	52
B. Present legal and institutional gaps	55

C. Gender equality and youth participation	57
D. Ongoing or future initiatives in a pragmatic fashion.....	58
RECOMMENDATIONS	58
UKRAINE.....	60
NATIONAL LEGAL FRAMEWORK	60
A. Legal framework of the advocate profession.....	60
B. Institutional framework	60
A. Monopoly of legal services by advocates	61
B. Legal Aid	62
B1. Legal framework	62
B2. Eligibility	65
B3. Institutional framework	67
GOOD PRACTICES AND OUTSTANDING CHALLENGES	69
A. Good practices	69
B. Present legal and institutional gaps	69
C. Gender equality and youth participation	70
D. Ongoing and future initiatives in a pragmatic fashion.....	70
RECOMMENDATIONS	71
COMPARATIVE ASPECTS OF LEGAL REPRESENTATION AND LEGAL AID	73
A. The comparative perspective of monopoly of legal services	73
B. The comparative perspective of national legal frameworks	73
C. The comparative perspective of legal aid	73

List of Abbreviations

ADR	Alternative Dispute Resolution
BRBA	Belarusian Republican Bar Association
CoE	Council of Europe
CoUA	Council of the Moldovan Bar Association
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EPD	Electronic Public Defender
EU	European Union
FLA	Free Legal Aid
FPLA	Free Primary Legal Aid
FRA	European Union Agency for Fundamental Rights
SFLA	Secondary Free Legal Aid
GBA	Georgian Bar Association
LAS	Legal Aid Service
OPD	Office of Public Defender
PGG	Partnership for Good Governance
UA	Moldovan Bar Association
UN	United Nations
UNBA	Ukrainian National Bar Association
W.L.A.	Women Lawyers Association

INTRODUCTION

The cross-country review is undertaken in the framework of the regional project “Strengthening the legal profession in line with European standards” (further – Project), which is funded by the European Union and the Council of Europe and implemented by the Council of Europe. The Project is being implemented under the “European Union/Council of Europe Partnership for Good Governance” Phase II (2019-2021). The participating countries of the Project include Armenia, Belarus, Georgia, Republic of Moldova and Ukraine.

The cross-country review was conducted in December 2020 – June 2021 by two international consultants: Ms Velislava Deltcheva provided analysis with regard to Belarus, Georgia and Ukraine, while Mr Apostolos Anthimos – on Armenia and the Republic of Moldova, as well as an overall compilation of the comparative review. Upon submission by the consultants the cross-country review was additionally edited by the Council of Europe.

The international experts conducted first a desk-work analysis of the applicable legislation on the systems of legal representation, including legal aid and the monopoly of advocates. Then the online expert discussions were carried out with the representatives of the bar associations, the judiciary, the state agencies and law societies.

In Belarus, due to - and as of the events which ensued after the presidential elections in August 2020, the technical co-operation with the authorities has been suspended in agreement with the European Union (European Commission, Directorate-General for Neighbourhood and Enlargement Negotiations - DG NEAR) and all project activities related to the public authorities in this country have been fully put on hold. However online expert meetings were held with non-public institutions and with representatives of the civil society.

On the basis of the above and the analysis of the relevant legislation, the international consultants elaborated country-specific reports on each participating country. Special attention was paid to the issues of gender and the particular needs of young lawyers. The cross-country review is primarily focused on the comparison of the legal framework of the systems of legal representation, including legal aid and the monopoly of advocates in each participating country, including, where relevant, the practical implementation of legal provisions relating to the legal profession. Therefore, the international experts attempted to outline in the most concise fashion the following:

- Legal framework of the advocate profession.
- Analysis of the system of legal representation.
- Analysis of the system of free legal aid.

Each country-specific analysis is benchmarked on relevant European standards and practices related to the task, in particular the recommendations, resolutions, policy papers of the CoE bodies, relevant opinions prepared by the CoE Directorate General of Human Rights and the Rule of Law, Charter of Fundamental Rights of European Union, pertinent case-law of the European Court of Human Rights¹, as well as studies and recommendations of relevant non-governmental organisations.

¹ Including *ECtHR, Airey v. Ireland*, No. 6289/73, 9 October 1979; *ECtHR, Del Sol v. France*, No. 46800/99, 26 February 2002, para. 20; *ECtHR, P., C. and S. v. The United Kingdom*, No. 56547/00, 16 October 2002; *ECtHR, A. v. the United Kingdom*, No. 35373/97, 17 December 2002; *ECtHR, Granos Organicos Nacionales S.A. v. Germany*, No. 19508/07, 22 March 2012; *ECtHR, Glaser v. the United Kingdom*, No. 32346/96, 19 September 2000; *ECtHR, Santambrogio v. Italy*, No. 61945/00, 21 September 2004; *ECtHR, Steel and Morris v. the United Kingdom*, No. 68416/01, 15 February 2005; *ECtHR, Nenov v. Bulgaria*, No. 33738/02, 16 July 2009; *ECtHR, McVicar v. the United Kingdom*, No. 46311/99, 7 May 2002; *ECtHR, Salduz v. Turkey [GC]*, No. 36391/02, 27 November 2008; *ECtHR, Meftah and Others v. France [GC]*, Nos. 32911/96, 35237/97 and 34595/97, 26 July 2002; *ECtHR, Lagerblom v. Sweden*, No. 26891/95, 14 January 2003; *ECtHR, Croissant v. Germany*, No. 13611/88, 25 September 1992; *ECtHR, Quaranta v. Switzerland*, No. 12744/87, 24 May 1991; *ECtHR, Zdravko Stanev v.*

APPLICABLE STANDARDS

Under CoE standards and EU Law, the right to legal aid is the right of any individual who does not have “sufficient financial resources” and is unable to afford the costs of court cases, to have access to legal representation. Both Article 6 of the ECHR and Article 47 of the EU Charter of Fundamental Rights guarantee the right of access to a court - arising from the right to a fair trial - for those who lack sufficient financial means.

Legal aid systems may provide for free legal representation or assistance (the right to be advised, defended, and represented) by a lawyer and/or take the form of dispensation from payment of the costs of proceedings or from provision of security for costs before an action is brought². The legal system may also provide for other complementary support schemes, such as “pro bono” defence, legal advice centres, legal expenses insurance etc.³.

A. Applicable standards in non – criminal proceedings

Article 6 of the ECHR guarantees that the right of legal assistance and representation in civil proceedings is effective for all individuals regardless of their financial means. Article 47 of the EU Charter of Fundamental Rights also states that “legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice”. According to the Explanations to the Charter, provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy. Additionally, explanation to Article 52 para. 3 of EU Charter makes it clear that Article 47 paras. 2 and 3 corresponds to Article 6 para. 1 of the ECHR⁴. The ECtHR in “Airey case” made it clear that Article 6 para. 1 of the Convention leaves to the State a free choice of the means to be used in guaranteeing litigants a right of effective access to a court⁵. Although Article 6 does not explicitly provide for legal aid in civil proceedings, the national legislation must ensure equal access to proceedings by setting up appropriate legal aid systems⁶.

Under CoE standards there is no automatic right under the ECHR for legal aid or legal representation in civil proceedings. There is no obligation under the Convention to make legal aid available for all disputes in civil proceedings, as there is a clear distinction between the wording of Article 6 para. 3c, which guarantees the right to free legal assistance on certain conditions in criminal proceedings, and of Article 6 para. 1, which makes no reference to legal assistance⁷. The decisive factor is, whether “such assistance is indispensable for effective access to court, either because legal representation is rendered compulsory, or by reason of the complexity of the procedure”⁸. There may be occasions, for example, when the possibility of appearing before the Court in person will meet the requirements of Article 6 para. 1, and where the guidance provided by the procedural rules and court directions, together with some access to legal advice and assistance, may be sufficient to provide an applicant with an effective opportunity to put his or her case⁹. As for granting legal aid to legal persons there does not appear to be a consensus or even a consolidated tendency among the Contracting Parties¹⁰. However, the ECtHR stated that it is not impossible and must be assessed in the

Bulgaria, No. 32238/04, 6 November 2012; ECtHR, *Artico v. Italy*, No. 6694/74, 13 May 1980; ECtHR, *Monnell and Morris v. the United Kingdom*, Nos. 9562/81 and 9818/82, 2 March 1987.

² CJEU, C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, 22 December 2010, ECLI:EU:C:2010:811, para. 47- 48.

³ FRA, Handbook on European law relating to access to justice, 2016, p. 58.

⁴ Explanations relating to the EU Charter of Fundamental Rights, OJ 2007 C-303/17.

⁵ ECtHR, *Airey v. Ireland*, No. 6289/73, 9 October 1979, para. 26.

⁶ Council of Europe, Committee of Ministers (1978), Resolution 78(8) on legal aid and advice, 2 March 1978.

⁷ ECtHR, *Del Sol v. France*, No. 46800/99, 26 February 2002, para. 20.

⁸ ECtHR, *P., C. and S. v. The United Kingdom*, No. 56547/00, 16 October 2002, paras. 88-89.

⁹ ECtHR, *A. v. the United Kingdom*, No. 35373/97, 17 December 2002, para. 97.

¹⁰ ECtHR, *Granos Organicos Nacionales S.A. v. Germany*, No. 19508/07, 22 March 2012, para. 47 and 53.

light of the applicable national rules and the company's situation¹¹. In order to permit persons in an economically weak position more easily to exercise their rights in member States, the CoE established an appropriate system of transmission of applications for legal aid, which allows every person who has his habitual residence in the territory of one of the Contracting Parties and who wishes to apply for legal aid in civil, commercial or administrative matters in the territory of another Contracting Party, to submit his application in the State where he is habitually resident¹².

In addition, the CoE published Recommendation no. r (81) 7 of the Committee of Ministers to Member States on measures facilitating access to justice. According to the Recommendation, Member states should take all necessary steps to inform the public on the means open to an individual to assert his rights before courts and to make judicial proceedings, relating to civil, commercial, administrative, social or fiscal matters simple, speedy and inexpensive. To this end, Member states should have particular regard to the following matters: A. Information to the public; B. Simplification through activation of ADR; C. Acceleration of proceedings; D. Reasonable costs for access to Justice; E. Development of special procedures, especially for cases of a small amount of money.

The EU legislator also established secondary law for applicable standards concerning legal aid in cross-border civil cases, for example the "Legal Aid Directive"¹³ to improve access to justice in cross-border disputes, by establishing minimum common rules relating to legal aid for such disputes, and the provisions on legal assistance and legal aid in relation to asylum¹⁴. According to the Directive, legal aid is considered to be appropriate when it guarantees a) pre-litigation advice, with a view to reaching a settlement prior to bringing legal proceedings, and b) legal assistance and court representation and exemption from, or assistance with, the cost of proceedings of the recipient and the fees to persons mandated by the court to perform acts during the proceedings¹⁵.

According to CoE standards and EU law, granting legal aid must be subject to a financial means and merits test. The ECtHR has not provided a definition of "sufficient financial means". It depends on the particular circumstances of each case. Thus, it may be acceptable to impose conditions on the grant of legal aid based, inter alia, on the financial situation of the litigant. However, the States, when establishing financial criteria for granting legal aid, must ensure that the essence of the right of access to a court is not impaired¹⁶ and that the assisted person is not placed at a substantial disadvantage in relation to the opposing party¹⁷. Under the CJEU case law, the national courts should ascertain whether the established criteria on granting legal aid constitute restrictions of the right to access a court and whether these restrictions involve, in the light of the objectives pursued, a disproportionate and intolerable interference which impairs the very substance of the right guaranteed¹⁸.

¹¹ CJEU, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, see above note. 4, paras. 52–54 and 62.

¹² Council of Europe, European Agreement on the Transmission of Applications for Legal Aid, CETS No. 92, 1977.

¹³ Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ 2003 L 026.

¹⁴ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in the Member States for granting and withdrawing refugee status, OJ 2005 L 326 (Asylum Procedures Directive), Articles 10 and 15; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ 2013 L 180 (Recast Procedures Directive), Articles 8, 12, 20 and 21; and Regulation No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ 2013 L 180/31, Art. 27 (5) and (6). See also FRA (2014), Handbook on European law relating to asylum, borders and immigration, Luxembourg, Publications Office, pp. 113-114.

¹⁵ Article 3 of the Directive, see note 15.

¹⁶ ECtHR, *Glaser v. the United Kingdom*, No. 32346/96, 19 September 2000, para. 99. See also ECtHR, *Santambrogio v. Italy*, No. 61945/00, 21 September 2004, para. 58 (the applicant's family paid for representation).

¹⁷ ECtHR, *Steel and Morris v. the United Kingdom*, No. 68416/01, 15 February 2005, para. 62.

¹⁸ CJEU, C-418/11, *Texdata Software GmbH*, 26 September 2013, ECLI:EU:C:2013:588, para. 84.

The national procedures must also establish fair mechanisms for selecting legal aid cases in accordance with the interests of justice and in compliance with CoE and EU applicable standards. Three factors should be taken into consideration for granting legal aid in civil proceedings: 1. The importance of the case to the individual, 2. the complexity of the case, and 3. the individual's capacity to represent him/herself. According to the ECtHR, national selecting mechanisms should take into account the particular importance of the case to the individual, especially when the latter belongs to a vulnerable group (for example has mental problems)¹⁹. Refusing to provide legal aid may also infringe Article 6 of the ECHR in complex actions, requiring competent and sustained representation by an experienced lawyer familiar with the case²⁰. The ECtHR also takes into account legal or factual issues of the case and statutory requirements for legal representation. Regarding the third factor, the key test is "whether the individual would be able to present his case properly without the assistance of a lawyer"²¹. On those grounds, the specific circumstances of each case are important.

B. Applicable standards in criminal proceedings

Legal aid in criminal proceedings is guaranteed under Article 6 para. 3c of the ECHR and Article 48 para. 2 of the EU Charter²². The ECtHR has ruled that in order for the right to a fair trial to remain sufficiently "practical and effective", Article 6 para. 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, the public prosecutor and the investigating judge, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction²³.

There is also EU secondary law, specifically a directive on legal aid for suspects or accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings²⁴ and a Commission's Recommendation on the right to legal aid for suspects or accused persons²⁵.

The right to choose one's own lawyer is not absolute. The right may be subject to limitations in favor of the interests of justice, for example when special qualifications are needed²⁶. Reserving the representation of a category of cases to the monopoly of lawyers, due to the special nature of proceedings, does not deny applicants a reasonable opportunity to present their cases under conditions that do not place them at a substantial disadvantage. This is considered by the ECtHR as an acceptable limitation²⁷. Moreover, an individual requesting a change of a lawyer has the burden of proof that the lawyer is unable to provide him/her with effective legal assistance²⁸.

As mentioned in relation with non - criminal proceedings, granting legal aid in criminal proceedings is subject to a financial means and merits test. Under the Convention, the burden of proving a lack of sufficient means should be borne by the person who pleads it²⁹. As for the merits test, three factors must be evaluated: 1. the seriousness of the offence and the severity

¹⁹ ECtHR, *Nenov v. Bulgaria*, No. 33738/02, 16 July 2009, para. 52.

²⁰ ECtHR, *Steel and Morris*, para. 69.

²¹ ECtHR, *McVicar v. the United Kingdom*, No. 46311/99, 7 May 2002, para. 48.

²² Explanations relating to the EU Charter of Fundamental Rights, OJ 2007 C303/17.

²³ ECtHR, *Salduz v. Turkey [GC]*, No. 36391/02, 27 November 2008, paras. 55-56.

²⁴ Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, EE 2016, L 297/1.

²⁵ European Commission, Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings, OJ 013 C 378.

²⁶ FRA, Handbook on European law relating to access to justice, p. 84.

²⁷ ECtHR, *Meftah and Others v. France [GC]*, Nos. 32911/96, 35237/97 and 34595/97, 26 July 2002, para. 47.

²⁸ ECtHR, *Lagerblom v. Sweden*, No. 26891/95, 14 January 2003, para. 60.

²⁹ ECtHR, *Croissant v. Germany*, No. 13611/88, 25 September 1992, para. 37.

of the potential sentence, 2. the complexity of the case and 3. the defendant's social and personal situation³⁰. The ECtHR ruled that the fact that the applicant, as an educated man, might have been able to understand the proceedings, does not mean that without the services of a legal practitioner he was almost certainly unable to defend himself effectively³¹. Personal circumstances are of particular importance, when the accused or suspected person belongs to a vulnerable group, such as children, persons with mental health problems, or refugees. Additionally, it is not necessary for the applicant to prove that the lack of assistance must have actually prejudiced the person charged with a criminal offence³². Regarding the appellate stage, the important factors for granting legal aid are: 1. the nature of the proceedings, 2. the capacity of an unrepresented appellant to present a particular legal argument, and 3. the severity of the sentence imposed by the lower courts³³. "The interests of justice cannot, however, be taken to require an automatic grant of legal aid whenever a convicted person, with no objective likelihood of success, wishes to appeal after having received a fair trial at first instance in accordance with Article 6 ECHR. Each applicant benefited from free legal assistance both at her/his trial, and in being advised as to whether (s)he had any arguable grounds of appeal"³⁴.

³⁰ ECtHR, *Quaranta v. Switzerland*, No. 12744/87, 24 May 1991, paras. 33-35.

³¹ ECtHR, *Zdravko Stanev v. Bulgaria*, No. 32238/04, 6 November 2012, para. 40.

³² ECtHR, *Artico v. Italy*, No. 6694/74, 13 May 1980, para. 35.

³³ FRA, Handbook on European law relating to access to justice, p. 70.

³⁴ ECtHR, *Monnell and Morris v. the United Kingdom*, Nos. 9562/81 and 9818/82, 2 March 1987, para. 67.

ARMENIA

NATIONAL LEGAL FRAMEWORK

A. Legal framework of the advocate profession

The freedom, independence and self-governance of the legal profession are guaranteed at the level of the Armenian Constitution (Article 64 para 2)³⁵. The Law of the Republic of Armenia on the profession of advocate prescribes a number of principles and institutional frameworks in order to guarantee those values in practice. The Law was adopted on 14 December 2004 (in force since December 2005), and regulates the most important aspects of the legal profession, among them, the principles of free legal aid and professional liability³⁶. In order to guarantee the above in practice, the Law established the Chamber of Advocates (“the Chamber”) as the only professional association of practicing lawyers, thereby replacing several associations of lawyers previously operating in parallel. Apart from the Constitution and the Law, the Chamber adopted the Code of Conduct and the Regulation on Disciplinary Proceedings against Advocates³⁷, which is an integral part of the Code of Conduct³⁸ and has a significant influence on the daily exercise of the lawyers’ profession.

The Law states that the legal profession is a form of a right-defending activity aimed at defence of the rights, freedom and interests by all legitimate means. The exercise of the legal profession consists of three main groups of activities: legal advice, legal representation (civil and administrative disputes), defence in criminal cases, as well as legal assistance to a witness when and as prescribed by law³⁹. The exercise of legal profession is generally a paid activity. At the choice of the lawyer, services may be provided on an unpaid basis⁴⁰. Thus, the legal profession is both a right-protecting and commercial activity; lawyers are free to decide the financial form in which they organise and exercise their profession.

In order to obtain an advocate license to practice law in the Republic of Armenia, a person must first pass an examination to be admitted to the RA Advocacy School, then pass the current exams to complete it, after which he must pass a qualification exam and only the latter passes the mentioned exams and qualification exam can gain the advocate license.

Moreover, even after going through this process, advocates are required to improve their knowledge regularly by participating in training courses for advocates.

It should be also mentioned that the Chamber of Advocates is the only organisation in the Republic of Armenia that is authorised to license advocates. This circumstance is a very strong guarantee that the institution of advocacy will be independent, united and strong.

B. Institutional framework

The Chamber is a professional, independent, self-governed, non-commercial organisation of advocates⁴¹, first established in 2005. The Chamber is the successor of all “lawyers’

³⁵ Article 64 para. 2 of the Constitution of the Republic of Armenia (adopted 06.12.2015), Right to Receive Legal Aid: ... Advocacy based on independence, self-governance and legal equality of advocates shall be guaranteed with a view of ensuring legal aid. The status, rights and responsibilities of advocates shall be prescribed by law.

³⁶ The Ministry of Justice is working on the basis of the Strategy Paper 2019-2023

³⁷ New edition (2019).

³⁸ Code of Conduct of Advocates (restated) approved by decision 1-L dated 19 October 2019 of the General Assembly of the Chamber of Advocates of the Republic of Armenia.

³⁹ Article 5. Attorneyship.

⁴⁰ Article 6. Attorneyship fees.

⁴¹ Article 1.1. of the Charter of the Chamber of Advocates of the Republic of Armenia (new edition), developed on 19.10.2019 and approved by the decision of General Assembly of the Chamber of Advocates of the Republic of Armenia N2-L on 19.10.2019.

associations” previously existing. Since it is the only body authorised to license lawyers for practicing law, it is the only official association of legal professionals in Armenia. There are other, non-governmental organisations bearing the name “association of lawyers”; however, they are neither officially, nor unofficially connected with the regulation or exercise of the legal profession as such⁴².

The Chamber consists of the following bodies⁴³:

- 1) General Assembly of the Chamber of Advocates;
- 2) Board of the Chamber of Advocates;
- 3) Qualification Commission of the Chamber of Advocates.

Regarding the role of alternative professional associations of lawyers operating in parallel with the Chamber, there is insufficient information, except for the Armenian Lawyers’ Association, Young Lawyer’s Association, European in Law Association (which is a Human rights Non-Governmental Organisation), with an expertise in legal drafting.

ANALYSIS OF THE SYSTEM OF LEGAL REPRESENTATION

A. Monopoly of legal services by advocates

As a general rule, the judicial representation or its organisation as a service provided on a regular or paid basis may be performed only by an advocate, except for:

1) Cases of free representation for a close relative, including a parent, child, adoptive parent, adoptee, relative or non-relative (father or sister) brother or sister, grandfather, grandmother, grandson, as well as a spouse or parent-in-law, son-in-law or daughter-in-law.

2) cases of representing in court the interests of a legal entity belonging to a close relative (relatives) owning more than half of the authorised capital. Pursuant to Article 5 para.3 of the Law⁴⁴, only registered lawyers⁴⁵ have the right to exercise representation in courts and in criminal defence⁴⁶ as a regular and paid activity. Consequently, legal advice as a regular and paid activity may be provided both by lawyers non-licensed by the Chamber, and by any other person who does not even have a law degree. This rule aims to ensure that, as a rule, only lawyers admitted to legal practice may assume the responsibility of representing individuals in legal disputes. Per definition, licensed lawyers have the training necessary for legal practice; they may act under a binding professional Code of Ethics, enforced through disciplinary proceedings, while non-licensed lawyers do not have similar professional qualities and responsibilities. In addition, there are no consequences for a non-lawyer representing several clients among whom there is an apparent conflict of interest, while such a situation would trigger disciplinary proceedings and measures against an advocate.

As regards court representation, there are some limitations and uncertainties. According to Article 52 para.1 of the Code of Civil Procedure, only advocates, including advocates of foreign

⁴² The Ministry of Justice is considering reforms in the structure of the Chambers of Advocates, i.e. whether there should be only one or more chambers.

⁴³ Chapter VI “Bodies of the Chamber of Advocates”, Article 6.2 of the Charter of the Chamber.

⁴⁴ Article 5 of the Law (as revised on December 8, 2011 by HO-339-N) reads as follows: (3) The representation in a court of law prescribed herein or its arrangement as a regular or paid service may be exercised solely by an attorney at law, except for: 1) Cases of pro bono representation on behalf of a close family member, including a parent, offspring, foster parent, foster child, natural, step or half brother or sister (who share the same father or mother), grandfather, grandmother, grandchild, spouse or parent of a spouse, brother or sister-in-law; 2) Representation in a court of law of a legal entity with over half of its equity held by a close family member(s). (4) Hereunder, the defence in criminal cases may be exercised solely by an attorney at law.

⁴⁵ This provision is positive, because licensed attorneys guarantee proper quality: Supreme Court Judge in civil cases and Member of the Supreme Judiciary Council.

⁴⁶ In criminal proceedings the lawyer’s presence is mandatory by law, COURT OF CASSATION.

states authorised to practice in Armenia, may represent individuals before the courts of general jurisdiction⁴⁷. However, the situation is different under the Code of Administrative Procedure. According to Article 22, any person may be authorised by a party to administrative proceedings to represent a private person before the Administrative Court⁴⁸. However, the Court has the power to remove a non-advocate representative from the proceedings on the grounds of inability to represent the party⁴⁹. The uncertainty lies in the fact that the majority of procedural actions (in particular: production of evidence) may be carried out by the court ex-officio. Thus, lawyer representation before Administrative Courts is not particularly important.

Representation to persons not admitted to legal practice was prohibited under the Code of Civil Procedure in 2015 in regard to courts of general jurisdiction. By virtue of a constitutional complaint, the Constitutional Court ruled that Article 5 of the Law is constitutional⁵⁰: Individuals unable to afford for hiring an advocate, have the possibility to apply for free legal aid, if eligibility requirements are met. Moreover, nothing prevents any person to be a court representative, if it is not a “regular” or “paid” activity. By way of exception, a non-advocate may represent a client before a court in civil or administrative cases on the above conditions and on an ad hoc basis. Additionally, legal advice may be provided practically by any person, even by non-lawyers, which runs contrary to a unified quality of legal services.

In criminal proceedings, only an advocate can act as a defender.

B. Legal Aid

B1. Legal framework

Free legal assistance is guaranteed at the level of the Constitution (Article 64⁵¹), while the institutional setting up and functioning of the system are guaranteed by the Law on Advocacy and implemented by the Office of the Public Defender (OPD)⁵², which forms part of the Chamber. In cases provided by law, free legal assistance is provided at the expense of state funds.

Pursuant to Article 41 para. 2, free legal aid shall include:

- 1) Legal consultation: drafting of claims, applications, complaints, and other legal documents, including provisions of legal information;
- 2) Representation or defense in criminal, civil, administrative, and constitutional cases.

Under para. 3 of the same provision, it is clarified that: In the sense hereof, legal representation or defense shall be provided in pre-trial proceedings for criminal cases

⁴⁷ Article 52 para.1. of the Civil Procedure Code of the Republic of Armenia, adopted on 9 February 2018. Such limitation does not concern representation by relatives or representation of a company by persons authorised by persons provided for by parts 2-5 of Article 49 or persons who own at least 20 per cent of its shares, see Article 52 paras.2 – 3 of the Civil Procedure Code.

⁴⁸ Article 22 of the Code of Administrative Proceedings of the Republic of Armenia of December 28, 2013 No. ZR-139 (as amended on 10-10-2020).

⁴⁹ Article 23 of the Code of Administrative Legal Proceedings of the Republic of Armenia: “The court can discharge of production of the agent of the party who is not lawyer or the legal representative, or the representative on position if at stage of preparation of case for consideration or during legal proceedings it becomes clear that this person is not able to represent the party in court.”

⁵⁰ Constitutional Court decision no. sdv-1263 dated 5 April 2016. By the mentioned decision, the RA Constitutional Court noted that only by fixing the legal requirement of judicial representation through an advocate, the legislator not only ensures his positive obligation to guarantee the right to receive legal aid foreseen in first part of Article 64 of the Constitution, but also guarantees quality legal aid. Thus, guaranteeing the right to effective judicial protection in accordance with the rule of law.

⁵¹ Article 64 para.1 of the Constitution Right to Receive Legal Aid: Everyone shall have the right to receive legal aid. Legal aid shall be provided at the expense of state funds in the cases prescribed by law.

⁵² The office of Public Defender exists since 2005.

examined before the court of the first instance, court of appeal, court of cassation as well as before the Constitutional Court of the Republic of Armenia.

Para. 4 of Article 41 states that the authority that handles criminal cases shall provide free legal assistance through the Public Defender's Office as prescribed by the Armenian legislation or international treaties or in the interests of justice.

The right of free legal aid applies to all appellate or other stages of domestic proceedings.

B2. Eligibility

Chapter 7 of the Law⁵³, especially Article 41⁵⁴, constitutes the main legal provision on free legal aid. It contains an exhaustive list of legal services available under legal aid and eligibility criteria for access to free legal assistance. There are several ways in which individuals may access free legal assistance under this provision. Individuals become eligible, if they demonstrate that they fall upon one of the categories of vulnerable persons, exhaustively listed under Article 41 of the Law, irrespective of their financial situation. The list of eligible persons under Article 41 include: refugees and asylum-seekers, victims of domestic violence, trafficking, and torture, persons with certain grade of disability, persons confined in psychiatric institutions for treatment of mental disorders⁵⁵ etc⁵⁶.

Finally, para. 6 regulates the exceptions to the rule. In particular, free legal aid cannot be provided to persons mentioned under para. 5 of this Article for:

- 1) Business issues (including corporate disputes);
- 2) Property (money) claims of over one thousand-fold of minimum salary, except when the person in question is a defendant or a third person appearing on behalf of the defendant;
- 3) If there is reliable factual information refuting applicant's inability to pay.

While free legal assistance on the grounds above is welcome and encouraged, the eligibility system is not built around the indigence of recipients of free legal aid. A person may actually belong to a vulnerable group, while at the same time possessing sufficient funds to hire a lawyer. Belonging to a vulnerable group is not an indicator of indigence. As regards the proof by applicants of their indigence, there is no state-wide system containing credible information about the economic situation of the person to which the OPD would have access to. In practice, in case of doubt, the OPD sends inquiries about the applicant's financial situation to various public institutions. The law does not define the meaning of "insufficient funds" for the purposes of eligibility.

⁵³ Public Defence and the Office of Public Defender.

⁵⁴ Article 41 para.1: Public defence shall be considered to be a free legal assistance provided in cases set forth hereunder.

⁵⁵ As regards the right of access to free legal aid by persons with mental illnesses (the list of vulnerable persons under Article 41 or the Law), it must be noted that often persons suffering from mental illnesses need legal assistance *before* they are placed in a psychiatric hospital. Actually, if they had access to high quality legal representation from the beginning of court procedure, where their compulsory treatment is being determined, they may even not need further assistance, because a court may refuse to place the person under compulsory treatment on the basis of skilled legal representation.

⁵⁶ In particular, the provision lists the following beneficiaries: disabled people of 1st and 2nd category; convicts; members of families registered in the family indigence assessment system with a grade above "0"; participants in the Great Patriotic war and the participants in military actions in defence of the national border; unemployed people; pensioners living alone; children left without parental care and similar persons; refugees; people temporarily sheltered in Armenia; insolvent natural persons who submit reliable data confirming their inability to pay; persons suffering from mental disorders, who receive treatment in psychiatric hospitals; victims of domestic violence, trafficking, abuse and torture; asylum-seekers (Article 41 edited pursuant to HO-339-N of 08.12.11, supplemented pursuant to HO-29-N of 30.04.13; HO-215-N of 17.12.14; HO-157-N of 17.10.16; HO-242-N of 16.12.16).

As to the access to free legal aid on the basis of the decision of an investigator, prosecutor or judge, the issue aforementioned (i.e., lack of check on the applicant's financial situation) remains the same. The Code of Criminal Procedure states that the body conducting the criminal procedure decides that the accused/defendant must be provided free legal aid and refers its decision to the OPD⁵⁷. The latter is bound to provide free legal aid without first being able or obliged to check the indigence of the accused/defendant. It is reported that, before the OPD, investigators were appointing attorneys and issuing a certificate stating the hours worked. Then, the attorney would go to the Ministry of Finance for payment. There were also accusations of collaboration between attorneys and investigators. The Chamber of Advocates mentioned that until 2005 the investigator himself appointed a Public Defender and provided a reference of his / her working hours. That reference was the basis for the Public Defender's remuneration. This model was highly unacceptable for two reasons: first, the Defender's independence was essentially counterproductive to earning money; in some cases, Defender co-operate with investigators to obtain references for longer working hours; and second, investigators often provided unreliable references.

Irrespective of how the individual was granted legal aid, in case there are court fees to be paid in case of defeat, the fees are nevertheless payable by the legal aid beneficiary. It appears counterintuitive that a person granted free legal aid on the grounds of indigence, may be obliged to pay the court fees.

B3. Institutional framework

B3.1. Office of the Public Defender

Articles 42-45 regulate all matters related to the Office of the Public Defender. The OPD currently consists of the Head of the Public Defender's Office, two deputies, public defenders and a supporting staff.

The Council of the Chamber determines the number of public defenders on the basis of finances received from the Government. The Head of the Public Defender's Office shall be appointed for a term of 4 years from among members with no less than 10 years of attorney experience by the Board of Chamber of Advocates as nominated by its Chairman. The Head of the OPD may request public authorities to provide information necessary for making a decision concerning eligibility of free legal assistance under Article 41 or the Law⁵⁸. A public defender is the advocate who works in the OPD on the basis of a labour contract⁵⁹.

There was a major reform of the OPD in 2015, including a widespread awareness campaign about the OPD and access to justice. As a result, the Government increased the financing of the OPD, since it was clear that awareness resulted in more legal aid applications. Since 2015 the OPD has been operating the "Electronic Public Defender" (EPD) programme, which contains all data about free legal aid cases⁶⁰. The EPD offers online legal advice. This database is a management, decision-making and quality-assurance tool. Each public

⁵⁷ According to interviewees, in criminal cases the investigator certifies the eligibility; then the OPD receives the document, and the Head appoints an attorney.

⁵⁸ Article 43 para 3: The Head of the Public Defender's Office shall: (8) seek the assistance of public authorities or local self-governments or business entities to verify the inability to pay off reportedly disadvantaged persons and to obtain other information required to provide free legal.

⁵⁹ The OPD hires attorneys as public defenders for one year (labor contract with right of renewal by the OPD). Only licensed attorneys are recruited: President of the Chamber.

⁶⁰ The EPD software is divided in two parts: Part 1: Criminal; Part 2: civil / administrative. All info is uploaded to the system (appointments by the Head; specific info on the public defenders; search engine; cases assigned to public defenders; huge data base; data on caseload of each P.D.; balance distribution mechanism; online monitoring of cases; public profile of each P.D. and cases assigned to her/him. It is a decentralised system: the applications are filed from the regions and the decisions are issued within minutes. There is also an assessment mechanism of the workload.

defender manages his or her own case in the EPD programme by uploading pertinent legal documents into the system, which is reviewed by the OPD. The EPD programme allows for approval by the OPD of legal aid applications filed remotely. Public defenders are evaluated each year for the January-October period. The evaluation consists of a score-based system, where the public defender receives a predetermined score for necessary legal actions in a specific case. The OPD does not extend contracts with public defenders receiving the lowest 30% scores within the reported period of 10 months⁶¹. The accuracy of information provided by the public defenders and his or her scores are checked annually by the Chamber's Monitoring Commission⁶². Despite what is mentioned above, it is reported that there are serious problems in operation of the OPD, due to lack of personnel in the OPD and low salaries. Each Public Defender receives a workload of 50 criminal cases for 8-10 months. It is proposed to streamline salaries of OPD lawyers with prosecutors. The Ministry of Justice is preparing an Action Plan aiming at the Reform of the OPD. The issues above form part of the draft⁶³.

It should be added to the above-mentioned that through the electronic system implemented in the OPD, the quality and effectiveness of the work of the public defender is evaluated every year. Evaluation is done digitally with clearly defined criteria. According to the results of the evaluation, the public defenders, who have shown low efficiency, are being replaced by other advocates on a competitive basis. For instance, according to the results of the 2020 work evaluation, the contract with 13 public defenders was not extended (including 0.5 and 0.25 posts, the total number of public defenders was 81).

Besides, the public defenders' actions and the quality of provided assistance is subject to direct and permanent control by the administration of OPD (by the head and the deputies). Direct control also involves communicating with beneficiaries, discussing their grievances, and resolving issues. At the same time, the OPD has implemented flexible and effective control mechanisms. In parallel with the Chairman of the Chamber of Advocates, his Deputy-coordinating the field, the monitoring group exercises control over the OPD. The latter conducts regular inquiries among beneficiaries receiving free legal aid (99 questionnaires were completed during January-August 2021, not counting oral inquiries), make follow-up visits to courts, and follow-up to court hearings with the participation of public defenders (54 visits were made during January-August 2021), through the constant study of the data contained in the electronic and management system installed in the OPD, follow the actions of public defenders, and study the proceedings in cases completed. The monitoring group reports on a regular basis (monthly, annually), as well as on individual issues by making reports and recommendations on specific issues.

B3.2. Budget and salaries of the Office of the Public Defender

Upon proposal of the OPD, and on the basis of data on requested and provided free legal aid, the Head of the Chamber's Council submits a budget proposal for the OPD to the Government (Article 45 para. 2)⁶⁴. Although case number increases, the budget remains the same⁶⁵. OPD has to spend 30% of the budget on running costs. In case the Government objects to the proposal, it transfers the matter to the National Assembly and the Chamber, adding the reasoning of the objections. The Chamber's Chairperson manages the financial resources of the OPD. The budget includes the officials and public defenders' fees, as well as expenses

⁶¹ The CoA & OPD have an electronic evaluation system. Credits are given to the attorneys for their actions and quality. The lowest 30% is excluded, and a new 30% is hired: President of the Chamber.

⁶² European Union and Council of Europe Partnership for Good Governance 2019-2021, PGG II Regional Project "Strengthening the profession of lawyer in line with European standards": Comparative review on Procedural and institutional setup of the functioning of lawyers in Armenia, Belarus, Georgia, Moldova and Ukraine, Council of Europe 2020, p. 21.

⁶³ Ministry of Justice.

⁶⁴ Reportedly, for the time being the OPD tries to survive. The Government needs to act. There is no transparency about the forthcoming amendments on the Law on Advocacy.

⁶⁵ In 2014: 5000 cases; In 2015: 7000 cases; Meanwhile nearly 16.000 cases.

necessary for the proper functioning of the OPD. In order to ensure equality of social benefits and conditions of employment, the salary of public defenders and deputies of the OPD Head are equal to the salary of the public prosecutor of Yerevan⁶⁶. In addition, the OPD Head is also entitled to remuneration for his or her functions, receiving the amount of 25% of the salary of a public defender. While prosecutors are entitled to increases to their salaries, such as rewards or extra-workload pay, the Law does not regulate those payments in similar situations to public defenders⁶⁷, thereby creating unequal conditions for the same work. Despite the low income, even experienced lawyers join the OPD, due to the volatile situation in the country.

In order to save and use the existing resources more efficiently, the OPD employs public defenders on the basis of 50% or 25% working time, especially in the regions. This technique allows the OPD to employ up to four public defenders at the cost of one. This may be the most effective solution in a situation where there is only one public defender in a remote area, while there are several defendants in a criminal case requiring free legal defence and there is a conflict between them, which would imply that one public defender cannot represent all⁶⁸.

GOOD PRACTICES AND OUTSTANDING CHALLENGES

A. Good practices

The right to free legal aid in the Republic of Armenia has a constitutional basis under Article 64 para.1 of the Constitution⁶⁹ and is specified under Article 41 of the Law on Advocacy. Free legal aid in Armenia shall be granted to any eligible applicant in all criminal, civil, administrative, and constitutional cases. Article 41 of the Law foresees, as seen above, that free legal aid is carried out through the Office of Public Defender and shall include counselling (drafting of claims, applications, appeals and other procedural documents of legal nature, including provisions of legal information) and representation or defence. If the request for legal aid is not accepted, the applicant may challenge the decision before the Head of the Chamber of Advocates. If the application is dismissed again, the applicant may appeal against the decision before the first Instance court⁷⁰ and reach even the Supreme court⁷¹. In practice however, applications are dismissed rarely. In the course of criminal proceedings, legal representation is provided in all stages of criminal procedure, including the pre-trial proceedings⁷². This provision corresponds to Article 6 para. 1 ECHR, which requires that access to a lawyer should be provided from the first interrogation of a suspect by the police, the public prosecutor and the investigating judge⁷³.

The policy of legal aid of Armenia does not discriminate on the basis of age, race, colour, gender, language, religion or belief, political or other opinion, class, national or social origin, property, citizenship or domicile, birth, education, social status or another status. Thus, equality and non-discrimination in regard to access to justice is ensured⁷⁴. Moreover, the Law

⁶⁶ A monthly salary of nearly 800 Euros is paid: President of the Chamber; (net goes down to 500). Public Defenders in the region are paid only the fuel.

⁶⁷ Allegedly, there is discrimination compared to prosecutors. The latter receive bonuses, the former not.

⁶⁸ Comparative review on Procedural and institutional setup of the functioning of lawyers in Armenia, Belarus, Georgia, Moldova and Ukraine, p. 21-22. It is reported that no expansion of the number of PD took place (only 5 new appointments). The total number of Public Defenders for the entire country is 75. Some PD quit, due to the overload in criminal matters. There is lack of motivation.

⁶⁹ Article 64 para. 1 of the Constitution of the Republic of Armenia provides that "everyone shall have the right to receive legal aid. Legal aid shall be provided at the expense of state funds in the cases prescribed by law".

⁷⁰ Public defender office.

⁷¹ Court of cassation.

⁷² Article 41 para. 3 of the Law on Advocacy.

⁷³ ECtHR, *Salduz v. Turkey*, No. 36391/02, 27 November 2008, para. 54, ECtHR, *Nechiporuk and Yonkalo v Ukraine*, No 42310/04, 1 June 2011, para 262.

⁷⁴ European Committee on Legal Cooperation - Drafting Group on Legal Aid Schemes, Efficiency and effectiveness of legal aid schemes in the areas of civil and administrative law. 6th draft of the Guidelines and the Explanatory Memorandum, Document prepared by the Secretariat Directorate General of Human Rights and Rule of Law,

of the Republic of Armenia guarantees a right to free legal representation and assistance, regardless of financial means, for an exhaustive list of individuals meeting certain social criteria, namely the arguably weaker and / or belonging to a vulnerable group of people⁷⁵. These categories include in particular⁷⁶: members of families of military servicemen who died defending the national borders; disabled people of 1st and 2nd category; convicts; members of families registered in the family indigence assessment system with a grade above “0”; participants in the Great Patriotic War (WWII) and the participants in military actions in defence of the national border; unemployed people; pensioners living alone; children left without parental care and similar persons; refugees; people temporarily sheltered in Armenia; persons suffering from mental disorders, receiving treatment in psychiatric hospitals; victims of domestic violence⁷⁷, trafficking, abuse and torture; asylum-seekers. The above categories are *ab initio* exempted from the financial means test.

In criminal proceedings any person (the victim, the suspect or the defendant) lacking sufficient means is entitled to the services of a State-funded advocate (Public Defender). Under Article 10 of the Code of Criminal Procedure, *“everyone has the right to receive legal assistance in accordance with the provisions of this Code. The body conducting criminal proceedings shall be obliged to ensure that the suspect or the accused receive legal assistance. [...] Further, the relevant court/body is entitled to provide the suspect or the accused with free legal aid based on the financial situation of the latter”*. In civil, administrative and constitutional cases, legal aid is granted if the applicant falls within the above categories, regardless of his/her financial situation. The eligibility system is disconnected from a financial means test. In other than criminal cases, free legal aid is also provided with no merits test being applied. For example, it is not possible to refuse legal aid to an applicant for frivolous action or no chance of success⁷⁸. It is not clear though, whether the Law on Advocacy, using the wording “in the interests of justice” in relation to criminal cases⁷⁹, refers to a merits test for granting legal aid to such cases. In any case, the law does not explain the meaning of “interests of justice”.

Moreover, the right of free legal aid applies to all appellate or other stages of domestic proceedings⁸⁰. This provision offers higher standards of free legal assistance to the beneficiaries, compared to those set by the Council of Europe and the ECtHR, as it does not impose additional conditions for granting legal aid to proceedings before higher instance courts.

In addition, enforcement of judgements is also a component of the right of access to justice. Failure to enforce judgements constitutes an obstacle to accessing justice⁸¹. The lack of legal aid provision for the fees that are related to the enforcement of judicial decisions in Armenian legislation⁸² does not constitute a breach of the right to an effective remedy. The majority of

CDCJ-GT-SAJ2 (2020) 8 prov., Strasbourg, 6 October 2020; The non-discrimination guideline toward legal aid proceedings is in line with Article 14 of the ECHR as well as Additional Protocol No. 12 on equality and non-discrimination.

⁷⁵ According to ECtHR, legal aid may be required, particularly if an individual is vulnerable, see ECtHR, *Nenov v. Bulgaria*, No. 33738/02, 16 July 2009, para. 52; ECtHR, *Quaranta v. Switzerland*, No. 12744/87, 24 May 1991, para. 35; FRA (2016), Handbook on European law relating to access to justice, p. 64, fra.europa.eu.

⁷⁶ Article 41 of the Law on Advocacy, as revised pursuant to HO-339-N of 08.12.11 and supplemented pursuant to HO-29-N of 30.04.13; HO-215-N of 17.12.14; HO-157-N of 17.10.16; HO-242-N of 16.12.16.

⁷⁷ Para. 16 of Article 41 of the law, supplemented pursuant to HO-327-N of 13.12.17, with effect starting from 30.06.2018.

⁷⁸ CEPEJ, Evaluation Questionnaire of the judicial systems (2016-2018 cycle) - Armenia, generated on 29/08/2018: 2.1.2. Quantitative information on legal aid, 024 “In other than criminal cases, is it possible to refuse legal aid for lack of merit of the case (for example for frivolous action or no chance of success)?”.

⁷⁹ Article 41 para. 4 of the Law reads as follows: The authority that handles criminal cases shall provide free legal assistance through the Public Defender's Office as prescribed by the Armenian legislation or international treaties or in the interests of justice.

⁸⁰ Article 41 para. 3 of the Law on Advocacy.

⁸¹ FRA (2011), Access to justice in Europe: an overview of challenges and opportunities, p. 62.

⁸² CEPEJ, Evaluation Questionnaire of the judicial systems (2016-2018 cycle) - Armenia, generated on 29/08/2018: 2. Access to justice and all courts, 2.1. Legal Aid, 2.1.1. Scope of legal aid, 018. “Can legal aid be granted for the fees that are related to the enforcement of judicial decisions (e.g. fees of an enforcement agent)?”.

persons interviewed don't find a provision for legal aid in enforcement necessary, since the enforcement agents in Armenia are paid state - funded.

B. Present legal and institutional gaps

Although, at first glance, the provision of legal aid to certain categories of vulnerable groups – without prior examination and regardless of their financial situation- is in line with CoE standards and ECtHR case law, it may be described as a double-edged sword, because it still leads to the paradox of granting legal aid to persons who possibly have sufficient funds to hire a lawyer⁸³. The latter, in combination with Armenia's annual approved and implemented public budget allocated to legal aid, i.e., 736.571,00 €⁸⁴, which remains steady although the case's number increases, may lead to low quality legal assistance or the exclusion of people who are in real need of free legal aid.

The Law on Advocacy does not provide for an efficient system on determination of legal aid beneficiaries because it is not based on the principle of the beneficiaries' indigence, but on their affiliation to certain social categories of vulnerable groups. Armenia should establish a financial means test for granting free legal aid⁸⁵. Armenia should also establish an accurate state-wide system containing credible information about the economic situation of the person to which the OPD and the body conducting the criminal procedure would have access to for its decision-making⁸⁶. For the time being, the ground rule of control focuses on public documents proving the income, such as pension orders, tax declarations etc. In criminal cases, it is reported that the judge or investigator decides for granting legal aid on the grounds of interests of justice and impenitence. The OPD, though, may not oppose to the decision. The latter leads to massive acceptance of applications. Every year the number of criminal cases of the OPD increases by 20%, while the number of public defenders remains the same⁸⁷. Further, it is noticed that there is a problem in criminal proceedings due to double appointment of lawyers, which has no legal basis. It was solidified by a ruling of the Constitutional Court in 2017. The court appoints a public defender even when the accused person has hired an attorney. In some cases, the proceedings take place when the hired attorney is absent. The court proceeds with the presence of the public defender. An adjournment by the hired lawyer is dismissed. This notably happens in high profile cases⁸⁸. This situation burdens the OPD workload, in cases where this is not necessary.

Although the Armenian legislation provides a uniform set of requirements for the provision of qualified legal assistance within the Law on Advocacy and Code of Conduct, it is allegedly that OPD offers bad quality services due to lack of mechanism of quality assurance. No quality standards and assessments have been determined for legal aid providers⁸⁹ to ensure their adequacy and competence for the task. However, recent findings suggest that quality standards and assessment of lawyers' capacity to deal with legal aid cases emanating from different branches of law are provided by the OPD, both in pre-selection and post-delivery of legal services. In particular, the breakdown of selection of the defenders based on their

⁸³ Comparative review on Procedural and institutional setup of the functioning of lawyers in Armenia, Belarus, Georgia, Moldova and Ukraine, p. 20-21.

⁸⁴ CEPEJ, Evaluation Questionnaire of the judicial systems (2016-2018 cycle) - Armenia, generated on 29/08/2018: 1.1.2. Budgetary data concerning judicial system, 012- 012-1 "Annual approved and implemented public budget allocated to legal aid, in €".

⁸⁵ The majority of persons interviewed agreed that this provision massively increases the categories of eligible persons. Improvement of eligibility conditions is needed.

⁸⁶ Comparative review on Procedural and institutional setup of the functioning of lawyers in Armenia, Belarus, Georgia, Moldova and Ukraine, p. 21-22.

⁸⁷ Proposed legal reforms have so far failed. It is reported that initiatives to establish filtering mechanisms were refused by the government.

⁸⁸ The rationale behind it is the acceleration of the trial, since public defenders are in line with the judges, offering minimal services for the accused. However, it is virtually inactive, and it serves only the purpose of covering the need for legal representation in theory.

⁸⁹ CEPEJ, Evaluation Questionnaire of the judicial systems (2016-2018 cycle) - Armenia, generated on 29/08/2018: 6.1.3. Quality standards and disciplinary procedures, 157. "Have quality standards been determined for lawyers?".

specialization exists. It is split in two blocks of specializations, i.e., criminal and civil, and administrative and constitutional law cases. This breakdown is also available in the electronic version of the OPD, where the search engine provides for the opportunity to select the defender based on her/his specialty. Regrettably, the process aforementioned is based on internal Regulations and by-laws of the OPD.

It is possible for everyone to file a complaint about the performance of lawyers to the Chamber of Advocates. If the complaint includes elements of violation of the Law on Advocacy or Code of Conduct, disciplinary proceedings will be initiated by the Council of the Chamber of Advocates⁹⁰. However, there isn't a formal and impartial procedure allowing legal aid beneficiaries to apply for the replacement of a legal aid provider, whose services are of unsatisfactory quality⁹¹.

Furthermore, the Armenian free legal aid system includes preliminary legal assistance, namely provision of initial legal information and advice for the right to use legal aid, general legal information, and legal aid in completing the application for free legal aid. Article 3 of the EU Directive 2002/8/EC⁹² states that legal aid is considered to be appropriate when it guarantees pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings.

In Armenia, legal aid is also not provided for the costs and fees of other professionals (notaries, translators, interpreters, technical advisors or experts etc.)⁹³ who may be involved in the case. The latter raises issues of infringement of the right of access to justice, as it does not allow a person to process a legal case in its entirety free of charge. According to Article 113 para. 2 of the Civil Procedure Code, though, the Court, taking into account the property status of the person participating in the case, may exempt the party who bears the reimbursement court fees due to Article 109 para. 3, including the amounts paid by the Republic of Armenia to witnesses, experts, specialists and interpreters/translators, from the obligation to reimburse these amounts. The latter, however, is at the discretion of the court.

In the event that the beneficiary is not succeeding at the litigation stage, the Armenian legislation does not provide for the exemption from court fees⁹⁴. Irrespective of how the individual was granted free legal aid in non – criminal proceedings, in case of defeat, the fees are payable by the beneficiary of free legal aid. At first, it appears contradictory that a person who benefits from free legal aid on grounds of indigence, is later refused the right to be exempted⁹⁵. Nevertheless, in the case of Armenia, it should be borne in mind that several categories of beneficiaries are entitled to legal aid, regardless of their financial means, and that the provision of legal aid is not subject to a merits test. Therefore, in these cases, it appears consistent for the losing party to be burdened with the court fees. Even so, things should be different in cases where the provision of legal aid is based on the applicant's indigence⁹⁶. In criminal proceedings, the court may impose on the convict the obligation to reimburse the state for the payment of the legal aid shown to him / her, but the court is constrained by the decision to exempt the person from the legal aid payment made in the previous stages of the proceedings. It turns out that even if there are appropriate grounds, the courts are deprived of the opportunity to impose such an obligation on the convict. In practice,

⁹⁰ Article 39.1 of the Law on Advocacy; Regulation on Disciplinary proceedings against advocates (2019).

⁹¹ ECtHR, *Bertuzzi v. France*, No. 36378, 13 February 2003, para. 30; ECtHR, Guide on Article 6 of the European Convention on Human Rights - Right to a fair trial (civil limb), updated to 31 August 2019, p. 34.

⁹² Article 3 of the Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ 2003 L 026.

⁹³ CEPEJ, Evaluation Questionnaire of the judicial systems (2016-2018 cycle) - Armenia, generated on 29/08/2018:: 2. Access to justice and all courts, 2.1. Legal Aid, 2.1.1. Scope of legal aid, 019. "Can legal aid be granted for other costs (different from those mentioned in questions 16 to 18, e.g. fees of technical advisors or experts, costs of other legal professionals (notaries), travel costs etc.)?"

⁹⁴ CEPEJ, Evaluation Questionnaire of the judicial systems (2016-2018 cycle) - Armenia, generated on 29/08/2018:: 2. Access to justice and all courts, 2.1. Legal Aid, 2.1.1. Scope of legal aid, 017. "Does legal aid include the coverage of or the exemption from court fees?"

⁹⁵ Comparative review on Procedural and institutional setup of the functioning of lawyers in Armenia, Belarus, Georgia, Moldova and Ukraine, p. 21.

⁹⁶ See Article 113 para. 2 Civil Procedure Code.

however, there are many cases when, despite the decision to exempt a person from legal aid costs, reliable evidence of the person's solvency emerges in the later stages of the proceedings. In this case, as a result of deficiencies and gaps in the legal regulation, Public Defenders are provided to the solvent's and in case of conviction, the expenses incurred at the expense of state funds are not confiscated from the convict⁹⁷.

Furthermore, legal aid professionals cannot represent applicants in a judicial mediation process or any other ADR process, whilst the legal system provides for private mediation, judicial mediation, and arbitration⁹⁸. The recent amendment in the Civil Procedure Code provides for 4-hour free mediation services⁹⁹. According to some of the interviewees the ADR is trendy, but not working at all.

Finally, the fundamental right to a fair trial in criminal proceedings guarantees the right to defence by a lawyer selected by the applicant¹⁰⁰. Despite the fact that this right is not absolute¹⁰¹, imposing a lawyer on a defendant against her/his will, causes a risk that the trial might be unfair and violate the defendant's rights. Although the Armenian legislation lacks such regulation, the internal legal acts of the Chamber of Advocates ("Regulation on Arranging the Provision of Free Legal Aid") establish replacement procedures. The deprivation of the right to choose one's own lawyer by the Armenian law is reported within the CEPEJ reports¹⁰². Therefore, an upgrading of the regulations mentioned above on the legislative level would strengthen the compliance with the with Article 6 para. 3c of the ECHR and Article 48 para. 2 of the EU Charter. The defendant's wishes must be considered and potentially entertained at the stage of the lawyer's appointment¹⁰³.

C. Gender equality and youth participation

In Armenia, there are no accusations of gender discrimination in access to the legal profession and the system of legal representation. Equality and non-discrimination in regard to the legal aid provision is also ensured.

Moreover, no problems have been reported regarding the participation of young people in the legal representation system and legal aid. On the contrary, it was reported that new attorneys are called to offer 20% of their professional daily time to pro bono¹⁰⁴.

D. Ongoing or future initiatives in a pragmatic fashion

First of all, it must be noted that as a result of the recent escalation of the conflict between Armenia and Azerbaijan over 100,000 Armenian civilians have fled their homes around the Artsakh (Nagorno-Karabakh) region. Armenia, Azerbaijan and Russia have signed on November 9, 2020 a truce agreement and the Republic of Armenia has agreed to withdraw from several disputed areas. It is indisputable that the majority of civilians from these areas will move to Armenia seeking protection. Regarding the current management of the situation, it is worth noting that no special measures need to be taken for these populations, because Article 41 of the Law on Advocacy already provides for legal aid to refugees and thus there is

⁹⁷ Chamber of Advocates.

⁹⁸ CEPEJ, Evaluation Questionnaire of the judicial systems (2016-2018 cycle) - Armenia, generated on 29/08/2018: 7.1. Mediation, 7.1.1. Details on mediation procedures and other ADR, 165. "Is there a possibility to receive legal aid for judicial mediation procedures?" and 168. "Does the legal system provide for the following alternative dispute resolutions (ADR)".

⁹⁹ Ministry of Justice.

¹⁰⁰ Open Society Justice Initiative, Legal aid in Europe: Minimum requirements under international law, p. 8.

¹⁰¹ ECtHR, *Lagerblom v Sweden*, No. 26891/95, 14 January 2003, para. 54.

¹⁰² CEPEJ, Evaluation Questionnaire of the judicial systems (2016-2018 cycle) - Armenia, generated on 29/08/2018: 2.1.2. Quantitative information on legal aid, 022. "Are individuals free to choose their lawyer within the framework of the legal aid system?".

¹⁰³ ECtHR, *Croissant v. Germany*, No. 13611/88, 25 September 1992, para. 29.

¹⁰⁴ President of the Chamber.

no reason for additional group of vulnerable people. Besides, a group of lawyers do provide legal assistance in the field¹⁰⁵.

The Ministry of Justice is also working on a Concept Paper on possible amendments to Article 41¹⁰⁶.

Furthermore, legal aid is required in ADR proceedings particularly if the imposition of costs for some parties would effectively shut off access to a court¹⁰⁷. Armenian legislation aims to expand applicability of alternative dispute resolution mechanisms (The Draft Strategy)¹⁰⁸. Hence, Armenia should grant legal aid for judicial mediation and ADR procedures.

Pro bono legal services are provided solely on a voluntary, ad hoc basis and are not regulated. However, the introduction of pro bono services is under consideration by the Ministry of Justice. In view of the processes for regulating pro bono services, the Ministry is taking into account the US model of law firms offering pro bono and receiving tax benefits. While all the initiatives towards introducing and strengthening the provision of the pro bono services in the country are welcomed, it is strongly recommended that all the developments proposed were coordinated closely with the bar association and the lawyer's society, in order to ensure the inclusiveness of the process and to avoid the establishment of the monopoly over the pro bono services by either of parties.

RECOMMENDATIONS

The main aspects, the best practices and the weaknesses of the legal aid system in Armenia were described above. The report aims to identify some areas, where some improvements could be made in order to strengthen the system of free legal aid.

The above findings lead to the conclusion that Armenia should create a state-wide system containing credible information about the economic situation of applicants to which the OPD would have access to, in order to apply the financial means test fairly and effectively¹⁰⁹. Moreover, the Armenian legislator should establish a merits test for granting legal aid to those who have an automatic right to receive free legal assistance under Article 41 of the Law on Advocacy, so that public funds are not spent in vain¹¹⁰. It is also proposed for Armenia to introduce a filtering mechanism for criminal cases on the basis of certain conditions, especially scrapping the double appointment of lawyers, and a right of the OPD for reimbursement of expenses in case of manifestly ill-founded applications¹¹¹. In general, it is advisable that Armenia should evaluate the impact of the eligibility criteria, especially in the context of the current economic and political crisis.

Another problem regarding the implementation of the right to free legal aid is the absence of preliminary legal assistance. In many cases, people don't know that they have a right to get free legal aid or they do not know who to contact with, and what documents to provide.

¹⁰⁵ Ministry of Justice.

¹⁰⁶ Ministry of Justice.

¹⁰⁷ Consultative Council of European Judges, Opinion no. 6 (2004) on Fair trial within a reasonable time and judge's role in trials taking into account alternative means of dispute settlement, as adopted by the CCJE, Strasbourg, 22-24 November 2004, para. 142; Lorna McGregor, Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR, *The European Journal of International Law* Vol. 26 no. 3 (2015), p. 621.

¹⁰⁸ CEPEJ, Evaluation Questionnaire of the judicial systems (2016-2018 cycle) - Armenia, generated on 29/08/2018:: 12. Reforms in judiciary, 208. "Can you provide information on the current debate in your country regarding the functioning of justice? Are there foreseen reforms? Please inform whether these reforms are under preparation or have only been envisaged at this stage. Have innovative projects been implemented?"

¹⁰⁹ 6th draft of the Guidelines and the Explanatory Memorandum, p. 5.

¹¹⁰ FRA (2016), Handbook on European law relating to access to justice, p. 64; Open Society Justice Initiative, Arrest Rights Brief No.3: The Right to Legal Aid, April 2013, p. 6-8.

¹¹¹ No case was reported against fake beneficiary filed by the OPD.

Armenian law should promote an information campaign on free legal aid regarding a number of aspects, such as the subjects of aid, the eligibility and the competent authorities¹¹².

In addition, the Armenian system does provide for the right of the defendant to choose a lawyer when the latter is provided free of charge by the legal aid system. It is important that the Armenian legislation sets specific requirements and quality standards for legal aid providers.

Free legal aid should also include the costs and fees of other professionals, such as notaries, bailiffs, technical experts, legal translators¹¹³ or interpreters, whenever the case requires it. The same applies to the fees that are related to the enforcement of judicial decisions.

It is recommended to:

- Create a state-wide system, containing credible information about the economic situation of the applicant to which the OPD would have access to.
- Establish a merits test for granting legal aid to those who have an automatic right to receive free legal assistance under Article 41 of the Law on Advocacy.
- Introduce a filtering mechanism for criminal cases on the basis of certain conditions; scrap the double appointment of lawyers; and introduce a right of the OPD for reimbursement of expenses in case of manifestly ill-founded applications.
- Provide for exemption from court fees in non -criminal cases where the provision of legal aid is based on the applicant's indigence.
- Establish a collection mechanism in criminal proceedings for the reimbursement of legal aid costs in case the convict person turns out to be solvent in the later stages of the proceedings.

In the field of quality assurance mechanisms for appointing legal aid providers: Establish a more robust regulation on the level of a law, instead of adopting soft law measures, which are not easily traceable or perhaps even not subject to judicial scrutiny.

- Upgrade the procedures for the replacement of legal aid lawyers if they fail to build a relationship of trust with the beneficiary or demonstrate deficient professional quality on the level of the act of parliament.
- Provide legal aid for the costs and fees of other professionals, such as notaries, bailiffs, technical experts, legal translators or interpreters, whenever the case requires it on an ordinary basis.
- Grant legal aid for judicial mediation and ADR procedures.
- Regulate pro bono services, taking into account the USA model.

¹¹² 6th draft of the Guidelines and the Explanatory Memorandum, p. 4.

¹¹³ Upon this subject, CJEU (C- 670/15, *Šalplachta*, 26 July 2017, ECLI:EU:C:2017:594), interpreting Articles 3, 8 and 12 of Council Directive 2003/8/EC, has ruled that “legal aid granted by the Member State of the court hearing the particular case, in which a natural person domiciled or resident in another Member State has submitted a legal aid application in the context of a cross-border dispute, also covers the costs paid by that person for the translation of the supporting documents necessary for the processing of that application”. Although, the ruling of CJEU refers to legal aid in cross- border disputes, it also indicates the legal aid standards in Europe.

BELARUS

NATIONAL LEGAL FRAMEWORK

A. Legal framework of the advocate profession

In its Article 62 the Constitution of Belarus (“the Constitution”) (adopted on November 24, 1996 as amended as of October 17, 2004) proclaims the right to legal assistance by an advocate and other representatives along with the right of legal aid.¹¹⁴ This constitutional provision provides the right of every citizen to legal assistance in court, other state institutions, local government bodies, at enterprises, institutions, organizations, public associations and in relationships with officials and citizens. In cases stipulated by law, legal assistance is provided at the expense of public funds.

At the normative level, the status of advocates is governed by the Law on the Bar and Advocacy Activity in the Republic of Belarus 334-Z dated December 30, 2011 (as amended by the Law 7-Z dated December 29, 2012, and Law 42-Z dated July 11, 2017) (“the Law on the Bar”). This is the main piece of governing the legal profession.

A set of by-laws regulating the advocate profession and supporting the implementation of the Law on the Bar should be also mentioned here:

1. Rules of professional ethics of advocates (as amended by the Regulation of the Ministry of Justice 227 dated December 28, 2018)
2. Decree by the President of the Republic of Belarus dated: June 14, 2012 No. 265 Regulation on Dissolution of Territorial Bar Associations (association of the city of Minsk and district association) and advocates bureaus.
3. Presidential Decree No. 450 governing authorisation to exercise various professions of September 1, 2010
4. Decision of the Ministry of Justice No. 58 “On certain issues governing the question of licensing of activities concerning provision of legal services” of March 7, 2014
5. Rule No. 1363 governing authorisation to exercise the legal profession adopted on October 20, 2003 by the Council of Ministers of Belarus and amended in December 2010
6. Decision of the Ministry of Justice No. 105 on “Regulation of the Qualification Commission on issues relating to the legal profession in the Republic of Belarus” of November 30, 2010
7. Regulation of the Ministry of Justice “On the qualification procedures for advocates” of February 2, 2012, amended by Regulation of May 16, 2017.

The above list does not include all the normative acts adopted by the executive bodies, nor the rules governing record-keeping on the provision of legal services.

The legal framework includes also local legal acts of the Republican Bar Council: methodical recommendations or guidelines. There are about 20 major recommendations which include

¹¹⁴ Article 62 para 1 of the Constitution of the Republic of Belarus “Everyone shall have the right to legal assistance to exercise and protect his rights and freedoms, including the right to make use, at any time, of assistance of advocates and his other representatives in court, other state bodies, bodies of local government, enterprises, institutions, organisations and public associations, and also in relations with officials and citizens. In the instances specified by law, legal assistance shall be rendered at the expense of state funding.”

Article 62 para 2 “Obstruction to rendering legal assistance shall be prohibited in the Republic of Belarus.” www.law.by

requirements as to the individual advocates and advocates' bureaus, the implementation of which is monitored by the Republican Bar.¹¹⁵

B. Institutional framework

The bodies of advocates' self-government in the Republic of Belarus are:

- The General Assembly of advocates is the supreme body of advocates' self-government and considers general issues of the activities of the Bar.
- Seven Local Bar Associations managed by the General assembly of all advocates, and the Council of the local bar association, which acts as its executive body. Auditing commissions are created within the local bar associations with a view to controlling its financial activity. Respectively, disciplinary commissions of the local bar associations examine the disciplinary cases and oversee the observance of the Rules of professional ethics.
- Belarusian Republican Bar Council that represents and defends the interests of advocates in relations with state bodies and other organizations, coordinates the activities of Local Bar Associations, implements measures aimed at increasing the access and quality of legal assistance, etc. An auditing and a disciplinary commission are created within the Republican Bar association.

Advocates' activities are organised in three forms: a legal consultation, an advocate's bureau or individually.

Legal consultations are formed by the local bar associations in districts, cities, city districts to provide legal assistance. Legal consultations ensure the provision in the territory of the respective administrative division and territorial unit of legal assistance in criminal matters by appointment through the territorial bar association at the request of the authority conducting the criminal process, as well as other types of legal assistance provided at the expense of the bar associations, republican and (or) local budgets, and are responsible for its availability. The procedure for legal consultations is determined by the Belarusian Republican Bar Association ("the BRBA"). Material, technical, financial, and staffing of legal consultation is provided by the territorial bar associations. The management of the legal consultations is carried out by the head appointed from among the advocates of the legal consultation. The Regulation on the head of legal consultation is approved by the Ministry of Justice.

In each legal consultation, the reception of visitors is carried out by the advocate on duty who gives oral and written consultations, prepares legal documents, if the client wishes to conclude an agreement with a specific lawyer, direct the client to the manager or directly to the appropriate lawyer, and performs other functions.

Unlike legal consultations, which are not legal entities, the advocates' bureaus are non-profit organisations with the right to hire advocates, assistant advocates, and other employees under an employment contract.

Registration and/or termination of these forms are depending to varying degrees on the Ministry of Justice decisions.

¹¹⁵ "Comparative-review-procedural-and-institutional-setup-of-the-functioning of advocates in Armenia, Belarus, Georgia, Moldova and Ukraine" - PGG II Regional Project "Strengthening the profession of advocate in line with European standards"

ANALYSIS OF THE SYSTEM OF LEGAL REPRESENTATION

A. Monopoly of legal services by advocates

The analysis of the legislation shows that the monopoly of advocates is not defined as exclusive since several legislative acts allow legal representation to be provided by a person that is not admitted as advocate.

The Constitution allows legal assistance to be provided by an advocate and other representatives. Though this question is regulated on the constitutional level, a certain contradiction is revealed in the Law on the Bar (see Article 26 para 2 thereof) which categorically determines that only advocates provide professional legal representation in criminal, civil cases, cases arising from economic disputes, and cases of administrative offenses in the courts, authorities conducting a criminal or administrative process. In addition to providing legal assistance, advocates are also entitled to act as mediators and conciliators in a mediation procedure or arbitrators when considering cases by arbitration courts.

Following the Constitutional provisions, procedural codes allow legal representation in the court to be provided not only by lawyers. The wording of Article 14 of the Civil Procedure Code¹¹⁶ (adopted on January 11, 1999, № 238-Z as amended as of July 14, 2020) confirms the constitutional provision that citizens and legal entities have the right to legal assistance from advocates and other representatives. A representative in court may be a legally capable person who has a duly formalised authority to conduct the court case. Article 72 further specifies that along with advocates, a court representative may be: for legal persons - their employees empowered to do so; authorised representatives of public associations (organizations), which by law have the right to act in courts; authorised organisations, which by law have the right to represent and defend in court the rights and legitimate interests of others; legal representatives; close relatives, spouse; representatives appointed by the court; one of the procedural accomplices - on behalf of these accomplices, or patent advocate.

According to the Article 20 of the Enforcement Code (adopted on October 24, 2016 № 439-3)¹¹⁷, representatives of citizens during the enforcement proceedings can be lawyers, legal representatives, close relatives, spouse (spouse), other persons in cases stipulated by legislative acts. Legal entities and organizations that are not legal entities, participate in enforcement proceedings through their bodies or their representatives, including advocates, within the limits of the powers granted to them by legislative acts or constituent documents.

The Criminal Procedure Code (adopted on July 16, 1999 № 295-Z as amended as of July 23, 2020) in Article 6 p. 28 clarifies who can be legal representative in court, noting that this circle is quite wide: close relatives, family members of the victim, advocates, representatives of trade unions and other public associations, as well as other persons admitted participating in a criminal case with the permission of the body conducting the criminal proceedings. The Article 20 para 4 of the Criminal Procedure Code gives the general rule that everyone has the right of legal assistance of advocates and other representatives. Defence counsel during the criminal procedure though can be only an advocate as it is stated in Article 44 p. 2.¹¹⁸ In the same direction Penitentiary Code (adopted on January 11, 2000 № 365-Z as amended as of December 17, 2020) stipulates that convicts have the right to use services of the lawyers or other persons having the right to rendering legal assistance (see Article 10 p. 8)¹¹⁹.

¹¹⁶ www.etalonline.by

¹¹⁷ pravo.by

¹¹⁸ Article 44 of the Criminal Procedure Code: "2. Advocates who are citizens of the Republic of Belarus or citizens of other states in accordance with international treaties of the Republic of Belarus shall participate in the criminal proceedings as defense counsel."

¹¹⁹ www.etalonline.by

Procedural Executive Code on Administrative Offenses (adopted on December 20, 2006 № 194-Z as amended and supplemented as of January 6, 2021)¹²⁰ has similar approach as the Criminal Procedure Code. A physical person in respect of whom the administrative process is being conducted has the right of defence counsel from the beginning of the administrative process, and in the case of administrative detention - from the moment of actual detention. The individual entrepreneur and legal entities in respect of which the administrative process is being carried out exercise their rights and obligations through their representative. A physical person that is considered as a victim during the administrative offence process also has right of a representative, including legal representative (statutory, legally established as parents and guardians). A legal entity exercises its rights and obligations through its representative - advocate, the head of the legal entity or the employee of the legal entity on affairs of this person, other persons carrying out representation in the cases provided by legislative acts.

Economic Procedure Code¹²¹ (adopted on December 15, 1998 № 219-Z as amended and supplemented as of July 17, 2020) contains a special section (Chapter 7 "Representation in the court considering economic cases") regulating the status of legal representatives. In seven Articles the Code gives detailed instructions about who is entitled to conduct cases in economic court on behalf of a legal and natural person.

Article 22 admits the right of legal entities, individual entrepreneurs, organizations that are not legal entities, and citizens to use the legal assistance provided by advocates and other representatives. Article 76 specifies that legal entities could be represented by an advocate, a manager or an appointed employee of the legal entity or other persons in cases stipulated by legislative acts. The difference for an individual entrepreneur and a citizen is that along with advocates and other persons in cases provided by a legislative act, legal representatives can be close relatives and spouse as well. For state bodies, local government, and self-government bodies their legal representatives are persons are authorised in the manner prescribed by law.

The Law on Mediation¹²² (adopted of July 12, 2013 No 58-Z as amended and supplemented as of December 18, 2019) in its Article 4 defines requirement of a physical person that can be a mediator. It clearly states that not only advocates, but any physical person having higher law education or other higher education, who has been trained in the sphere of mediation in the order established by the Ministry of Justice or having work experience as a conciliator in accordance with the procedural legislation, having obtained the certificate of the mediator issued by the Ministry of Justice based on the decision of the Qualification Commission for mediation, can be a mediator.

In practice, the provision of legal assistance (legal advice and court representation) is divided between advocates, so-called "licensees" who provide legal assistance usually on commercial issues (with exception of court representation) and employees of companies. The various interviewees expressed one and the same opinion that having in mind the quality of the legal representation, the monopoly of advocates in the court room should be maintained, such a way guaranteeing the quality of the services provided to the citizens. This guaranty is particularly reflected in the following points: advocates are well prepared and qualified and can provide high quality of services, well-trained young lawyers enter the profession and there are professional ethics rules that are in place and regulate the profession to the great extent.

¹²⁰ www.etalonline.by

¹²¹ <http://law.by/>

¹²² <http://law.by/>

B. Legal Aid

B1. Legal framework

The Constitution provides that in cases specified by law, everyone can receive legal assistance at the expenses of the state such a way guaranteeing the right of legal aid for every citizen.

As there is no specialised law on free legal aid, the mechanism is regulated in more detail in the Law on the Bar. The Article 28 introduces legal assistance provided by advocates free of charge for the citizens. Article 18 p.2 thereof stipulates the obligation of an advocate to provide legal assistance in accordance with the requirements of the law and by appointment through the local bar associations at the request of the authority, as well as other types of legal assistance at the expense of bar association, the Belarusian republican and (or) local budgets.

In terms of the procedural codes, the Criminal Procedure Code¹²³ explicitly mentions the free legal aid. More specifically in Article 20 para 4 it is formulated individual's right to legal assistance at the expense of public funds, in cases provided by law. Legal assistance to the suspects and accused persons is also provided at the expense of the local budget.

The Civil Procedure Code only prescribes the issues of reimbursement of attorney's fees when the party wins the court case and costs are paid by the other party.¹²⁴

Other legislative acts regulating the topic are Law of the Republic of Belarus dated January 7, 2012 No. 350-3 "On combating human trafficking" (as amended on July 20, 2016) and the Law of the Republic of Belarus "On the Rights of the Child" (as amended on May 11, 2016).

The procedure for reimbursing the costs of an advocate at the expense of the republican and/or local budgets is determined by the Council of Ministers (Article 28 para 5). Those bylaws are:

- Resolution of the Council of Ministers of the Republic of Belarus "On Procedure of Reimbursement of Advocates' Fees for Provision of Legal Aid to Victims of Human trafficking and Terrorism" dated February 6, 2012 No. 122, last amended March 14, 2018 No. 195¹²⁵;
- Advocates provided legal aid to criminal suspects or defendants are reimbursed from the applicable regional budget as it is determined by the Resolution of the council of Ministers "On Procedure of Reimbursement of Advocates' Fees for Provision of Legal Aid from Regional Budgets" August 30, 2007 No. 1003, last amended April 30, 2019 No. 269, and
- the Resolution of the Ministry of Justice and the Ministry of Finance of the Republic of Belarus "On Instruction of Reimbursement of Advocates' Fees from Regional Budgets" dated August 30, 2007 No. 57/129¹²⁶.
- Resolution of the Council of Ministers of the Republic of Belarus on November 9, 2009 No. 1458 "On the procedure for the implementation of social rehabilitation of persons affected by terrorism" (as amended on August 15, 2016)

Code on administrative offenses and Procedural Executive Code on Administrative Offenses do not contain provisions on free legal aid services.

¹²³ www.etalonline.by

¹²⁴ Article 124 para 2 "In the case when, in accordance with the established procedure, the assistance of an advocate was rendered to the party in favor of which the decision was made, at the expense of the collegium of advocates or the republican budget, the specified amount shall be collected from the other side in favor of the collegium of advocates or the republican budget."

¹²⁵ www.artlaw.by

¹²⁶ www.online.zakon.kz

B2. Eligibility

According to the Article 28 para 1 of the Law on the Bar, all citizens of Belarus, foreigners, and stateless persons have right of legal assistance. However, legal aid is not available to the wider public as the existing legislation defines certain categories of citizens allowed to free legal aid using the following paths:

The first one is the legal assistance provided at the expense of the local bar associations to the following group of citizens:

- claimants in the first-instance courts in employment and aliment claims
- oral consultations to the veterans of the World War II excluding commercial issues
- all citizens about pensions and social payments
- oral consultations which do not require the examination of documents for handicap citizens
- minors, or their parents (legal representatives) acting in the interests of the minors.

Each local bar association can also determine other categories of individuals to whom its members can provide legal aid services at their expenses in addition to those categories of individuals who are entitled to receive legal aid services. This situation violates the requirement of means and merits testing set in para 10 of the Guidelines of March 31, 2021 providing that: "With a view to contributing to robust and financially sound legal aid schemes, procedures for testing an applicant's means and the likelihood of a successful outcome of the legal proceedings should be in place" (see also ECtHR¹²⁷).

In addition, local bar associations are charged with the organisation of free legal aid. They determine the procedure for providing legal assistance and distributes the costs of its provision between advocates of legal consultations, advocates' bureaus, as well as advocates that carry out advocacy activity individually.

Thus, free legal aid is rendered to citizens based on a resolution of the local Bar association or an order of the head of the Legal Consultation on the request of the person who applied for legal assistance upon presentation of a document confirming their belonging to the relevant category of persons.

Example of such procedure are the Rules¹²⁸ for receiving free legal aid at the expense of the Minsk Regional Bar Association according which the application for legal assistance at the expense of the funds of the Local bar association (with the exception of legal assistance to minors - in their interests, their parents (guardians, trustees) - in the interests of children a citizen as well as drawing up applications for the appointment of pensions and benefits) must contain information about citizen's last name, first name, patronymic, address of residence, type of legal assistance required, grounds for obtaining it at the expense of the bar association. The application should be supported with documents confirming the existence of grounds for its provision at the expense of the funds of the Local bar association, or copies of them are attached: a certificate of a participant in the Great Patriotic War, a disabled person, a certificate of family composition, a certificate of income of each family member or a lonely citizen for the last three calendar months preceding the month of applying to the bar association, a certificate of the presence (absence) of property and monetary contributions, as well as other documents confirming the financial situation of a citizen. Copies of the submitted documents are attached by the person accepting the application to the citizen's application.

In exceptional cases, a decision to exempt a citizen from paying for legal assistance can be made upon his written application without providing additional documents.

¹²⁷ ECtHR, Glaser v. the United Kingdom, No. 32346/96, 19 September 2000, para. 99. See also ECtHR, Santambrogio v. Italy, No. 61945/00, 21 September 2004, para. 58 (the applicant's family paid for representation).

¹²⁸ Rules for receiving free legal aid at the expense of the Minsk Bar Association www.moka.by

Based on the results of consideration of the citizen's application, a decision is made (order of the head of the Legal Consultation or resolution of the local bar association) to provide or refuse to provide legal assistance at the expense of the bar association.

In some cases, even in the presence of documents confirming a difficult financial situation, a citizen may be denied legal assistance at the expense of the bar association, if there is reason to believe that the citizen is hiding his true financial situation (for example, there are court decisions on the division of monetary contributions, on the collection in favour of this citizen of a significant amount of debt, etc.) or abuses his right to provide legal assistance at the expense of the bar association.

The second path includes the legal aid provided at the expense of the state budget to persons who are the victims of human trafficking or terrorism and who need to protect their social rights.

The third path includes legal aid provided during criminal procedures where it is provided to suspects or the accused at the expense of the local budget. The law sets as condition the advocate's participation in the inquiry, the preliminary investigation, and the trial by appointment through the local bar association at the request of the authority conducting the criminal process. Legal aid in these matters is provided by advocates' bureaus or individually practicing advocates who are admitted to practice by the relevant local bar association.

In practice, during administrative criminal cases the access of free legal aid is not fully provided even when courts ask for the participation of duty lawyers as it is provided under the Law on the Bar. The Law allows free legal aid, but at the same time requires decisions of the local Bar council in relation to a specific person who applied for his exemption from paying for legal assistance. This situation is evaluated as a risk for exercising the right to protection on the citizens as it depends on the decision of a body outside the court room. The free legal aid can be refused on criteria that are not contained in the law, or even allowed, could be done with a long delay when the need for it does not exist anymore.

This situation does not correspond to Article 6 para 1 ECHR, which requires that access to a lawyer should be provided from the first interrogation of a suspect by the investigative bodies, the public prosecutor, and the investigating judge¹²⁹.

The legislation does not explicitly provide for free legal aid during mediation and executive proceedings for citizens. Although there is insufficient information on how often this option is used, in practice there is no prohibition on providing legal aid in such procedures.

Legal aid does not cover any other costs except for advocates fees. However, the legislation does stipulate for the exemption in whole or in part from the payment of court fees and state duty of individuals based on their property status (Article 130 of the Civil Procedure Code) after an application and attached documents proving individual's financial and marital status.

The legal aid does not cover fees that are related to the enforcement of judicial decisions neither the costs and fees of other professionals (notaries, translators, interpreters, technical advisors, or experts etc.) who may be involved in the case. The latter raises issues of infringement of the right of access to justice, as it does not allow a person to process a legal case in its entirety free of charge. Failure to enforce judgements constitutes an obstacle to accessing justice¹³⁰.

B3. Institutional framework

As there is not specialised body administering the free legal aid, local bar councils are responsible for administering the free legal aid. In accordance with Article 6 of the Law of the Republic of Belarus "On the Bar and Advocacy in the Republic of Belarus", any individual and legal entity on the territory of the Republic of Belarus has the right to seek legal assistance

¹²⁹ ECtHR, *Salduz v. Turkey*, No. 36391/02, 27 November 2008, para. 54, ECtHR, *Nechiporuk and Yonkalo v Ukraine*, No 42310/04, 1 June 2011, para 262.

¹³⁰ FRA (2011), *Access to justice in Europe: an overview of challenges and opportunities*, p. 62.

from a lawyer of their choice, except for cases of rendering legal assistance at the expense of the Local Bar Association, republican and (or) local budgets, to protect their rights and interests in courts, government agencies, other organizations, which are competent to resolve relevant legal issues, and before individuals.

To receive legal assistance, a citizen should go directly to the Legal Consultation office at his/her place of residence (without an appointment, within the working hours of a specific legal consultation) and contact the lawyer on duty.

This is a specific form of providing legal assistance created by local bar associations that provide full financial and organisational assistance. Also, the local bar associations oversee recruiting staff for their legal consultation. The Head of the legal consultation, in addition to his or her legal activity, ensures certain managerial and control functions over the advocates working in the consultation. He or she is appointed by a council of the local bar association.

Along with that, in accordance with the resolution of the Republican Bar Council issued every year, there are several dates for admission of low-income citizens who can receive legal information free of charge. For 2021 there are five days.

The Republican Bar Association has its role in unifying regional practice through internal instructions on legal aid.

GOOD PRACTICES AND OUTSTANDING CHALLENGES

A. Good practices

Under the website of the Republican Bar Association there is a section for Free on-line consultation where each citizen can ask questions and advocates provide a preliminary explanation of the norms of the legislation on criminal cases, administrative cases, civil cases, etc. on issues that do not require familiarization with documents and other materials. In addition, online consultation is also an opportunity to choose advocate through direct communication.

To receive a free legal online consultation, the user fills out the form on the page. The information specified by the user in the "Question" box, including personal data, is posted on the site and becomes publicly available. By submitting a question to the site, the user agrees that all the information specified in the question text, including personal data, becomes publicly available. According to the information provided during fact-finding interview around 700-900 citizens per day is using the online consultation.

The publication of the Rules for receiving free legal aid at the expense of the Minsk Regional Bar Association should also be mentioned as a good practice¹³¹.

B. Present legal and institutional gaps

Role of the Ministry of Justice

The analysis shows that the Republic of Belarus should take further steps, in order to comply with the regulatory standards, set in Recommendation No. R (2000)21 on the freedom of exercise of the profession of lawyers, in particularly without improper interference from the state authorities.

On the first place, need of some changes focused on minimizing the powers of the Ministry of Justice over the bar functioning should be mentioned. The system is subject to the control of the executive branch that takes decisions over registering all local bar associations, determining number of lawyers in the legal consultations in each region, enacting the Rules of professional ethics of advocates, approving lawyers' appraisals procedures and candidates

¹³¹ Rules for receiving free legal aid at the expense of the Minsk Bar Association www.moka.by

for the positions of the heads of the legal consultations and local bar associations, etc. Control over the bar associations and advocate formations functioning is carried out by state authorities violates the Principle V p. 2 of the Recommendation No. R (2000)21 on the freedom of exercise of the profession of lawyers. During fact-finding interviews, a practice was revealed that an advocate license can be revoked for minor issues, for example not filling properly technical documents. This situation calls into question the limits of interventions of the Ministry of Justice into the bar functioning.

Though at moment there are no new significant legislative or institutional changes in that direction, some initial discussions are taking place between the Republican Bar Association and the Ministry of Justice so that to increase the level of the bar self-regulation. The line of those propositions is to keep the powers of the Ministry of Justice only to the limits where they are necessary and to transfer all other responsibilities to the Bar Association. Those could be as follows: licensing the advocates activities, keeping advocates register, admission to the bar, initiating disciplinary procedures in case of violation of professional ethic rules etc. This process is foreseen to be finalized in 2022 and requires amendments in Article 38 of the Law on the Bar.

Monopoly of Advocates and Quality of Services

On the next place, provision of legal assistance (legal advice and court representation) is divided between advocates, licensees who provide legal assistance usually on commercial issues (except for court representation) and employees of companies who present them in the courts without special requirement for qualification or licenses. During the interviews some concerns were observed about the quality of services provided by the second and third groups.

“Licensees” practice outside the court based on a special licence, issued by the Ministry of Justice, but are not admitted to the Bar. According to data from the website of the Ministry of justice 1 424 licensees were providing legal services, 1 134 of which were individual entrepreneurs and 290 were legal entities. Comparing with 2 112 advocates, they are large enough in number to affect the legal market. The control over the quality of their services is not considered as sufficient and in that direction the Ministry of Justice should take additional measures concerning the increase of licensing requirements, additional qualifications and trainings, stricter rules on revocation of licenses etc.

The same concern regarding the quality of legal representation exists for employees hired by companies, sometimes only for a specific case, without any requirements even for legal education. Though usually they are lawyers, they may not be sufficiently prepared to participate in court hearings and protect their clients’ interests. Except by the companies who hired them, no other control is exercised. The control over the services they provide is left on discretion of the employer. As far as those relations are regulated on contractual base there are no options to change the situation. Having in mind that in the country the practice of professional insurance for advocates is not popular, those “employees” do not take responsibilities for the bad quality of the services they provided.

Last, but not least, the discrepancy between regulation on constitutional and legislation levels concerning the monopoly of advocates should be overcome so that to create a consistent legal order. Overall, fragmentation of legislation through several resolutions, issued by the Ministry of Justice, Ministry of Finance or the Council of Ministers and their amendments, a practice that needs to be minimized.

Legal aid

Belarus needs to further develop the current legal aid system in place starting with introduction of a separate detailed legislation. According to Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of

civil and administrative law¹³², granting legal aid must be subject to a financial means and merits test. The Belarus Bar does not implement regulatory set financial dimension or criteria when using financial means test and does not use merits test when deciding who is entitled to legal aid; in addition, there is no mechanism in place for checking a person's income for legal assistance purposes. The fact-finding interviews show the need to enlarge the list of people who have right of free legal aid, for example including people from vulnerable groups as there are cases reported when, for example, elderly people are deceived, and they do not even know that they are entitled to free legal aid. This situation does not correspond to the ECtHR decision, *Glaser v. the United Kingdom*¹³³ according to which, the States, when establishing financial criteria for granting legal aid, must ensure that the essence of the right of access to a court is not impaired and that the assisted person is not placed at a substantial disadvantage in relation to the opposing party.

The reflections above lead to the next issue, i.e. the awareness of free legal aid by the citizens at large. Though there is a good practice with the online consultation (between 700-900 citizens per day according to the information given during the fact-findings interviews), other means of disseminating information must be considered and used. This especially concerns the different paths (regimes) for providing legal aid which make access for citizens more difficult. The navigation in different rules, documents and procedures applied should be accessible and easy.

According to the Article 6 para 2 of the Law on the Bar the citizens do not have the right to choose their free legal aid advocate which is not in compliance of the above-mentioned Guidelines. The fundamental right to a fair trial in criminal proceedings guarantees the right to defence by a lawyer selected by the applicant¹³⁴. Even though this right is not absolute¹³⁵, choosing a lawyer on a defendant, causes a risk that the trial might be unfair and violate the defendant's rights. Thus, the deprivation of the right to choose one's own does not seem to comply with Article 6 para 3c of the ECHR and Article 48 para 2 of the EU Charter as well. The defendant's wishes must be considered and potentially entertained at the stage of the lawyer's appointment.

Several particularly important issues are subject to the discretion of the local bar association and should be seriously reconsidered: taking decision about citizens who have right to legal aid, fix the categories of individuals to whom its members can provide legal aid services at their own expenses, appointing advocate to a free legal aid and advocates' remuneration. Under current legislation, those decisions may stay under the discretion of the local bars, but clear criteria should be adopted and officially announced so that to avoid any suspicion of subjectivism.

Furthermore, the legislation does not have a uniform set of requirements for the provision of qualified legal assistance. No quality standards are set up to ensure their adequacy and competence. There is not a formal and impartial procedure allowing legal aid beneficiaries to apply for the replacement of a legal aid provider, whose services are of unsatisfactory quality¹³⁶.

C. Gender equality and youth participation

Under the auspices of the BRBA, the Council of Young Advocates of the Belarusian Republican Bar Association is created. It is dedicated to the promotion of the interests of young

¹³² Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law – as adopted on March, 31 2021 <https://search.coe.int/>

¹³³ ECtHR, *Glaser v. the United Kingdom*, No. 32346/96, 19 September 2000, para. 99. See also ECtHR, *Santambrogio v. Italy*, No. 61945/00, 21 September 2004, para. 58 (the applicant's family paid for representation).

¹³⁴ Open Society Justice Initiative, *Legal aid in Europe: Minimum requirements under international law*, p. 8.

¹³⁵ ECtHR, *Lagerblom v Sweden*, No. 26891/95, 14 January 2003, para. 54.

¹³⁶ ECtHR, *Bertuzzi v. France*, No. 36378, 13 February 2003, para. 30; ECtHR, *Guide on Article 6 of the European Convention on Human Rights - Right to a fair trial (civil limb)*, updated to August 31, 2019, p. 34.

advocates and is working in several directions: organisation of cultural and sport activities, technical support of the Republican Bar activities, organisation of trainings etc.

The Association of Women Lawyers is a separate non-governmental organization focused on the protection of the rights of women-advocates, the promotion of legal education and volunteering activities. Concerning the level of women involved in the life of advocate's profession, a certain feminization is observed. In the past, citizens used to ask for a man advocate. Now days, this wrong practice has disappeared.

D. Ongoing and Future initiatives

Upon the main assessments within the present review were finalised new amendments on legislation regulating the activities of advocates (as of May 27, 2021) were introduced in several directions:

- the only form of advocacy in Belarus will be activities within Legal Consultations which creation and procedure of activities will be agreed by the Ministry of Justice. This amendment will limit to the great extent the freedom of exercising the profession making it dependent from the Ministry of Justice, therefore violating further the Recommendation No. R (2000)21 on the freedom of exercise of the profession of lawyers, in particularly Principle I p. 1 requirement for member states to take all necessary measures for exercising the profession of lawyers without improper interference from the state authorities. By reducing previously existing forms of advocacy, as individual advocates and Advocates Bureaus, the access of advocates to their client is limited thus violating Principle I p. 5 of the above-mentioned Recommendation;
- In addition to the existing powers of the Ministry of Justice new ones are added, including approval of the candidate for the internship, approval of the candidacies of members of the councils of the bars, participation of the officials of the Ministry in the activities of lawyers' self-governing bodies. The excessive powers of the Ministry of Justice violate Principle V p. 2 according to which Bar associations and other professional lawyers' associations should self-governing bodies, independent of the authorities and the public;
- A new principle of payments for the legal aid will be introduced, which will be based on compliance with the volume, complexity, and quality of the services (aid). The powers of the Council of the Republican Bar will include ensuring this compliance. As there are no details about these amendments their compliance cannot be assessed.

RECOMMENDATIONS

Several additional steps are recommended as follows:

- Full revision of Article 38 of the Law on the Bar in direction of increasing self-regulation of the Bar and leaving the executive power to decide only some technical questions and have organisational role in educational and activities on increasing qualification.
- Adoption of addition requirements for support sufficient level of good quality and control over the quality of services provided by lawyers practicing based on a special license, issued by the Ministry of Justice.
- Adoption of addition requirements for better control over work of the counsels hired by companies.
- Legislative regulation of the procedure and criteria, including by clarifying the definition "people with low-income", of free legal aid allowed based on the decision

of the local bar, in particularly cases of low-income citizens.

- Set up independent free legal aid system regulated with separate legislation and managed by separate legal aid body, including following presently missing elements:
 - remove the control of the bars on the rates of the advocates providing free legal aid;
 - enlarging the list of beneficiaries of free legal aid;
 - enlarge the scopes of the legal aid and to include fees/costs of other professionals, such as notaries, bailiffs, technical experts, legal translators or interpreters, whenever the case requires it;
 - introduce financial situation and merits test;
 - introduce opportunity of choosing and changing the advocate within free legal aid system;
 - increase awareness on the free legal aid.

GEORGIA

NATIONAL LEGAL FRAMEWORK

A. Legal framework of the advocate profession

The right of legal representation in Georgia is enshrined on the constitutional level. Article 31 of the Constitution of Georgia¹³⁷ (adopted on August 24, 1995 as amended as of June 29, 2020) (“the Constitution”) explicitly recognises the right of defence before court in person or through an advocate, or through a representative in cases defined by law. In addition, the provision contains a guarantee for unrestricted exercise of the profession as well as the right of self-organisation of advocates.

The Law on Lawyers (adopted on July 05, 2012 № 5076-VI as amended as of June 17, 2020), is the key legislative act that regulates the self-organization and operation of the Bar and the practice of law in Georgia, particularly the requirements for becoming an advocate, the responsibility of advocates, types of practice of law, etc.

Several by-laws regulating the advocate profession and supporting the implementation of the Law on the Lawyers should be also mentioned here:

- Charter of the Georgian Bar Association
- Code of Professional Ethics of Advocates
- Regulation on Disciplinary Proceedings against advocates
- Examination and Appeal rules
- Accreditation Rules

The legal framework in Georgia guarantees the independence of the legal profession. The state authorities are not involved in the functioning of the Bar association that is self-governed. In this respect and having in mind the institutional set-up and functioning of the Bar, it can be assessed as in compliance with the CoE standards.

B. Institutional framework

The Law on the Lawyers gives a legal basis for establishment of the Georgian Bar Association (“the GBA”). The Preamble of the Charter of the GBA defines its goals to facilitate and promote administration of justice, the rule of law, protection of human rights, development of the legal profession, independence of a lawyer, protection of his/her rights and professional liberties. To facilitate the implementation of those principles and functions an Executive Board, Ethics Commission and the Audit Commission are created. The work of those executive bodies is led by the General Assembly of the GBA that is the main decision-making body.

Beyond the GBA, there are other advocates’ organisations (NGOs), pursuing different goals. Their actions and activities are focused on supporting the implementation of the Law on Lawyers. Among them are “Georgian Lawyers for Independent Profession”, “Union of Law Firms of Georgia”, “Independent Union of Georgian Lawyers”, “Young Lawyers” and “Association of Law Firms of Georgia”.

¹³⁷ Article 31 of the Constitution of Georgia “The right to defence shall be guaranteed. Everyone has the right to defend his/her rights before a court in person or through an advocate, or through a representative in cases defined by law. The unrestricted exercise of the rights of an advocate, as well as the right of advocates to self-organisation, shall be guaranteed by law.”

ANALYSIS OF THE SYSTEM OF LEGAL REPRESENTATION

A. Monopoly of legal services by advocates

The analysis of the legislation shows that the monopoly of advocates is not defined exclusively, since several legislative acts allow legal representation to be provided by a person that is not admitted to the bar. The Constitution itself does not allow monopoly of advocates as Article 31 explicitly provides that everyone could be a representative before courts in cases defined by the law. The Law on Constitutional Court (adopted on November 11, 1997 № 1059 as amended as of May 21, 2020)¹³⁸ in Article 30 provides that parties appearing before the Constitutional court have right to entrust the protection of their interests to an advocate or other person with higher legal education and the exercise of their powers to an agent – a representative. This line is repeated by the Law on Constitutional proceedings (adopted on March 21, 1996 as amended as of July 21, 2018), as well.

The Law on Lawyers further develops norms aimed at regulating practice of the profession of advocate. It announces that advocates provide legal advice, represent clients in constitutional disputes, in criminal, civil or administrative court proceedings or in arbitration, as well as in front of detention or investigation bodies. Drafting of legal documents and their submission on behalf of a client to third parties is also defined as advocate service.

All procedural codes allow representation before courts to be provided by other persons, not only by advocates. The Civil Procedure Code (adopted on November 14, 1997 as amended as of September 18, 2019) allows individuals and legal entities to be represented by an advocate, employees of state and local authorities, organisation, or other legal entities.

The same approach is seen in the Criminal Procedure Code¹³⁹ (adopted on October 09, 2009, as amended as of September 18, 2019) as well. Talking about representation Article 3 thereof gives concrete definition that a close relative, a guardian, a care giver or a supporter could represent minors and people with disabilities. The same applies with the administrative proceedings that are regulated by the Administrative Procedure Code (adopted on July 23, 1993, as amended as of June 23, 2020). It allows a person who is not an advocate to represent one of the parties during the proceedings. It also talks about defence advocate concerning the procedure for hearing a case on involuntary isolation of a patient and issuing an order.

On the other hand, talking about representative of a legal person, the approach is also similar in all above-mentioned pieces of legislation. Though, according to Article 15 of the Administrative Procedure Code, the state or local self-government bodies are represented by its head or an official, to whom the right of representation under the legislation of Georgia has been delegated. They are also entitled to appoint an official or a public servant employed at the administrative body or an advocate as their representatives. The General Administrative Code (adopted on June 25, 1996 as amended as of May 21, 2020) does not differ from this structure as well. According to it, the administrative bodies are represented by its official representative or appointed responsible official, but Article 86 defines that a person (an applicant or an interested party) participating in an administrative procedure have right to receive assistance by a defence advocate.

In case of defending counselling, the monopoly of advocates is preserved to the great extent. The Civil Procedure Code dedicates special chapter XII to the representation in courts. A physical person can act personally or be represented by an advocate. Legal person can be represented by an authorized employee. As representatives in court may act not only advocates, but other persons having legal capacity when the court case is examined before the court of first instance.¹⁴⁰ This means that the participation of advocate at second and third

¹³⁸ [State Gazette of Georgia](#)

¹³⁹ [State Gazette of Georgia](#)

¹⁴⁰ Article 94 of the Civil Procedure Code “Persons who may act as representatives in court
1. The following persons may act as representatives of the parties in court:

instance is obligatory. To guarantee the quality of legal assistance the parties receive, the Civil Procedure Code gives the court a particularly important option to refuse or to accept as a representative in the proceedings a person who is not an advocate if it finds that the representative does not have sufficient qualification to represent a party and protect its interests (see Article 97). Defence during criminal proceedings is provided exclusively by advocates of the Georgian Bar Association. The whole chapter V of the Criminal Procedure Code uses only the term “defence advocate” and Articles 44 thereof defines its legal status. Such a way, the legislators guarantee the professional protection of right of defendants. The exclusivity of advocates’ participation is clearly stated for criminal cases as well as court representation in all appellate and cassation instances.

In the same sense and for the same reason, Article 18 of the Imprisonment Code (adopted on July 05, 2012 № 5076-VI as amended as of June 17, 2020) stipulates that the legal aid of an accused or convicted person is provided only by person practising law. Article 84 continues that during the disciplinary procedure, an accused or convicted may be represented by a defence advocate.

Several other legislative acts should be mentioned here. The Law on Legal Aid defines as provider of legal aid not only advocates, but any other legal person under private law who provides legal aid (see more Chapter B below). The Law on Mediation (adopted on September 18, 2018, as amended as of September 27, 2019) does not explicitly put limits on who can be representative during a mediation proceeding which leads to the conclusion that every physical person registered with the Unified Register of Mediators who meets the requirements of this Law can act as mediator. However, the Law on Arbitration (adopted on July 19, 2009 as amended as of September 18, 2019) allows to a party the right to be represented by a lawyer or other representative.

The Code of Rights of the Child¹⁴¹ (adopted on September 20, 2019 as amended as of May 21, 2020) stipulates that during court proceedings with the participation of a child, the latter has the right to an advocate. Going further, the Law on Child Friendly Justice confirms the right of free legal aid and even enlarges it to an accused or convicted person at the age of 18 to 21 years as well.

The variety of options allowing a person to be represented during a court procedure by a representative led to the conclusion that only partial monopoly of advocates is present. On the other hand, the State shows efforts to guarantee provision of the necessary representation by professional lawyers, especially when the court case could affect essentially the right of a person and consequently the current legislation and practice are complying with the Recommendation (81)7 on measures facilitating access to justice indicating that: “...Where, having regard to the nature of the matter involved, it would be desirable, in order to facilitate access to justice, for an individual to put his own case before the courts, then representation by a lawyer should not be compulsory.” In addition, in *Meftah and Others v. France* case the ECtHR states that:” the right of legal assistance may be subject to restrictions by way of professional regulation, when, for example, different qualifications may be required for different levels of jurisdiction. Additionally, the special nature of proceedings may justify using specialist lawyers”¹⁴².

This conclusion under the present review is supported by the observations introduced in the “Comparative review of procedural and institutional setup of the functioning of advocates in Armenia, Belarus, Georgia, the Republic of Moldova and Ukraine” concerning the broadening

a) advocates

b) employees of state and local authorities, employees of organisations – for the cases concerning those authorities and organisations

c) one of the joined parties – under the authorization of the other joined parties

d) other persons having legal capacity – only in a court of first instance.”

¹⁴¹ [State Gazette of Georgia](#)

¹⁴² ECtHR, *Meftah and Others v. France* [GC], Nos. 32911/96, 35237/97 and 34595/97, July 26, 2002

the area of mandatory¹⁴³: “As regards the legal “monopoly” of advocates, which appears to be a major issue of concern in certain participating countries, it should be recalled that it is not considered as such to be a part of the core European standards with regard to the legal profession. It is also recalled that the case-law of the European Court of Human Rights¹⁴⁴ is only concerned with that “monopoly” in the context of the access to court, where it could prevent citizens from legal assistance in certain circumstances. It is also important to consider and further assess the arguments of those bar associations which defend a full legal monopoly in the light of particular circumstances of their countries.”

B. Legal Aid

Within the framework of this review Georgia could be recognized as one of the leading reformer countries in the region as regards legal aid. Several factors lead to this conclusion. On one hand, there is a detailed and clear regulation of the provision of free legal aid. Secondly, there is a broad scope of citizens who have right to free legal aid and to whom the service is provided. Another asset is the various and full list of services that are offered to the citizens and their quality that is guaranteed. The policy of legal aid does not discriminate based on age, race, colour, gender, language, religion or belief, political or other opinion, class, national or social origin, property, citizenship or domicile, birth, education, social status or other status, thus, equality and non-discrimination in regard to access to justice is ensured. The last, but not least argument is the independence of the system.

The free legal aid in Georgia is administered by a specialized body - Legal Aid Service (“the LAS”), which includes Legal Aid Bureaus in a number of cities of Georgia.

B1. Legal framework

As it was mentioned above, the Constitution guarantees the right of legal aid and gives a base for adopting sectorial legislation. The main legislation is the Law on Legal Aid (adopted on July 19, 2007 as amended as of July 14, 2020)¹⁴⁵ discussed in detail in the following lines.

All procedure codes supplement the regulation of free legal aid. Article 46 of the Criminal Procedure Code provides that the legal aid is paid by the State in the following cases: when the accused cannot afford to pay for defence advocate and there is a case of mandatory defence specified by this Code and a defence advocate hired by the accused is not participating in the criminal case. Article 18 of the Imprisonment Code states that legal aid of an accused or convicted person is provided only by person practising law.

The Civil Procedure Code in its Article 47 guarantees the participation of an advocate if the party is insolvent and, taking into consideration the importance and complex nature of a case, participation of an advocate in the hearing is advisable. In this case the court may, based on the motion of this party, appoint an advocate at the expense of the State. Another approach is valid for both the General Administrative Code and the Administrative Procedure Code that do not contain explicit texts on legal aid. The Law on Mediation does not explicitly say whether parties during a mediation proceeding have right of free legal aid as well.

The Code of Right of the Child (adopted on September 20, 2019 as amended as of May 21, 2020) in its Article 74 para 3 stipulates not only that a child has the right to an advocate to protect its rights but obliged the State to provide the child with an advocate free of charge

¹⁴³ European Union and Council of Europe Partnership for Good Governance 2019-2021, PGG II Regional Project “Strengthening the profession of lawyer in line with European standards”: Comparative review on Procedural and institutional setup of the functioning of lawyers in Armenia, Belarus, Georgia, Moldova and Ukraine, Council of Europe 2020, p. 9.

¹⁴⁴ Among the most important judgments and decisions of the European Court on that matter is *Kateryna Makarivna Moldavska vs Ukraine* (judgment of 14 May 2019, appl. no. 43464/18 Para. 26).

¹⁴⁵ [State Gazette of Georgia](#)

when he/she does not appoint one. The Law on Child Friendly Justice confirms the right of a child to free legal aid. This right is given to an accused or convicted person from 18 to 21 as well. If a child does not have an advocate, the person administering the juvenile justice procedure is obliged to immediately apply to the Legal Aid Service with a request to appoint an advocate for the minor.

B2. Eligibility

Georgia's Law on Legal Aid designates Legal Aid Service as main institution administering the free legal aid system. It also implies two categories of service: legal consultations and legal aid. The first one includes legal advice on any topics. It is free and anyone may benefit from it. Legal consultation can be obtained either face to face or by distance service, online. There is no need to produce any document to obtain legal advice in Legal Aid Service.

The second one includes: drafting legal documents; defending an accused, convicted, or acquitted person in criminal proceedings; protect victims in criminal proceedings when conducting a defence in cases provided by the Criminal Procedure Code; provide representation in court with respect to administrative and civil cases; provide representation before an administrative body.

Drafting of legal documents includes the preparation of legal papers such as application, claim, complaint, counterclaim, motion, etc. Legal Aid Service ensures the drafting of legal documents related to civil, criminal, and administrative cases only if the person satisfies with the financial vulnerability (insolvency) criteria.

One of the most important functions of the Legal Aid Service is the protection of the defendant in criminal proceedings. Legal aid is provided to the defendants in criminal cases for free if an insolvent person, a defendant or convict is asking for the appointment of a defence counsel, or if there is a case of mandatory defence in cases stipulated by the Criminal Procedure Code, and the defendant is not a privately retained advocate.

The cases when the defence is mandatory in criminal procedure are for minors, persons not familiar with the language of the criminal law; persons suffering from physical or mental disorder etc. In cases of the mandatory defence, the costs of the counsel are at the State costs, notwithstanding the financial situation of the defendant.

In civil and administrative cases, representation is provided if these two criteria are met: a) a person is insolvent; b) the case is complex and important; There are also mandatory defence cases on civil and administrative law matters: e.g., recognition as a beneficiary of support in civil law, etc. In civil cases, the mandatory defence is when the appointment of guardian to the person is being decided.

Social-economic indicator is also used for insolvent people that are registered in the Unified Database of the Socially Vulnerable Families. According to the Resolution N424 of the Government of Georgia:

- socially vulnerable person is deemed insolvent if his/her ranking point is 70 thousand or less;
- besides, socially vulnerable person is also considered insolvent in case of holding 100 thousand or less points and if s/he belongs to one of the categories, listed in the Resolution, in particularly: member of the family with many children, that has 3 or more children under 18 years old; veteran of war or military forces; a person with limited capacity; an orphan under 18 years of age; internally displaced persons.

In exceptional cases public advocate is appointed to the persons not registered in the data base, however due to hard socio-economic conditions cannot afford advocate's service. This

is regulated by the Decision № 27 of the Legal Aid Service Board adopted on September 9, 2015.¹⁴⁶ This condition applies to the persons who belong to the following categories:

- Persons who meet the criteria of insolvency;
- Persons whose difficult social-economical condition is proved by the certificate issued by the local self-governing institutions;
- Persons with incurable and serious disease;
- Single mother who has juvenile children;
- Person acknowledged as a victim of political repressions;
- Pensioner;
- Juvenile person who may be a party to civil / administrative cases.¹⁴⁷

The list of cases when the legal aid is rendered could be supplemented with cases of juveniles as well as related to patients' rights and victims of domestic violence; for family and inheritance disputes; social protection and pension issues; legal aid for veterans; cases of involuntary psychiatric treatment; disciplinary proceedings against prisoners and cases entailing administrative arrest; asylum seekers etc.

According to the Law of Georgia on State Fees (Article 5, para 1, I1), persons registered in the unified database of socially vulnerable families, whose social and economic indicator of the family is equal to or less than the maximum score determined by the Government of Georgia are exempt from the court fees. Civil Procedure Code confirms this in its Article 46 and Criminal Procedure Code has similar provision (Article 46 para 4) where it is stipulated that if the defence is carried out at public expense, the state, in accordance with the procedure established by the legislation of Georgia, also assumes other expenses necessary for the defence, if these expenses are directly related to the defendant's self-defence.

The Legal Aid Act has special provision on reimbursement of legal aid expenses saying that if, when considering civil or administrative proceedings, the court decides in favour of a legal aid beneficiary, the reimbursement of legal aid expenses shall be imposed on the opposing party for the benefit of the Legal Aid Service. If a legal aid beneficiary receives legal aid by way of submitting forged and/or false information about his/her insolvency, he/she must reimburse the rendered legal aid expenses.

Legal aid, though, is not granted for the fees that are related to the enforcement of judicial decisions.¹⁴⁸ The latter raises issues of infringement of the right of access to justice, as it does not allow a person to process a legal case in its entirety free of charge which is not in compliance with the Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law (para19)¹⁴⁹.

B3. Institutional framework

The free legal aid in Georgia is rendered by the Legal Aid Service. The LAS is an independent body under the supervision of the Parliament. This legislative decision is seen as a good achievement by all stakeholders. Previous concerns about the independence of the system,

¹⁴⁶ www.legalaid.ge

¹⁴⁷ www.legalaid.ge

¹⁴⁸ CEPEJ, Evaluation Questionnaire (2018-2020), 2. Access to justice and all courts, 2.1. Legal Aid, 2.1.1.

Scope of legal aid, 016-1. "Please briefly describe the organisation of the legal aid system in your country both before going to court and during court proceedings." <https://rm.coe.int/>

¹⁴⁹ Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law, adopted on March 31, 2021- "*Repayment of legal aid costs*"

19. Member States should consider the possibility of revoking legal aid and of seeking repayment of legal aid costs by the recipient, where it is found to have been granted on the basis of false information provided by the applicant."

which was under the control of the Ministry of Justice, have now allayed and the maximum level of guarantee of full independence is considered to have been achieved.

The current model of a supervisory board which includes representatives of all stakeholders is foreseen as enough guarantee for them to present their ideas and protect their interests. It has the functions of supervision over daily work of the LAS.

According to the Article 10 of the Law on Legal Aid the Legal Aid Council is a collective body established to ensure administration of the LAS efficient performance of its functions, and independence and transparency of the LAS. The Council is comprised of nine members. Three members are selected by the Executive Council of Georgian Bar Association and three members – by the Public Defender of Georgia; one member is selected by the Legal Aid Bureaus from the lawyers of the Bureaus; one member is nominated by the Minister of Justice of Georgia from the employees of the Ministry of Justice of Georgia and one member is nominated by the High Council of Justice of Georgia from the non-judge members. The Council members hold their positions for a 4-year term, except the member who is a lawyer of the Service at the same time.

This mixed representation of the different relevant stakeholders elects the Director of the Service. In this construction, the supervision of the Parliament is symbolic and limited only to the presentation of annual reports. Otherwise, the Director is responsible only to the Legal Aid Council. This balanced structure gives enough guarantees for a completely independent free legal aid system and participation of each stakeholder.

Regionally, the LAS comprises 13 Legal Aid Bureaus and 24 consultation centres established under this Law. Legal Aid Bureaus are divisions of the LAS that render legal aid and are composed of the Head of Legal Aid Bureau, advocates, consultants, and administrative staff.

Legal advice is provided in Consultation Centres established within the unified legal aid system. A physical person may receive legal advice in any Consultation Centre regardless of his/her place of residence and financial status within one hour. In those regions where no Legal Aid Bureaus operate, a Consultation Centre ensures the involvement of a public advocate in a proceeding from the registry.

The system of free legal aid in Georgia has public and private components. Public defenders and all advocates providing legal aid are listed in the respective registers. The Register of public defenders is created by way of open competition. The Legal Aid Service has a database – a roster of private advocates, who provide free services to the clients on public funds. The advocates registered in the roster of invited public defenders are appointed to criminal, legal and administrative cases if one of the parties applies to the bureau that appoints the advocate. Where there are no legal aid bureaus, the advocates are appointed by Consultation Centres of Legal Aid Service.

The Legal Aid Service introduced a quality evaluation system in terms of the advocates' quality of the court representation guaranteeing that the State budget is allocated for providing high quality services to the citizens. Thus, the free legal aid system corresponds to the requirements of the Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law (para 7, 8 and 9).

The stakeholders interviewed supported the conclusion from the “Comparative review of Procedural and institutional setup of the functioning of advocates in Armenia, Belarus, Georgia, the Republic of Moldova and Ukraine” developed by the CoE that “Many human rights NGOs, law associations, university law school clinics and individual advocates are also involved in the provision of pro-bono or grant-funded free legal services to vulnerable groups and individuals. Organisations like the Georgian Young Lawyers' Association have their units throughout the country and provide free legal assistance to vulnerable groups and individuals. Other organisations include: Legal Aid Centre, Transparency International Georgia, Tbilisi Free University, Human Rights Centre and many others. Most of them operate based on

grants and employ members of the GBA on a contractual basis for ensuring court representation.”¹⁵⁰

In terms of the pro-bono services, the GBA has created a special committee dedicated to this topic, thus showing its interest and importance of development of such type of services. The purpose of the Committee is to promote the development of pro bono services among advocates, to introduce and develop a system of services based on the Bar Association and to promote the pro bono service in the legal profession.

After 2018 the GBA extended its pro-bono activities on the project basis (e.g. pro-bono days, free legal aid for persons with disabilities). Those activities are supported by different international donors. Now, the GBA works on setting up a pro bono centre which will extend the pro-bono services provided by the private advocates.

GOOD PRACTICES AND OUTSTANDING CHALLENGES

A. Good practices

- Independent LAS monitored only by the Parliament in such a way that the maximum guarantee of full independence from the executive and the bar is achieved. The only functions that the bar has over the free legal aid is to introduce permanent training activities for advocates and taking care of their professional capacities through an initial training courses, continuing legal education activities, additional seminars, workshops, and conferences in different areas of interest.
- The LAS is socially oriented. Though there are some budgetary issues, the large scope of legal aid should be considered as a good practice. Legal advice is rendered on any legal issue, and legal aid is provided during criminal, civil and administrative legal proceedings and before an administrative body.
- The citizen can choose the public defender. When needed, it can apply to the LAS for the appointment of the advocate. The application can be filed personally as well as through a close relative or legal representative and submitted to a selected bureau or consultation centre of LAS. If the application meets the relevant criteria, the advocate is appointed within 2 days. If the application fails to meet with the requirements, the decision shall be taken on the refusal of the appointment of the counsel. The refusal of the appointment of the counsel may be appealed before the director of the LAS and if the application is not granted, it may be appealed to the court.
- LAS guarantees the quality of the services the advocates provide through a Quality Assurance System, developed based on so called “Peer Review” methodology. It implies evaluation of the quality of advocates’ performance by their colleagues, where the principle of confidentiality is fully protected, and quality assurance and quality improvement are priorities. The system was developed in close collaboration with the GBA and unanimously approved by the Legal Aid Council.

B. Present legal and institutional gaps

Though in recent years the scope of the free legal aid in the country was extending (new amendment to include the right of free legal aid for minors regardless of their status in criminal proceedings is under consideration in the Parliament), still judicial system representatives report cases (e.g in guardianship cases), when a judge considers that a citizen needs legal representation or free legal aid, but the LAS could not provide it because they do not fall under

¹⁵⁰ “Comparative review of Procedural and institutional setup of the functioning of advocates in Armenia, Belarus, Georgia, the Republic of Moldova and Ukraine” - PGG II Regional Project “Strengthening the profession of advocate in line with European standards” – 2019 - 2020

the requirement of the legislation. They recommend additional legislative changes which will ensure the legal aid for all first instance civil cases which means more broad scope of the system.

At the same time, admitting the large scope of the legal aid, stakeholders acknowledge problems in terms of financial resources - low cost per legal aid case and a high number of cases benefiting from legal aid. The budgetary allocations stay low, respectively the advocates' fees are not high and the number of advocates providing legal aid is low compared to the number of cases. Especially in the capital and big cities where they hardly can manage the consultation and the representation. After legislative changes of 2018, the legal aid covers a wider range of beneficiaries. It includes juveniles, convicts, persons with disabilities, victims of domestic violence etc. The practice of extending the eligibility to a relatively large number of cases but with limited resources allocated¹⁵¹ should be stopped.

C. Gender equality and youth participation

The gender balance is reported as 49% of women and 51 % of men advocates. In every direction, women advocates are active, including the management of the bar - the ethics and audit commission, in the Executive board, in other topic commissions¹⁵². Access to the profession for women is guaranteed and cannot observe a discrimination when citizens choose their advocates¹⁵³.

As there is no clear information on the situation of women advocates after entering the profession – for instance, if there are some obstacles when they practice, or in what kind of cases they usually participate, additional research towards this direction is needed.

The GBA has a special committee dedicated to promoting young lawyers' integration into the profession and help them overcome barriers to integration. In order to achieve these goals, the Committee develops initiatives, proposals, and projects and submit them to the Chairperson and staff of the Association. The recent status shows that 95% of young lawyers enter the profession as private advocates.

The positive development in that direction is seen in the proposed amendments concerning the mandatory introduction program for those who want to become a member of the bar – 3 months theoretical course and practical skills and 9 months internship. Through the internship period, the young lawyer assists acting advocates in many areas, including court representation. This means that they have high responsibilities, and they should comply with the ethical standards and rules that apply to other attorneys.

D. Ongoing and future initiatives in a pragmatic fashion

While deciding the issue of a large number of cases and limited resource allocation, many existing models can be studied and used. Filtering of cases that are eligible for free legal aid system is one of them. In this direction, the consultation call centres have key role. Before submitting to the free legal aid system, the case first refers to a legal consultant who provides advice whether this case needs legal representation or not and refereeing when applicable to the free legal aid system. Another solution may be the promoting of mediation as an accessible, fast, and cheap means of resolving disputes. There are many NGOs that can be developed as a resource not only in terms of mediation but providing pro bono services as well. Thus, the free legal aid system will be following the requirement of para 20 of the Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law to launching

¹⁵¹ European judicial systems - CEPEJ Evaluation Report – 2020 Evaluation cycle (2018 DATA) “How is legal aid organised in the different states/entities?” - page 36 <https://rm.coe.int/>

¹⁵² More about Bar Association Committees on [GBA website](#)

¹⁵³ Facts are gathered during fact-finding interviews

initiatives to increase the diversity of legal aid providers. When the LAS does not have an option to admit a case, it shall refer cases to pro bono services from advocates and NGOs. These three branches should stop considering each other as competitors and start working together at least on cases concerning vulnerable persons, immigration, and domestic violence cases. It is particularly important to start promoting this type of service among advocates. It should be noted that the GBA has established a Committee of the Pro Bono Services Development with the purpose of promoting the development of pro bono services among the members of the Bar Association, introducing, and developing a system of services on the basis of the Bar Association and promoting the pro bono service in the legal profession.

RECOMMENDATIONS

It is recommended to take several additional steps, as follows:

- To reconsider extending the eligibility for free legal aid to a relatively larger number of cases if the resources for the aid are remaining limited.
- To introduce the mechanisms for reduce the large number of cases of free legal aid:
 - by introducing filtering mechanisms on the basis of certain conditions (eligibility and the merits of cases),
 - by promoting use of pro bono services (rendered by individual advocates and NGOs) as alternative source of legal aid.

THE REPUBLIC OF MOLDOVA

NATIONAL FRAMEWORK

A. Legal framework of the advocate profession

The guarantees of legal defence in the Republic of Moldova are provided by the Constitution (Article 26). The main legal enactment relating to the profession of advocate in the Republic of Moldova is the Law “On Advocacy” dated 19 July 2002 (hereafter – the “Law”)¹⁵⁴. Other important acts include:

- the Statute of the Profession of Lawyer (adopted by the Congress of the Union of Lawyers on January 29, 2011, effective as of April 08, 2011);
- the Regulation on the Organization and Functioning of the Union of Lawyers of the Republic of Moldova (approved by the Union of Lawyers Council on May 27, 2016);
- the Code of Ethics (Deontology) of Lawyers (approved by the Congress of Lawyers on 20 December 2002, with amendments and additions adopted on March 23, 2007 by the Congress of Lawyers, with amendments and additions adopted on July 1, 2016 by the Congress of Lawyers).

The legislation cited above represents only major enactments relating to the practice of legal profession. There are also a number of laws and subordinate legislation referring to specific issues of lawyers’ activities, including the rules on civil and criminal procedure, regulations on sitting the examinations to get access to the profession, specific issues referring to the provision of legal aid, etc.

B. Institutional framework of the legal profession

There are two legal forms for carrying out professional activities of lawyers:

- lawyer’s cabinet (individual law office) and
- associated lawyers’ bureau¹⁵⁵.

Upon receiving a bar license, a lawyer automatically becomes a member of the Moldovan Union of Lawyers (Moldovan National Bar Association). It is mandatory for lawyers to be members of the bar and to hold a pertinent license, if they want to represent clients in a court of law.

However, many other activities that are usually practiced by lawyers (providing legal advice, preparing legal documents, and assisting clients in certain transactions, representing clients under administrative procedures before public authorities, obtaining and submitting certain documents from/to public bodies, etc.) can be and are frequently performed by persons who are not lawyers and/or are not members of the bar. There’s a National Bar Association (Union of Lawyers of the Republic of Moldova) and 4 regional bars (Chisinau, Balti, Cahul, and Comrat) that operate within the district of the respective courts of appeal. The Union of Lawyers is the main self-government association of lawyers in the Republic of Moldova.¹⁵⁶

¹⁵⁴ According to some interviewees amendments to the law are expected; There is lack of transparency for the time being.

¹⁵⁵ Article 29 of the Law on Advocacy of the Republic of Moldova.

¹⁵⁶ COMPARATIVE REVIEW on Procedural and institutional setup of the functioning of lawyers in Armenia, Belarus, Georgia, Moldova and Ukraine, p. 43.

ANALYSIS OF THE SYSTEM OF LEGAL REPRESENTATION

A. Monopoly of legal services by advocates

In the Republic of Moldova, a general legal monopoly on the representation of clients before domestic courts is subject to certain exceptions. In civil proceedings, as a general rule, only lawyers (members of the bar) and trainee lawyers¹⁵⁷ (officially registered with the respective bar as trainees) can represent clients (Article 75 para.1 of the Civil Procedure Code). Exceptions to this rule are as follows:

- natural persons can also be represented in civil cases by their spouse, parents, children, brothers/sisters, grandparents, grandchildren, if they have higher legal education and have been authorised to represent the respective person in court by a notarised power of attorney (Article 75 para.11 of the Civil Procedure Code);
- legal entities in civil cases can be represented by their administrative bodies and employees (Article 75 para.2 of the Civil Procedure Code). The latter have to provide the court with the documents confirming their position within the legal entity.¹⁵⁸

Allegedly, there is a problem in 1st instance of civil proceedings: once pre-trial phase is completed, a hearing is scheduled even three years after. In the meantime, no new evidence may be submitted. The majority of persons interviewed are also against the amendments in the proceedings before the Supreme Court: No fresh evidence and no presence of a lawyer is allowed. It is considered as a blow to the legal profession. The same appears on an appeal level in civil and commercial cases. The problem lies in the abolition of the orality of proceedings.

In criminal cases, defence can only be ensured by a licensed lawyer. Representation of victims, civil claimants/respondents in criminal cases can be carried out by lawyers and other persons duly authorised through a power of attorney. Legal entities that participate in criminal cases as civil claimant/respondent can be represented by their heads/directors.¹⁵⁹

B. LEGAL AID

B1. Legal framework

The following legal enactments regulate the provision of free legal aid in the Republic of Moldova¹⁶⁰:

- the Law about the legal aid guaranteed by the state¹⁶¹;

¹⁵⁷ Reportedly, there is a problem with cassations filed by trainee lawyers. They are rejected as inadmissible.

¹⁵⁸ COMPARATIVE REVIEW on Procedural and institutional setup of the functioning of lawyers in Armenia, Belarus, Georgia, Moldova and Ukraine, p. 42.

¹⁵⁹ Article 79 para. 2 of the Criminal Procedure Code of the Republic of Moldova reads as follows: «Attorneys and other persons authorised by a power of attorney of a participant in the respective proceeding may act as representatives of the victim, injured party, civil party, and civilly liable party. The manager of a legal entity upon presenting a certificate of employment may act as the representative of an entity acknowledged as a civil party or as a civilly liable party».

¹⁶⁰ Legal aid is quite popular among lawyers. Young lawyers provide legal aid in the beginning of their career, mostly in criminal cases. It is however a transitional phase.

¹⁶¹ The Law of the Republic of Moldova of July 26, 2007, No. 198-XVI, About the legal aid guaranteed by the state (as amended on 09-07-2020).

- the Regulation of the National Council on State Guaranteed Legal Aid¹⁶².

According to Article 3 of the Law about the legal aid guaranteed by the state, there are two types of legal aid guaranteed by state:

1) **Primary** legal aid includes informing on the system of law of the Republic of Moldova, the existing regulations, the rights and obligations of persons of law, methods of realisation and use of the rights in judicial and extrajudicial procedure; consultation on legal issues; help in creation of documents of legal nature; other forms of the help which are not falling under the determination of qualified legal aid; The primary legal aid can be provided by paralegals¹⁶³ or NGOs¹⁶⁴.

2) **Qualified/secondary** legal aid includes the provision of legal advice bureaus, representation and/or protection in criminal prosecution authorities, in degrees of jurisdiction on criminal cases, cases on administrative offenses, civil or administrative cases, representation in bodies of public management;¹⁶⁵ The qualified legal aid can only be provided by the public defenders, by private lawyers who deliver legal aid upon request¹⁶⁶ and by NGOs¹⁶⁷. Qualified legal aid can be requested at any stage of criminal proceedings and in civil cases even before the initiation of proceedings¹⁶⁸.

The legal aid guaranteed by the state is provided in the following forms: a) informing, giving consultations and explanations according to legal issues; b) creation of documents of legal nature; d) protection of interests of the suspect, person accused, defendant of criminal procedure; e) protection and representation of interests of the convict; e-1) protection and representation of interests of the children who became the victims of crimes, and also victims of violence in family¹⁶⁹; f) protection of interests of a person in production on cases on administrative offenses; g) protection and representation of interests of a person in civil process;¹⁷⁰

The lawyers in the Republic of Moldova are not obliged to provide any amount of pro bono work. It remains fully at their discretion¹⁷¹. Pro bono is granted in the country for one day on the occasion of the Attorney's Day¹⁷².

B2. Eligibility

The Law about the legal aid guaranteed by the state guarantees the right to free legal aid to the above categories of persons:

- a) citizens of the Republic of Moldova in the limits established by this law;

¹⁶² The Regulation was approved by the Decree of the Minister of Justice no. 18 of 24 January 2008.

¹⁶³ Article 2 and Article 17 of the Law about the legal aid guaranteed by the state.

¹⁶⁴ *Nadejda Hriptievschi*, Legal aid reform in Moldova – prerequisites, progress, challenges and expectations, November 2008.

¹⁶⁵ Article 2 of the Law about the legal aid guaranteed by the state.

¹⁶⁶ Article 29 of the Legal Aid Law. According to Article 2 of the Law “a public defender is a person given according to the Law on legal profession the right to perform lawyer activities, allowed based on certain selection criteria to provision of free or partially free qualified legal aid at the expense of the means intended for provision of the legal aid guaranteed by the state”.

¹⁶⁷ Article 35 of the Law about the legal aid guaranteed by the state.

¹⁶⁸ Article 19 para. 2 of the Law about the legal aid guaranteed by the state.

¹⁶⁹ The Women Lawyers Association has submitted reports to the UN on social rights; the W.L.A. publishes assessments of draft laws, focusing on the protection of victims and domestic violence.

¹⁷⁰ Article 7 of the Law about the legal aid guaranteed by the state.

¹⁷¹ COMPARATIVE REVIEW on Procedural and institutional setup of the functioning of lawyers in Armenia, Belarus, Georgia, Moldova and Ukraine, p. 50-51.

¹⁷² The Women Lawyers Association (W.L.A.) participates in many pro bono projects, however it has no project governed by them.

b) foreign citizens and stateless persons, in the processes or cases which are within the competence of bodies of public management and degrees of jurisdiction of the Republic of Moldova;

c) the legal entities registered in the Republic of Moldova, according to the Code of penal procedure of the Republic of Moldova and this law¹⁷³.

Primary legal aid is granted to any person under Article 6 of the Law, regardless of his/her financial means. As mentioned above, primary legal aid can be provided by paralegals or NGOs specialised in legal aid delivery¹⁷⁴. Any person can apply verbally or in writing for primary legal aid to the competent authorities, within the area of his or her permanent domicile. Primary legal aid is delivered immediately upon request. When the immediate legal aid delivery is impossible, the applicant shall be informed on the date and time of the meeting that is to take place within a term that will not exceed 3 days from the date when the request was submitted. If the case of the person concerned requires qualified legal assistance, paralegals and non-governmental organisations should inform the applicant about the conditions, on which he or she can receive such aid and should assist him/her in submitting an application¹⁷⁵.

The eligibility criteria for qualified/secondary legal aid are of two types:

- a. Financial criteria, and
- b. Merits of the case.

Qualified legal aid is granted to entitled persons under Article 6, who do not have sufficient means to pay, namely whose income is lower than the level of income established by the Government¹⁷⁶, in criminal, civil and administrative cases. The beneficiary shall submit the request for the delivery of qualified legal aid, in person, by mail or through relatives or representatives, to the territorial office, to the criminal investigation body or to the court of law depending on the case¹⁷⁷. The applicant must also attach to the request an income declaration¹⁷⁸. However, according to Article 24 para. 1 – (d) of the Law, qualified legal aid shall not be granted when the applicant is able to fully cover the expenses for the delivery of legal services from his or her own property, except for the goods, which in accordance with the legislation in force, cannot be impounded.

Qualified legal aid can also be partial. Partial legal aid is provided in the case when the person, whose income is bigger than the level of income, established by the Government in the view of receiving legal aid, in accordance with the present law is capable to cover a part of the expenses for legal aid. In such a case, qualified legal aid can be delivered with the financial contribution of the beneficiary, if this contribution does not exceed his or her financial and material possibilities¹⁷⁹.

Qualified legal aid is provided irrespective of the applicant's financial means in the following cases:

¹⁷³ Article 6 of the Law about the legal aid guaranteed by the state.

¹⁷⁴ Article 15 of the Law about the legal aid guaranteed by the state.

¹⁷⁵ Article 18 of the Law about the legal aid guaranteed by the state.

¹⁷⁶ According to Article 21 of the Law about the legal aid guaranteed by the state, "for the calculation of income of the applicant for state guaranteed legal aid, there will be taken into consideration the average monthly incomes and profits for the last 6 calendar months prior to the month when the request has been submitted. The methodology of calculating the income and the level of income that allows the delivery of qualified legal aid, as well as the form of the income statement are approved by the Government. The level of income that allows the delivery of qualified legal aid is being periodically determined, taking into consideration, mainly, the indexation of financial incomes. In order to benefit from qualified legal aid, persons shall submit their income declaration in the form established by the Government; See also the Regulation on the methodology of income calculation for granting state-guaranteed qualified legal aid, Government Decision no. 1016 of 01.09.2008.

¹⁷⁷ Article 26 of the Legal Aid Law.

¹⁷⁸ Article 25 of the Legal Aid Law.

¹⁷⁹ Article 22 of the Legal Aid Law.

- 1) for emergency legal aid in a case of detention during criminal proceedings or administrative proceedings¹⁸⁰;
- 2) cases where the right to legal aid is mandatory pursuant to Article 69, para. 1, p. 2)-12) of the Criminal Procedure Code of the Republic of Moldova.
- 3) cases where the right to legal aid is mandatory pursuant to Articles 304 and 316 of the Civil Procedure Code of the Republic of Moldova¹⁸¹;

As for the merits test criteria, qualified legal aid is granted in criminal cases where the interests of justice require so. In civil and administrative cases, the additional criteria are the complexity of the case from the legal or procedural point of view¹⁸². Qualified legal aid shall also be refused when: the request for the delivery of legal aid is manifestly ill-founded; the applicant does not have the right, for which the legal aid is requested, and this fact results from the submitted documents; the value of the action is considerably smaller than the expenses for the delivery of qualified legal aid¹⁸³.

B3. Institutional framework

The administration of the legal aid system is administered and carried out by the:

- a) Ministry of Justice;
- b) The Bar Association¹⁸⁴;
- c) The National Council for State Guaranteed Legal Aid and its territorial offices (hereafter: National Legal Aid Council)¹⁸⁵.

The general role of the Ministry of Justice is to develop the policy in the area of legal aid, draft relevant legislation, monitor the functioning of the legal aid system, develop the budget for the system, etc. The Union of Lawyers participates in developing the criteria for selecting lawyers for the legal aid system and the criteria for the quality assessment of legal aid service; it participates in the activity monitoring of lawyers involved and imposes sanctions on them.

The main body ensuring the administration and functioning of the legal aid system is the National Legal Aid Council¹⁸⁶. The composition of the National Council includes: 2 members assigned by the Ministry of Justice; 2 members assigned by the Union of Lawyers; one member assigned by the Ministry of Finance; one member assigned by the Superior Council of Magistrates; one member on behalf of public associations and academic environment. The mandate of a member of the National Council shall constitute 4 years and it can be renewed only once¹⁸⁷.

The National Legal Aid Council carries out the following prerogatives: a) implementation of policy in the field of delivering of state guaranteed legal aid¹⁸⁸; b) ensuring initial and continuous training, including through the National Institute of Justice, of persons involved in

¹⁸⁰ Article 28 of the Legal Aid Law provides that “in cases when a person needs urgent legal aid under Article 19 para. 1 b), upon request of the person or of the body that carried out the detention the territorial office shall be obliged to deliver emergency legal aid by assigning a defence lawyer on duty”.

¹⁸¹ Article 19 para. 1 - (b - c - d) and Article 20 of the Law about the legal aid guaranteed by the state.

¹⁸² *Nadejda Hriptievschi*, Legal aid reform in Moldova – prerequisites, progress, challenges and expectations, p. 8-9.

¹⁸³ Article 24 para. 1 – (a-b-c) of the Law about the legal aid guaranteed by the state.

¹⁸⁴ The Law on Legal Aid Guaranteed by State refers to the Bar Association and not to the Union of Lawyers. However, the Law passed in 2007, when the older version of the Law on the Bar was still effective. That version only provided for one single bar association for the whole country (and no territorial bars as it currently does) which was later substituted by the Union of Lawyers. Thus, the reference to the Bar Association in the Law on Legal Aid Guaranteed by State shall be read as the Union of Lawyers.

¹⁸⁵ Article 8 of the Legal Aid Law.

¹⁸⁶ Allegedly, the Legal Aid Council is understaffed in the capital.

¹⁸⁷ Articles 7 and 10 of the Regulation of the National Council on State Guaranteed Legal Aid.

¹⁸⁸ It is reported that there is a contest each year organised by the Legal Aid council for hiring new lawyers. Good lawyers are not interest though.

the system of delivering of state guaranteed legal aid; c) compilation of practice of implementation and development of recommendations for the purpose of ensuring the uniform enforcement of the Law on State-Guaranteed Legal Aid; d) record keeping of persons, who deliver state guaranteed legal aid; e) ensuring the functioning of territorial offices; f) drafting annual reports on activity in the system of delivering of state guaranteed legal aid and their submission to the Ministry of Justice, the Government and the Parliament; g) submission to the Ministry of Justice of the quarterly report on the use of financial means allocated for the delivery of state guaranteed legal aid; h) co-operation with foreign organisations, international and non-governmental organisations, which are involved in the field of state guaranteed legal aid; i) ensuring the implementation of pilot model of the delivery of state guaranteed legal aid¹⁸⁹.

The lawyers in the Republic of Moldova are not obliged to provide any amount of pro bono work. It remains fully at their discretion¹⁹⁰. However, the lawyers who participate in the programme of legal aid are guaranteed by the state the pre-determined fees for their services¹⁹¹.

GOOD PRACTICES AND OUTSTANDING CHALLENGES

A. Good practices

The right to free legal aid in the Republic of Moldova is stipulated under the Law on State Guaranteed Legal Aid. This legislation takes into consideration the need to protect the right to a fair trial guaranteed by Article 6 of the ECHR, including the need to ensure free and equal access to legal aid by organising and delivering state-guaranteed legal aid and by diminishing the economic and financial impediments in realising the access to justice. The Law was adopted on July 26, 2007 and entered into force on July 1, 2008¹⁹². The legal aid reform in the Republic of Moldova is part of a broader effort to improve the legal aid system, begun in 2004 by the Ministry of Justice in partnership with the Soros Foundation-Moldova and other partner organisations, including the Council of Europe and European Union's joint programme for the of Moldova, in order to respond to the failures and shortcomings of the previous underfunded and unstructured system. The findings of the previous legal aid delivery showed that 1) there was no legal aid provision in non – criminal proceedings; 2) legal aid was only delivered in criminal proceedings where the presence of a lawyer was mandatory; 3) there was a lack of rules for appointing lawyers by an independent authority, that resulted in a dependence between legal aid providers and the criminal investigation bodies and judges, and; 4) there were no clear rules for the payment of legal aid providers, which did not motivate lawyers to provide high-quality services and in many cases they demanded additional payment from their clients¹⁹³.

Firstly, legal aid in the Republic of Moldova is provided to all citizens of the country, to foreign citizens and stateless persons in the processes or cases which are within the competence of bodies of public management and degrees of the jurisdiction of the Republic of Moldova and to legal entities registered in the Republic of Moldova¹⁹⁴. The policy of legal aid does not discriminate on the basis of age, race, colour, gender, language, religion or belief, political or another opinion, class, national or social origin, property, citizenship or domicile, birth,

¹⁸⁹ Article 12 of the Legal Aid Law and Article 3 of the Regulation of the National Council on State Guaranteed Legal Aid.

¹⁹⁰ The Young lawyer' s association provided pro bono for 2-3 years (2015-2017)

¹⁹¹ COMPARATIVE REVIEW on Procedural and institutional setup of the functioning of lawyers in Armenia, Belarus, Georgia, Moldova and Ukraine, p. 50-51.

¹⁹² the Law of the Republic of Moldova of July 26, 2007, No. 198-XVI, About the legal aid guaranteed by the state (as amended on 09-07-2020).

¹⁹³ *Nadejda Hriptievschi*, Legal aid reform in Moldova – prerequisites, progress, challenges and expectations, p. 1-2.

¹⁹⁴ Article 6 of the Legal Aid Law.

education, social status or another status. Thus, equality and non-discrimination in regard to access to justice is ensured¹⁹⁵.

The new national legal aid law in the Republic of Moldova provides for two types of free legal assistance. The first one is primary legal aid, provided by paralegals and specialised NGOs, which allows any Moldovan resident, regardless of his/ her financial status, to have access to 1) information regarding the legal system, the normative acts in force, the rights and the obligation of subjects of law and the method of enforcing and exercising the persons' rights both in the judicial and extrajudicial proceedings; 2) counselling on legal issues; and 3) assistance in drafting juridical acts. This provision is in line with CoE standards and guidelines for preliminary legal assistance (making widely available, and for the easy access of everyone, information on the law and the legal system; providing the public with easy access to legal advice and assistance; supporting access to information on legal rights, obligations, and remedies)¹⁹⁶ and with Article 3 of the EU Directive 2002/8/EC which states that legal aid is considered to be appropriate when it guarantees pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings¹⁹⁷. The purpose of primary legal aid is to give prompt solutions to problems that can quickly be solved even by non- lawyers and to improve the congestion of qualified legal aid mechanism and courts. Thus, the system does not impose eligibility criteria to primary legal aid.

Qualified legal aid in the Republic of Moldova shall be granted, in all criminal, civil, administrative cases, to any eligible applicant who does not have sufficient means to pay for the services¹⁹⁸. The secondary legal aid system is subject to a financial means test. In order to benefit from qualified legal aid, the applicant should have a lower income than the level of income established by the Government¹⁹⁹. Actually, the Government established a regulation on the methodology of income calculation for granting state-guaranteed qualified legal aid²⁰⁰. Moldovan law also provides for partially free qualified legal aid. In such case, qualified legal aid can be delivered with the financial contribution of the beneficiary, if this contribution does not exceed his or her financial and material possibilities²⁰¹. This provision is good for those persons whose income is bigger than the level of income established by the Government but cannot afford the legal aid fees in their entirety. A partial contribution may prevent from frivolous legal aid requests. Additionally, there is a provision for recovering legal aid expenses from the party who lost the trial in civil and administrative cases or from the beneficiary, who received qualified legal aid by submitting false or untrue information, including about his or her financial situation. The reimbursement of expenses is also applied if, during the trial or during the enforcement of the judicial decision, the financial situation changed, and the person has totally or partially lost the right to qualified legal aid²⁰². This provision assures that the state funds are not spent in vain.

¹⁹⁵ European Committee on Legal Cooperation - Drafting Group on Legal Aid Schemes, Efficiency and effectiveness of legal aid schemes in the areas of civil and administrative law. 6th draft of the Guidelines and the Explanatory Memorandum, Document prepared by the Secretariat Directorate General of Human Rights and Rule of Law, CDCJ-GT-SAJ2 (2020) 8 prov., Strasbourg, 6 October 2020; The non-discrimination guideline toward legal aid proceedings is in line with Article 14 of the ECHR as well as Additional Protocol No. 12 on equality and non-discrimination.

¹⁹⁶ 6th draft of the Guidelines and the Explanatory Memorandum, p. 4.

¹⁹⁷ Article 3 of the Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ 2003 L 026.

¹⁹⁸ Article 19 para. 1 a-e of the Legal Aid Law.

¹⁹⁹ Qualified legal aid is granted to applicants whose monthly average income is lower than the subsistence level per inhabitant in the country. In assessing the income of the applicant for legal aid guaranteed by the State, the monthly average income and the gains achieved in the six months preceding the month of application is taken into account. The monthly income limit for all cases is 984 EUR; CEPEJ, Evaluation Questionnaire of the judicial systems (2016-2018 cycle) – Republic of Moldova, generated on 29/08/2018: 2.1.2. Quantitative information on legal aid, 023. "Does your country have an income and assets evaluation for granting (full or partial) legal aid to the applicant?"

²⁰⁰ Regulation on the methodology of income calculation for granting state-guaranteed qualified legal aid, Government Decision no. 1016 of 01.09.2008.

²⁰¹ Article 22 of the Legal Aid Law.

²⁰² Article 23 of the Legal Aid Law.

Legal aid is also provided, irrespective of the beneficiary's financial means where the presence of a lawyer is mandatory according to criminal and civil procedure²⁰³. The Moldovan legislator does not expect the applicant to bear the cost of a lawyer, where the law imposes a mandatory legal representation²⁰⁴.

Furthermore, the Moldovan legal aid law provides for immediate and early intervention at the preliminary criminal proceedings²⁰⁵. In particular, in cases of detention during criminal proceedings (police station) or administrative proceedings, emergency legal aid is delivered, with no financial means test being applied²⁰⁶. It is not practical, due to the urgency of the proceedings, to check the financial status of the applicant. This provision corresponds to Article 6 para. 1 ECHR, which requires that access to a lawyer should be provided from the first interrogation of a suspect by the police, the public prosecutor and the investigating judge²⁰⁷.

As for the merits test, in criminal cases, legal aid is provided, where the interests of justice require so²⁰⁸. In civil and administrative cases, legal aid is granted on the basis of the complexity of the case from the legal or the procedural point of view²⁰⁹. In addition, legal aid shall be refused to the eligible persons, if the request for the delivery of legal aid is manifestly ill-founded, if they do not have the right for which the legal aid is requested and this fact results from the submitted documents, or the value of the action is considerably smaller than the expenses for the delivery of qualified legal aid²¹⁰. The merits test applied by the Moldovan law²¹¹ corresponds to the ECtHR case law. According to the ECtHR, in order to determine whether the interests of justice require the delivery of free legal assistance, one should take into consideration the seriousness of the offence and the severity of the sentence, the complexity of the case and the ability of the applicant to represent him/herself in an adequate manner²¹². Refusing to provide legal aid may also infringe Article 6 para. 1 of the ECHR in complex actions, requiring competent and sustained representation by an experienced lawyer familiar with the case²¹³.

Although the law does not guarantee the right to defence by a lawyer selected by the applicant²¹⁴, the Co-ordinator of the territorial office shall take into account the applicant's request to appoint a certain defence lawyer, his or her degree of involvement in the enforcement of other decisions on the delivery of qualified legal aid, as well as other relevant circumstances. Additionally, the defence lawyer, assigned for the delivery of qualified legal aid in a certain case, can be replaced upon a written and grounded request of the applicant or in case a conflict of interests is detected or in other circumstances that exclude the possibility of the assigned defence lawyer's participation in the delivery of qualified legal aid in a certain case²¹⁵. The latter complies with Article 6 para. 3 c of the ECHR and Article 48 para. 2 of the EU Charter. The fundamental right to a fair trial in criminal proceedings guarantees the right to defence by a lawyer selected by the applicant²¹⁶. Despite the fact that this right is not

²⁰³ Article 19 para. 1 c-d of the Legal Aid Law.

²⁰⁴ *Nadejda Hriptievshi*, Legal aid reform in Moldova – prerequisites, progress, challenges and expectations, p. 8.

²⁰⁵ The interviewees confirmed that there are no problems in pre-trial investigation. The Supreme Court has experience with appointed lawyers in criminal matters.

²⁰⁶ Article 19 para. 1 b and Article 28 of the Legal Aid Law.

²⁰⁷ ECtHR, *Salduz v. Turkey*, No. 36391/02, 27 November 2008, para. 54, ECtHR, *Nechiporuk and Yonkalo v Ukraine*, No 42310/04, 1 June 2011, para 262.

²⁰⁸ Article 19 para. 1 a of the Legal Aid Law.

²⁰⁹ Article 19 para. 1 e of the Legal Aid Law.

²¹⁰ Article 24 para. 1 of the Legal Aid Law.

²¹¹ In contrast, see CEPEJ, Evaluation Questionnaire: 2.1.2. Quantitative information on legal aid, 024. "In other than criminal cases, is it possible to refuse legal aid for lack of merit of the case (for example for frivolous action or no chance of success)?"

²¹² ECtHR, *Quaranta v. Switzerland*, No. 12744/87, 24 May 1991, paras. 32-36.

²¹³ ECtHR, *Steel and Morris v. the United Kingdom*, No. 68416/01, 15 February 2005, para. 69.

²¹⁴ CEPEJ, Evaluation Questionnaire: 2.1.2. Quantitative information on legal aid, 022. "Are individuals free to choose their lawyer within the framework of the legal aid system?"

²¹⁵ Article 27 paras. 2 and 4 of the Legal Aid Law.

²¹⁶ Open Society Justice Initiative, Legal aid in Europe: Minimum requirements under international law, p. 8.

absolute²¹⁷, imposing a lawyer on a defendant against her/his will, causes a risk that the trial might be unfair and violate the defendant's rights. After all, according to the ECtHR case law, the defendant's wishes must be considered and potentially entertained at the stage of the lawyer's appointment and the national provisions should include a procedure for replacement of legal aid lawyers if they fail to build a relationship of trust with the beneficiary or demonstrate deficient professional quality²¹⁸.

Moreover, there is an independent legal aid authority²¹⁹ in the Republic of Moldova, namely the National Legal Aid Council, that is responsible for managing or overseeing the provision of legal aid. The National Legal Aid Council works jointly with the Ministry of Justice, which remains the main policy making body in the field. The Union of Lawyers sets the criteria for selecting lawyers for the legal aid system and ensures high standards of representation. This mixed system that separates the functions between the Ministry of Justice, the National Legal Aid Council and the National Bar Association guarantees an impartial and independent implementation of the legal aid law and a higher quality of the system²²⁰. Further, the new rules regarding the selection criteria for legal aid providers, the sanctions for lawyers that break the rules, and the appointing of lawyers²²¹ ensure the quality of the legal aid system and the independence between the legal aid lawyers and the criminal investigation bodies, which are no longer involved in the appointment of legal aid providers. The mixed system of legal aid delivery by the public defender offices alongside private lawyers increases the quality of legal aid services²²². Allegedly the Legal Aid Council has an extensive role in monitoring the activities of the assigned lawyer, including checking the docket and chosen strategy, which in some extent considered as a breach of confidentiality.

B. Present legal and institutional gaps

Qualified legal aid in the Republic of Moldova is subject to a financial means test. When applying for qualified legal aid, a person must submit an income declaration in the form established by the Government alongside with the application, at the territorial office of the National Legal Aid Council²²³. The respective office can request data or documents from the applicant, that prove the origin of his/her income, for the delivery of legal aid. As well, it can request data or documents free of charge from fiscal bodies, other central or local public authorities as well as from natural persons or legal entities in order to check the credibility of data presented in the application for the delivery of state guaranteed legal aid²²⁴. On the other hand, according to legal aid law, in cases where a financial means test is applied, the decision on the delivery of qualified legal aid shall be taken by the Co-ordinator of the territorial office and shall be communicated to the applicant in the course of 3 working days²²⁵. It is obvious,

²¹⁷ ECtHR, *Lagerblom v Sweden*, No. 26891/95, 14 January 2003, para. 54.

²¹⁸ ECtHR, *Croissant v. Germany*, No. 13611/88, 25 September 1992, para. 29.

²¹⁹ The Young Lawyer's Association finds positive the fact that the Legal Aid Council is a separate body from the Bar.

²²⁰ *Nadejda Hriptievschi*, Legal aid reform in Moldova – prerequisites, progress, challenges and expectations, p. 11.

²²¹ Article 12 para. 2 h-k of the Legal Aid Law; Regulation on the contest of selection of lawyers for the delivery of state -guaranteed qualified legal aid, Decision no. 6 of 05 June 2008 of the National Council for State Guaranteed Legal Aid.

²²² *Nadejda Hriptievschi*, Legal aid reform in Moldova – prerequisites, progress, challenges and expectations, p. 18. In the opposite direction, according to the stakeholders, an artificial conflict has been caused between private and state-appointed lawyers. State-appointed lawyers are also called public defenders. They are licensed lawyers contracted by the state. Applies only to criminal proceedings. The interviewees point out that parallel presence of private attorneys and public defenders appointed by the judge, the prosecutor or the police officer causes confusion (two lawyers for one person accused or detained).

²²³ Article 21 para. 5 of the Legal Aid Law.

²²⁴ Article 18 of the Regulation on the methodology of income calculation for granting state-guaranteed qualified legal aid.

²²⁵ Article 26 paras. 1 and 4 of the Legal Aid Law.

that there is not enough time for gathering the necessary proofs for the financial status of the applicant by the territorial office²²⁶.

Although, at first glance, the provision of legal aid, irrespective of the beneficiary's financial means, where the presence of a lawyer is mandatory, according to Moldovan criminal and civil procedure, offers higher standards of free legal assistance to the beneficiaries, compared to those set by the Council of Europe and the ECtHR, it still raises issues about the sustainability of the state budget²²⁷. Reportedly, this provision is too liberal, since it overburdens the system and poses bureaucratic obstacles in its proper delivery. Given the fact that especially the Criminal Procedure Code provides a broad list of mandatory defence cases²²⁸, it may lead to low quality legal assistance or the exclusion of people who are in real need of free legal aid.

As mentioned above, the merits test provided by the Moldovan legal aid law is in line with CoE standards and ECtHR case law. The Moldovan legislator though, does not explain the meaning of "interests of justice²²⁹" and of "complexity of a case from the legal or procedural point of view". There is no clear scope of the provision, since there are scarce elements in the laws. The latter makes it difficult for the territorial offices to apply these criteria properly, without too much discretion and avoiding arbitrariness²³⁰. The policy of the Legal Aid Council is to accept all the applications and leave the Courts²³¹ to decide later about the eligibility criteria on the merits. The above situation makes the system overloaded and vulnerable.

Although, the Moldovan legislation provides for new clear rules on the amount and manner of remuneration of lawyers for the delivery of legal aid²³², the interviewees notice discrimination in payment of lawyers in the legal aid system (200 Lei =10 Euros). They request equal treatment with prosecutors. They stated that there is a lack of quality due to low fees. Moreover, it is reported that only procedural activities of lawyers are reimbursed, no other actions or even expenses (for instance transportation). They receive only the controversy unit. The latter does not motivate the legal aid lawyers to provide more qualitative services.

Further, Moldovan legislation does not provide for the exemption from court fees²³³. It appears contradictory that a person who benefits from free legal aid on grounds of indigence, is later refused the right to be exempted. The interviewees mentioned that the court fees²³⁴ are cheap for divorce cases but may be horrendous in property cases. Reportedly, there is a lack of fair trial. Since the delivery of free legal aid is subject to a merits test and a reimbursement of expenses for qualified legal aid delivery is provided in several cases, including from the party who lost the trial in civil and administrative cases, it appears inconsistent for the beneficiary to be burdened with the court fees.

In addition, enforcement of judgements is also a component of the right of access to justice. Failure to enforce judgements constitutes an obstacle to accessing justice²³⁵. Thus, the lack of legal aid provision for the fees that are related to the enforcement of judicial decisions (fees of private enforcement agents) in Moldovan legislation²³⁶ may constitute a breach of the right

²²⁶ *Nadejda Hriptievschi*, Legal aid reform in Moldova – prerequisites, progress, challenges and expectations, p. 7.

²²⁷ CEPEJ, Evaluation Questionnaire: 1.1.2. Budgetary data concerning judicial system, 012- 012-1 "Annual approved and implemented public budget allocated to legal aid, in €".

²²⁸ *Nadejda Hriptievschi*, Legal aid reform in Moldova – prerequisites, progress, challenges and expectations, p. 8.

²²⁹ According to interviewees, a ruling from the Supreme Court sheds light to the criteria (no info on the ruling).

²³⁰ *Nadejda Hriptievschi*, Legal aid reform in Moldova – prerequisites, progress, challenges and expectations, p. 8-9.

²³¹ The Supreme Court is not directly involved. The Supreme Court does not influence the merits test. No judgment has been issued by the SC on legal aid issues. Instance courts are responsible for that. The burden of proof lies with the applicant.

²³² Regulation on the amount and manner of remuneration of lawyers for the delivery of state-guaranteed qualified legal aid, Decision No 22 of 19 December 2008 of the National Council for State Guaranteed Legal Aid.

²³³ CEPEJ, Evaluation Questionnaire, Access to justice and all courts, 2.1. Legal Aid, 2.1.1. Scope of legal aid, 017. "Does legal aid include the coverage of or the exemption from court fees?".

²³⁴ 3% of the claim.

²³⁵ FRA (2011), Access to justice in Europe: an overview of challenges and opportunities, p. 62.

²³⁶ CEPEJ, Evaluation Questionnaire: 2. Access to justice and all courts, 2.1. Legal Aid, 2.1.1. Scope of legal aid, 018. "Can legal aid be granted for the fees that are related to the enforcement of judicial decisions (e.g. fees of an enforcement agent)?".

to an effective remedy²³⁷. In the Republic of Moldova, legal aid is also not provided for the costs and fees of other professionals (notaries, translators²³⁸, interpreters, technical advisors or experts etc.)²³⁹ who may be involved in the case. The latter raises issues of infringement of the right of access to justice, as it does not allow a person to process a legal case in its entirety free of charge.

Although, legal aid professionals can represent applicants in a judicial mediation process²⁴⁰, the same does not apply to other ADR processes, whilst the legal system provides for private mediation²⁴¹, arbitration and conciliation²⁴².

C. Gender equality and youth participation

No gender discrimination was reported in the Republic of Moldova in access to the legal profession and the system of legal representation. Equality and non-discrimination in regard to the legal aid provision is also ensured.

The contribution of the Association 'Women Lawyers of the Republic of Moldova' (FAM Association, henceforward W.L.A.) in this area is significant. The W.L.A. is a professional, non-governmental, apolitical, non-commercial, non-profit association established in 2015 by a group of women lawyers, defenders of human rights. The main goal of the W.L.A. is to defend the rights and interests of women lawyers and of intern women lawyers²⁴³.

Although it does not concern the subject of the present comparative review, there are accusations regarding the principle of equality against women lawyers with regards to the presence of women lawyers in the decision-making bodies of UA²⁴⁴ and the situation of women lawyers within the public social and health insurance system²⁴⁵. Although there is no discrimination against women in accessing the legal profession, discrimination in the economic and social areas can discourage women lawyers from remaining in the profession.

Moreover, no problems have been reported regarding the participation of young people in the legal representation system and legal aid. It should be noted that there is the Moldovan Young Lawyers Association, which strengthens youth participation in the framework of legal representation.

²³⁷ Reportedly, creditor pays in advance the enforcement costs.

²³⁸ There is an exception in Article 229 para. 2 of the Criminal Procedure Code. The law relieves the defendant who is granted free legal aid from the payment of the amounts paid to interpreters and translators.

²³⁹ CEPEJ, Evaluation Questionnaire: 2. Access to justice and all courts, 2.1. Legal Aid, 2.1.1. Scope of legal aid, 019. "Can legal aid be granted for other costs (different from those mentioned in questions 16 to 18, e.g. fees of technical advisors or experts, costs of other legal professionals (notaries), travel costs etc.)?"

²⁴⁰ CEPEJ, Evaluation Questionnaire: 7.1. Mediation, 7.1.1. Details on mediation procedures and other ADR, 165. "Is there a possibility to receive legal aid for judicial mediation procedures?": In July 2015, a new Law on mediation was adopted in order to foster the resort to the mediation procedure. Different measures are devised: legal aid, state fees exemptions, enforcement of transaction of mediation. According to art. 22 par. (7) of the Law no. 137 of July 3, 2015 on mediation, the parties may be assisted by lawyers during the mediation process and in the mediation process, a party or both parties have the right to benefit from the state-guaranteed services of a mediator in the manner prescribed by law.

²⁴¹ Law 137/2015 Medierea civil.

²⁴² CEPEJ, Evaluation Questionnaire: 7.1. Mediation, 7.1.1. Details on mediation procedures and other ADR, 168. "Does the legal system provide for alternative dispute resolutions (ADR)?"

²⁴³ Statute of the Association, approved at the General Assembly of 12 November 2016.

²⁴⁴ Development Strategy of the "Women Lawyers of the Republic of Moldova for the years 2016-2020, approved by a Decision of the General Assembly No 1/3 of 12 November 2016.

²⁴⁵ Report on observing the right of women lawyers in the Republic of Moldova not to be discriminated against on grounds of gender when accessing social insurance services developed by the Association of Women Lawyers of the Republic of Moldova 'FAM Association, Republic of Moldova, January 2020.

D. Ongoing or future initiatives in a pragmatic fashion

According to the information provided by the official website of the Moldovan Parliament there are currently three concurrent draft laws registered in Parliament. They refer to incompatibilities with legal profession (the draft laws propose enlargement of the list of activities compatible with practicing the legal profession) and access to the legal profession.

However, during development of the present review the status of these draft laws is unclear. The latest parliamentary debates with respect to them took place in 2017. There was no information on whether any of the proposed amendments are expected to pass by the Parliament²⁴⁶. Meanwhile, after finalisation of the main assessments, the draft submitted by the Council of the Bar was adopted by the Parliament. Allegedly the law didn't pass any consultations with the Bar and advocates' community and was not subject to appropriate expertise.

Furthermore, Alternative Dispute Resolution Mechanisms reform is in the agenda of the Moldovan legislator (new Justice Reform Strategy for the years 2018-2024)²⁴⁷. It should be noted that legal aid is required in ADR proceedings particularly if the imposition of costs for some parties would effectively shut off access to a court²⁴⁸. Hence, the Republic of Moldova should grant legal aid for judicial mediation and ADR procedures.

RECOMMENDATIONS

The main aspects, the best practices and the weaknesses of the legal aid system in the country were described above. The review aims to identify some areas, where some improvements could be made in order to strengthen the system of free legal aid.

The above findings lead to the conclusion that the Republic of Moldova should expand the time - limit for delivering a decision to grant legal aid, and yet within a reasonable time, where a financial means test is applied. This will allow the territorial office to collect the financial data needed and will reduce the number of reimbursements of expenses.

Providing qualified legal aid to any applicant regardless of his/her financial means, where the presence of a lawyer is mandatory according to Moldovan criminal and civil procedure, may raise issues about the sustainability of the state budget. In many cases, legal aid may be granted to persons who possibly have sufficient funds to hire a lawyer. The latter, in combination with the broad list of mandatory defence cases may lead to low quality legal assistance or the exclusion of people who are in real need of free legal aid. On those grounds, the Moldovan legislator should establish a financial means test²⁴⁹. This provision is necessary for allowing the state to control the budget needed for legal aid, especially in criminal cases.

Another problem regarding the implementation of the right to free legal aid is the absence of clarification of "interests of justice" and of "complexity of a case from the legal or procedural point of view", for delivering a decision to grant or refuse qualified legal aid on the merits. Thus,

246 European Union and Council of Europe Partnership for Good Governance 2019-2021, PGG II Regional Project "Strengthening the profession of lawyer in line with European standards": Comparative review on Procedural and institutional setup of the functioning of lawyers in Armenia, Belarus, Georgia, Moldova and Ukraine, Council of Europe 2020, p. 42.

247 CEPEJ, Evaluation Questionnaire: 12. Reforms in judiciary, 208. "Can you provide information on the current debate in your country regarding the functioning of justice? Are there foreseen reforms? Please inform whether these reforms are under preparation or have only been envisaged at this stage. Have innovative projects been implemented?"

248 Consultative Council of European Judges, Opinion no. 6 (2004) on Fair trial within a reasonable time and judge's role in trials taking into account alternative means of dispute settlement, as adopted by the CCJE, Strasbourg, 22-24 November 2004, para. 142; *Lorna McGregor*, Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR, *The European Journal of International Law* Vol. 26 no. 3 (2015), p. 621.

249 6th draft of the Guidelines and the Explanatory Memorandum, p. 5.

the Nation Legal Aid Council shall establish explanatory guides for its territorial offices, in order to manage a uniform implementation of the right to state-guaranteed legal aid²⁵⁰.

Free legal aid should also include the exemption of the court fees and the costs and fees of other professionals, such as notaries, bailiffs, technical experts, legal translators²⁵¹ or interpreters, whenever the case requires it. The same applies to the fees that are related to the enforcement of judicial decisions.

It is recommended that to:

- Expand the time - limit for delivering a decision for granting legal aid, and yet within a reasonable time, where a financial means test is applied.
- Establish a financial means test where the presence of a lawyer is mandatory according to Moldovan criminal and civil procedure.
- Establish explanatory guides for the territorial offices in relation with the meaning of “interests of justice” and “complexity of a case from the legal or procedural point of view”.
- Provide legal aid for the exemption from the court fees.
- Provide legal aid for the costs and fees of other professionals, such as notaries, bailiffs, technical experts, legal translators or interpreters, whenever the case requires it.
- Provide legal aid for the fees that are related to the enforcement of judicial decisions.
- Grant legal aid for ADR procedures.
- Reform the structure of the Bar Association, because setting up of four regional Bar Associations has been considered as unnecessary and useless, given the relatively small size of the country.

²⁵⁰ *Nadejda Hriptievschi*, Legal aid reform in Moldova – prerequisites, progress, challenges and expectations, p.9.

²⁵¹ Upon this subject, CJEU (C- 670/15, *Šalplachta*, 26 July 2017, ECLI:EU:C:2017:594), interpreting Articles 3, 8 and 12 of Council Directive 2003/8/EC, has ruled that “legal aid granted by the Member State of the court hearing the particular case, in which a natural person domiciled or resident in another Member State has submitted a legal aid application in the context of a cross-border dispute, also covers the costs paid by that person for the translation of the supporting documents necessary for the processing of that application”. Although, the ruling of CJEU refers to legal aid in cross- border disputes, it also indicates the legal aid standards in Europe.

UKRAINE

NATIONAL LEGAL FRAMEWORK

A. Legal framework of the advocate profession

In its Articles 59²⁵² and 131 para 2, the Constitution of Ukraine (adopted on June 28, 1996 № 254к/96-BP as amended as of September 3, 2019) states that the right to professional legal assistance is provided by a defender chosen by the person and free of charge in cases regulated by law.

The Law on the Bar and Practice of Law (adopted on July 05, 2012 № 5076-VI as amended as of July 17, 2020), is the key legislative act that proclaims the organizational and operating principles of the bar and the practice of law in Ukraine, particularly the requirements for becoming an advocate, the responsibility of advocates, types of practice of advocate profession, the system of advocates' self-governance, etc. It outlines provision of legal defence, legal representation, and other types of legal assistance as the professional activities that can be provided by an advocate.

Several by-laws regulating the advocate profession and supporting the implementation of the Law on the Bar should be also mentioned here:

- Charter of non-state non-commercial non-profit professional organisation "Ukrainian National Bar Association" ("the UNBA");
- The Rule of professional conduct;
- Regulation on the qualification and disciplinary commission of the Bar;
- Rules on the Higher qualification and disciplinary commission of the Bar;
- Regulation on Representative Offices of Ukrainian National Bar Association;
- Resolution No 201 on convening the conferences of regional advocates, establishing quotas on representation, approving the procedure for nominating and electing delegates to the conferences of regional advocates and the rules of procedure for holding thereof;
- Regulation on the Bar Council of Ukraine;
- Regulation of the Higher Audit Commission of the Bar.

The legal framework in Ukraine guarantees the independence of the legal profession. The state authorities are not involved in the functioning of the Bar association that is self-governed. In this respect and having in mind the institutional set-up and functioning of the Bar, it can be assessed as in compliance with the CoE standards.

B. Institutional framework

All advocates of Ukraine are united under the Ukrainian National Bar Association as the official bar association. Its creation, organisation and activities are regulated by the Law on the Bar²⁵³.

The UNBA is governed by the Congress of Advocates of Ukraine as the highest body of the bar self-government in Ukraine. The Congress of advocates of Ukraine is convened by the Bar Council whose work is regulated by a Regulation adopted in 2012. Respectively, on regional level, organisations have their advocates' conferences and Bar councils. On national and regional level there are two additional bodies owing powers in qualification of advocates,

²⁵² Article 59 of the Constitution "Everyone has the right to professional legal assistance. Such assistance is provided free of charge in cases envisaged by law. Everyone is free to choose the defender of his or her rights."

²⁵³ Article 45 of the Law on the Bar and the Practice of Law "The Ukrainian National Bar Association is a non-governmental non-profit professional organization comprising all Ukrainian advocates and formed for the purpose of ensuring implementation of the objectives of advocates' self-government."

disciplinary proceeding, and auditing. Those are the Higher Qualification and Disciplinary Commission of the Bar and the Higher Audit Commission of the Bar on the national level and qualification and disciplinary commissions of the Bar and audit commissions of the Bar on regional level. The organisation, work and powers of those bodies are regulated by the Regulation of the Bar Council in Ukraine, Regulation on the Higher Qualification and Disciplinary Commission, Regulation on the Higher Qualification and Disciplinary Commission and Regulation of Higher Audit Commission of the Bar. An “International Relations Officer” is operating at the Ukrainian National Bar Association.

In parallel to the UNBA, there are other associations of advocates, established as nongovernmental entities. They are created in accordance with Article 18 of the Law on the Bar providing for advocates having the right to found local, national, and international unions in accordance with the procedure established by law. In this context the All-Ukrainian public organisation “Ukrainian Bar Association” (“the UBA”) under which a Forum of Young Advocates is organised and the Ukrainian Women Lawyers Association “JurFem” should be mentioned.

4. ANALYSIS OF THE SYSTEM OF LEGAL REPRESENTATION

A. Monopoly of legal services by advocates

The Constitution protects the monopoly of advocates to the extent that only an advocate represents another person before the court and defends a person against prosecution. Though Article 59 gives an option for a person to choose its defender, Article 131 para 2 puts some limits and defines that this could be only an advocate. At the same time, some exceptions for certain type of court procedures are allowed when determined by the law.

Civil Procedure Code (adopted on March 18, 2004 № 1618-IV as amended as of July 14, 2020) follows the constitutional approach. The general rule is that a court representative may be an advocate or a legal representative²⁵⁴ (see also Article 19 of the Civil Procedure Code)²⁵⁵. Those, explicitly listed in the Code, are parents, adoptive parents, guardians, or other persons determined by law when it concerns children as well as people who are placed under guardianship.

Certain exceptions from this rule exist, limiting the advocates’ monopoly. Article 60 para 2 provides that in labour cases and minor disputes (see article 19 - 6) a person might be represented in the court room by a person who is not an advocate. Such person should meet several conditions, such as be at least 18 years old, and to possess civil procedural capacity, i.e., duly certified powers of court representation. Para 4 of Article 60 intends to prevent conflict of interests in cases when one person simultaneously represents several plaintiffs or defendants. Following that line, the Code also lists people who cannot be legal representatives.

The Criminal Procedure Code (adopted on April 13, 2012 № 4651-VI as amended as of July 21, 2020) does not allow exceptions and its Article 45 is explicit that the defender is an advocate. Such a way it keeps the advocates’ monopoly during a criminal court procedure. Here should be noted that the next article limits the possibility advocates that are not registered under the Unified Register of Advocates of Ukraine to be legal representatives during a criminal procedure. However, the Criminal Execution Code (adopted on 11 June 2003 №

²⁵⁴ Article 60. of the Civil Procedure Code “The representative in the court can be an advocate or legal representative.” <http://continent-online.com/>

²⁵⁵ Article 15. of the Civil Procedure Code “Legal assistance

1. The participants in the case have the right to use legal assistance.

2. Representation in court as a type of legal assistance is carried out by an advocate (professional legal assistance), except for cases established by law.

3. Free legal aid is provided in accordance with the procedure established by the law governing the provision of free legal aid.”

1129-I Vas amended as of July 21, 2020) stipulates that legal assistance of a convicted person is guaranteed giving him an option to be represented not only by an advocate, but by another specialist.²⁵⁶

The Code on Administrative Offences (adopted on December 7, 1984 № 8073-X as amended and supplemented as of November 6, 2020) is not so strict and gives an option for other specialists in the field of law who are not advocates to represent victims in the cases of administrative offences²⁵⁷. Administrative Procedure Code (adopted on July 6, 2005 № 2747-IV as amended as of July 7, 2020) uses the same approach as the Civil Procedure Code, namely in Article 16 para 2 it states that representation in court, can be provided by an advocate (professional legal assistance), except in cases established by law. Later in Article 57 para 1²⁵⁸ it uses again the word “advocate” giving priority to them in administrative cases. However, several exceptions are listed in the next paragraphs defining that in cases of insignificant complexity and in other cases determined by this Code, the representative may be a natural person who has administrative procedural capacity. Respectively, for administrative bodies, administrative procedural capacity belongs to state and local authorities, their officials, enterprises, institutions, organizations (legal entities). The advocates' monopoly is once again confirmed by the detailed regulations that are given when determining their remuneration (Article 134).

May 19, 2020, the draft Law on Mediation No. 3504²⁵⁹ – drafted by the Ministry of Justice in cooperation with mediators' community – was registered in the Parliament and approved in the first reading on July 15, 2020²⁶⁰. The Draft Law proposes that anyone can play the role of mediator – if he/she has the necessary qualifications – irrespective of the profession that he/she fulfils. Currently an advocate can be a mediator if he/she took special training and adherence to internationally recognized ethical principles of mediation, as well as the basic principles of legal ethics. The regulation needs further development, considering the ethical issues of combining these professions.²⁶¹

As a conclusion, legal advice as a regular and paid activity may be provided by advocates, lawyers not admitted to the Bar and by any other person who does not have a law degree. In this regard, still some additional survey should be done so that to evaluate the quality of legal advice provided by non-advocates.

Court representation is carried out only by advocates for all types of cases with certain exceptions. To this extent, the present legislation and practice follow the CoE standards that give emphasis on legal assistance which presupposes that the defender is sufficiently legally qualified for effective participation in the court proceedings.²⁶²

B. Legal Aid

B1. Legal framework

The Constitution also proclaims that everyone has the right to assistance from a professional advocate provided free of charge in cases envisaged by law. Such a way the principle of free

²⁵⁶ Article 8 para 2 of the Criminal Execution Code “The convicted person is guaranteed the right to legal assistance. In order to obtain legal assistance, convicted persons can use the services of advocates or other specialists in the field of law, who, by law, are entitled to provide legal assistance personally or on behalf of a legal entity. This right extends to convicts undergoing treatment in health care institutions.”

²⁵⁷ Article 270 of the Code on Administrative Offences “The interests of the victim may be represented by a representative - an advocate, another specialist in the field of law, who by law has the right to provide legal assistance in person or on behalf of a legal entity.”

²⁵⁸ Article 57 para 1 of the Administrative Procedure Code “The representative in the court can be an advocate or legal representative.”

²⁵⁹ <https://newjustice.org.ua/>

²⁶⁰ www.rada.gov.ua

²⁶¹ <https://www.pravojustice.eu>

²⁶² See: Harris, D.J., M. O'Boyle, E.P. Bates, C.M. Buckley et al., Law of the European Convention on Human Rights, 3 rd ed., Oxford: Oxford University Press, 2014, p. 478.

legal aid is outlined on a constitutional level and gives basis for the adoption of laws and by-laws in that field. It could be said that the Constitution takes important steps for adoption of legislation that defines the right to legal aid, procedures for exercising it, grounds and procedures for its provision, and government guarantees.

In 2011 Ukraine has adopted a special law detailing the provision of the free legal aid. The Law on free legal aid (adopted on June 2, 2011 № 3460-VI as amended as of June 16, 2020) puts the focus on and defines legal aid as provision of legal services to safeguard human and civil rights and freedoms, protect them, and restore, if violated. The legal services include provisions of legal information, advice, and clarifications on legal issues; preparing appeals, complaints, and procedural and other legal documents; representation of persons before courts, other government agencies, local self-government agencies, and other persons; defence against charges; and facilitating a person's access to secondary legal aid and mediation. The Law defines the circle of persons that can enjoy the right of free legal aid. Those are described as all citizens of Ukraine, foreigners, and stateless persons, including certain vulnerable groups.

As the main legislative act, the Law defines the essence of the right to free legal aid, procedure for exercising this right, the grounds and procedure for providing free legal aid of two separate types (free primary legal aid ("the FPLA") and free secondary legal aid ("the FSLA"), government guarantees for the provision of free legal aid, principles of the state policy, etc.

The Law on the Bar is concise regarding legal aid, leaving the details to be specified in the Law. Nevertheless, Article 25 para 2 thereof determines that the quality, completeness, and timeliness of free primary legal aid by advocates shall be made upon request by bodies of local self-government, and in the case of free secondary legal aid – upon request by a body (agency) authorized by law to provide free legal aid, and by the commissions formed by regional bar councils for that purpose. In addition, article 17 of the Code of Ethics stipulates that, lawyers defending a client through the free legal aid system, has no right to provide professional legal assistance under private contract to the same client in the same proceeding, as well as from the same, or related circumstances under which the lawyer was engaged to provide free legal aid.

The Criminal Procedure Code is another essential legislative act regulating the provision of FSLA. In its Article 20 it establishes the right to protection. In addition, it defines the right of suspects and accused persons to receive legal aid at no cost (para 3 of Part 3 of Article 42). The Criminal Procedure Code also gives obligations for their defenders, and victims and their representatives, the general rules of participation of defenders and representatives in criminal proceedings, the procedure for participation of a defender by designation or in a single procedure, applicable requirements for compulsory participation of a defender, the procedures for reporting cases of detention of individuals to FSLA centres, etc.

The Civil Procedure Code states that legal aid is provided in the manner envisaged by the Law of Free Legal Aid. As a rule, a representative in court may be an advocate or another person who has reached the age of eighteen, has civil capacity and duly certified powers for representation in court. In this case, the authority of the representative of a natural person who is a subject of the right to secondary legal aid and at whose request the decision to provide such assistance may be certified by an official of the Centre for FSLA (Part 2 of Article 62 of the Civil Procedure Code of Ukraine).

The Administrative Procedure Code uses the same method as the Civil Procedure Code, namely it does not set forth special procedures related to the provision of free legal aid.

In accordance with the provisions of the Code on Administrative Offenses the persons to whom administrative detention was applied, fall to a separate category of subjects of the right to legal aid. In connection with that, officials entitled to carry out administrative detention have the duty to inform the free secondary legal aid centres about each case of implementation of

a relevant coercive measure unless a person defends himself/herself personally or invites a defender²⁶³.

A specific piece of legislation is the Law on Local Self-Government. According to para 39.1 of Part 1 of Article 26 thereof city councils are addressed, including "creation in accordance with the law at the expense of the local budget of institutions for free primary legal aid, appointment and dismissal of heads of these institutions, involvement of individuals or legal entities of private law to provide free primary legal aid in the manner prescribed by law".

Several by-laws are important in the legal regulation of free legal aid²⁶⁴:

- Regulation of the Cabinet of Ministers of Ukraine dated June 6, 2012, № 504 on the Establishment of the Coordination Centre for Legal Aid Provision and the Liquidation of the Centre for the Legal Reform and Drafting of Laws under the Ministry of Justice;
- The Regulation of the Cabinet of Ministers of Ukraine of February 11, 2016, No. 99, on the Reform of Territorial Agencies of the Ministry of Justice of Ukraine and the Development of the Free Legal Aid System, pursuant to which, a decision was made to dissolve territorial agencies of the Ministry;
- The Regulation of the Cabinet of Ministers of Ukraine of December, 212016, No. 989, on Amendments to Paragraph 17 of the Regulations on the Coordination Centre for Legal Aid Provision, etc.;
- The Regulation of December 28, 2011, No. 1363, enacting the Procedure for Reporting Cases of Detention, Administrative Arrest, or Preventive Custody to FSLA Centres;
- The Regulation of the Cabinet of Ministers of Ukraine of December 28, 2011, No. 1362, enacted the Procedures and Conditions of Competitive Selection of Advocates for Provision of Free Secondary Legal Aid. The Procedures and Conditions establish the mechanism for competitive selection of advocates for provision of secondary legal aid and requirements for their professional level;
- The Regulation of the CMU of September 17, 2014, No. 465, on Service Fees and Compensation of Expenses of Advocates Providing Free Secondary Legal Aid;
- The Regulation of the Cabinet of Ministers of June 24, 2016, No. 401, on the Use of Interpreters (Sign Language Interpreters) for Providing Free Secondary Legal Aid;
- The Regulation of the Cabinet of Ministers of Ukraine of December 21, 2016, No. 1048, on Amendments to the Regulation of the Cabinet of Ministers of Ukraine of September 17, 2014, No. 465, introduced the revised Procedure for payment of fees and compensation of expenses of advocates providing FSLA and the Methodology for calculating the amount of fees of advocates providing FSLA.

Also, several regulations were adopted on the procedures for provision of free legal aid addressing provision of free primary legal aid in local communities across Ukraine, including the following:

- The Order of the Ministry of Justice on Approval of the Procedures and Criteria for Local Self Government Agencies to Engage Legal Entities under Private Law in Providing Free Primary Legal Aid, No. 891/5 of June 14, 2012;
- The Order of the Ministry of Justice on Approval of the Standard Regulations on a Free Primary Legal Aid Provider, No. 483/5 of September 28, 2012;

²⁶³ Part 3 of Article 261 of the Code of administrative offences "The bodies (officials) authorized to carry out administrative detention shall inform the centres for the provision of free secondary legal aid in accordance with the procedure established by the Cabinet of Ministers of Ukraine, unless the person defends himself personally or has invited a defender."

²⁶⁴ "Legal framework for free legal aid in Ukraine" Etibar Vali Maharramli Issues 2, 2020 "Public Administration and Law Review" www.public.scnchub.com

- The Order of the Ministry of Justice on Approval of the Operating Procedures of Public Reception Offices¹⁷ for Free Primary Legal Aid, No. 2047/5 of September 21, 2011.

In addition to that, in 2015, the Ministry of Justice of Ukraine issued a series of orders establishing a new institutional framework for the legal aid system, setting new tasks for legal aid centres, and addressing cooperation between regional and local FSLA centres, as well as taking steps to improve the quality of FSLA services, introducing new approaches to calculating the amount of advocates' fees and payment procedures for their FSLA services, etc. These included the following orders of the Ministry of Justice of Ukraine:

- On Amendments to the Regulations on Free Secondary Legal Aid Centres of March 10, 2015, No. 329/5;
- On Approval of the Procedures for Managing the Register of Advocates Providing Free Secondary Legal Aid by the Coordination Centre for Legal Aid Provision of April 30, 2015, No. 633/5;
- On Amendments to Standard Form Certificates of Delivery of Free Secondary Legal Aid Services and Annexes Thereto of April 30, 2015, No. 634/5, and On Amendments to Paragraph 2, Subparagraph 2.1 of Annex 1 to the Standard Form Certificate of Delivery of Free Secondary Legal Aid Services of August 10, 2015, No. 1461/5;
- On Amendments to Quality Standards for Free Secondary Legal Aid in Criminal Proceedings of October 13, 2015, No. 1960/5 and numerous others.

It is also worth mentioning the two orders of the Ministry of Justice that are of administrative rather than regulatory nature, but are also instrumental in the institutional development of the legal aid, namely:

- On the Development of the Free Secondary Legal Aid System of March 10, 2015, No. 331/5. Pursuant to this order, local FSLA centres were established and FSLA centres in Kyiv and Kyiv Oblast were renamed due to changes in work organization and focus;
- On the Restructuring of Territorial Agencies of the Ministry of Justice of Ukraine and the Development of the Free Legal Aid System of December 25, 2015, No. 2748/5.

Last but not least, the Decree of the President of Ukraine on the Concept of Free Legal Aid of Ukraine No. 509/2006 of June 9, 2006, should be mentioned. The provisions of the Concept establish basic principles for the free legal aid system and set forth conducting experiments to test different organizational forms. As a result of generalisation of outcomes of the said experiments a draft was developed, and the Law of Ukraine on Free Legal Aid was adopted. After its adoption by the State Target Program of formation of the legal aid system for 2013-2017, approved by the Cabinet of Ministers of Ukraine No. 394 of February 13, 2013 the formation of the free legal aid system has been ensured by organizational and legal means.

B2. Eligibility

The scope of legal aid in Ukraine comprises of provision of free primary and secondary legal aid.

Free primary legal aid is focused on informing persons on their rights, giving legal information and consultations as well as explanation of legal issues. It also includes drafting statements, complaints, and other legal documents (except for procedural documents) and assisting people in accessing secondary legal aid and mediation.

Article 7 of the Law on Legal Aid stipulates that one of the types of primary legal aid is the provision of assistance in ensuring a person's access to secondary legal aid and mediation. The free legal aid accepts mediation as a remunerated form of legal aid and support with its own list of mediators. This is an important instrument to disseminate the use of mediation

broadly. Currently, "mediation offices" have been opened based on the free legal aid system; cooperation has been established with volunteer mediators who provide free mediation services in family and inheritance disputes free of charge; a training program has been developed for further trainings on mediation.²⁶⁵

Secondary legal aid includes defence of legitimate rights and interests, drafting legal documents, court representation and in state agencies, self-government authorities, and versus other persons. Legal aid can also be granted for pre-trial investigation. This provision corresponds to Article 6 para 1 of ECHR, which requires that access to a lawyer should be provided from the first interrogation of a suspect by the police, the public prosecutor and the investigating judge²⁶⁶.

In criminal cases, there is a possibility for the defendant to be assisted by an advocate free of charge, but not for the victim. Courts grant or refuse legal aid. There is also a private system of legal expense insurance. Article 20 para 1 of Law on free legal aid does not give ground to refuse legal aid based on the merits of the case.

The explicit reference to legal aid in detention shows the state commitment to safeguard the right to defence against charges and provide legal aid in cases heard in courts and other government agencies.

By virtue of an amendment in June 2016, the state guarantees legal aid provided by qualified advocates delivering professional services which is in compliance with the requirements of the Resolution 78 (8) of the Committee of Ministers on legal aid and advice. The right to professional legal aid means a person's ability to receive high-quality services of a legal professional as guaranteed by the national constitution, which only a trained professional advocate and no other person can provide. Notably, the proposed formula is without prejudice to the right to professional legal aid in general, including free legal aid which can be provided by legal professionals other than professional advocates. However, the emphasis is specifically on receiving guaranteed professional aid.

The Ukrainian legal aid system envisages a wide range of beneficiaries for the secondary legal aid. All persons under the jurisdiction of Ukraine, including citizens of Ukraine, and foreigners and stateless persons legally staying in Ukraine, are eligible for all types of legal services. Law gives an exhaustive list of FSLA beneficiaries. Subject of the secondary free legal aid are representatives of vulnerable groups, including: persons whose average monthly income does not exceed the minimum subsistence level, persons with disabilities who receive a pension or allowance that does not exceed the minimum subsistence level, including orphan children, children deprived of parental care, children in difficult circumstances, children affected by war or armed conflict, internally displaced persons, veterans of war, persons suffered from domestic or gender-based violence persons to whom administrative detention or administrative arrest are applied, persons to whom custody as a restrictive measure is applied persons who, under the provisions of the criminal procedural law, are considered to be detained.

This list is supplemented by other law and regulations previously mentioned. Thus, the Law on Free Legal Aid ensures a large-scale access to justice and stronger protection of human rights in compliance with the CoE Committee of Ministers' Recommendation Rec(93)1 on effective access to the law and to justice for the very poor.

Following the Guidelines of the CoE Committee of Ministers on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law, the eligibility to secondary free legal aid is based on the financial situation of the applicant. Moreover, certain

²⁶⁵ "[Mediation Gap Analysis](#)"—July 2020, Justice E. Maan, Prof. dr. C.H. van Rhee, Luiza Romanadze, Alina Serhieieva, Svitlana Sergejeva, Prof. dr. Volodymyr Rodchenko, EU funded Project "Pravo-Justice"

²⁶⁶ ECtHR, *Salduz v. Turkey*, No. 36391/02, 27 November 2008, para. 54, ECtHR, *Nechiporuk and Yonkalo v Ukraine*, No 42310/04, 1 June 2011, para 262.

categories of the population can benefit from free legal aid irrespective of their financial situation (war veterans, refugees etc.).

Special attention should be given to the impact of the new Law of Ukraine on Prevention and Combatting Domestic Violence, effective from January 2018. This piece of legislation amended the Law on Free Legal Aid by further expanding the list of categories of people entitled to free secondary legal aid. More specifically, the new law granted free legal aid to all children under the age of 18 (until recently only orphans, children deprived of parental care, children in difficult living conditions and children who have suffered from hostilities or armed conflict were eligible for free legal aid) and persons who have suffered from domestic violence or gender-based violence.

The legal aid does not cover court fees or that are related to the enforcement of judicial decisions²⁶⁷ which infringes the right of access to justice, as it does not allow a person to process a legal case in its entirety free of charge. However, according to the article 5 of the Law of Ukraine on Court Fees, there 24 categories of persons that are exempt from paying court fees. Civil Procedure Code in its Article 136 gives an option to the court, taking into account the property status of the party, to postpone or defer the payment of the court fee for a certain period. The same approach is followed in the Criminal procedure code respectively articles 119 and 120.

Under the Resolution of the Cabinet of Ministries of Ukraine dated June 24, 2016, № 401 “Certain issues of involvement of interpreters (sign-language interpreters) for the provision of free secondary legal aid” it is envisaged that the centres for free secondary legal aid involve an interpreter (sign-language interpreter) to ensure the provision of free secondary legal aid to the subjects of the right to such aid in accordance with the Law of Ukraine “On Free Legal Aid”, if the mentioned subjects of the right to such aid do not speak the state language and/or are deaf, dumb or deafmute. It is determined that the interpreters (sign-language interpreters) are involved for securing the provision of free secondary legal aid on the basis of concluded agreements on the provision of translation services, including those with individual entrepreneurs/legal entities, in accordance with the requirements of civil law. The present situation is in compliance with the standards set in the Resolution 78 (8) of the Committee of Ministers on legal aid and advice, the Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law (para 19) as well as Article 7 Council Directive 2002/8/EC of January 27, 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

B3. Institutional framework

The Coordination Centre for Legal Aid Provision is established as a governmental agency to form an effective legal aid system in Ukraine and ensure accessibility and quality of legal aid. Coordinated by the Ministry of Justice of Ukraine a Supervisory Body of the abovementioned Centre is also established with a purpose to ensure the independence and transparency of the legal aid system, and the effective implementation of state policy in the sphere of legal aid. For better access, territorial offices of the Coordination Centre are also organised. Recognizing the unique needs of respective regions (city, district), specific structural units are established to provide all types of legal services in a respective territory: 23 regional centres for free secondary legal aid provision, 84 local centres for free secondary legal aid provision and 432 legal aid bureaus (sub-divisions of local centres localized in small towns)

Regional centres for free secondary legal aid provision provide early access to legal aid to suspects and accused persons in criminal proceedings, detained and arrested persons. They coordinate free legal aid provision by FSLA centers in respective regions. Local centres for

²⁶⁷CEPEJ, Evaluation Questionnaire (2018-2020), 2. Access to justice and all courts, 2.1. Legal Aid, 2.1.1. Scope of legal aid <https://rm.coe.int/>

free secondary legal aid provision provide free primary and secondary legal aid in civil and administrative matters, and to victims and witnesses in criminal proceedings. Legal aid bureaus are sub-divisions of local centres localised in small towns and remote areas. They provide free primary and secondary legal aid in civil and administrative matters as well as are active in legal empowerment of local communities, and other functions According to the Standard Regulations on Legal Aid Bureaus, approved by the joint order of the Ministry of Justice of Ukraine and the Coordination Centre for Legal Aid dated March 31, 2016, № 26

In this context it should be mentioned so called «PRAVOKATOR» Legal Clubs serving as interregional platforms for partnering and networking of lawyers, civil society and the general public. Currently there are five PRAVOKATOR» Legal Clubs existing as a part of in the organizational structure of the Coordination Centre for Legal Aid. They are creating with purpose of being a training centre for the training of free legal aid providers and legal communities in general, to promote the exchange of best practices and the implementation of innovations within legal field.

Some specific features of legal aid in Ukraine are remote counselling access points that provide on a regular basis access to legal assistance in the premises of partner institutions and organisations, in particular libraries, local authorities, employment centres, penitentiary facilities, etc. They also provide consultations by videoconference points as well as legal assistance in remote settlements or specialised institutions (hospitals, geriatric boarding houses, etc.) according to a specified schedule, and domiciliary for persons with disabilities. Another advantage of the system is the unified contact centre of the free legal aid system”.. They provide legal advice and clarification of legal issues and are involved in registration of notifications. «WikiLegalAid» is an online legal information platform containing and providing free legal information of the most common legal issues in accessible language. It also includes samples of documents and court rulings. From 2020 local centres provide legal assistance by mean of digital platforms, such as Viber, Telegram and client cabinet.

Compliance with standards of free secondary legal aid provision is mandatory for advocates and jurists. To provide free secondary legal aid, an advocate must take part in a competition, and go through a distance learning course on the legal aid system before officially cooperating with the free legal aid system. Selection of the legal aid team is based upon merit, and an assessment of the required professional competencies, as well as a genuine desire to serve and help other.

For the quality system the Coordination Centre uses the model of Alain Paterson and at the beginning they tried to introduce it for all advocates that provide free legal aid. At present, the “peer review” quality control is introduced only for lawyers hired by the Coordination Centre. A commission for evaluation of quality is set up to check the quality of both primary and secondary free legal aid providers.

The Coordination centre proceeds payments of the services provided, based on the documents presented by the advocates. The amount to be paid is regulated by the Decree of the Cabinet of Minister 465 in relation to paying fees advocates. The system for determining the lawyers' fees is relatively complex, but an electronic calculator is created and used by advocates, in which they record case data and electronically calculate their remunerations.

The so described institutional framework is in full compliance with the Recommendation Rec (93)1 on effective access to the law and to justice for the very poor and the Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law.

GOOD PRACTICES AND OUTSTANDING CHALLENGES

A. Good practices

Though some elements of the free legal aid system are in process of improving, generally it can be assessed as in compliance with the CoE standards. What should stand out is the good cooperation between the Coordination Centre and NGOs providing free legal aid for persons not eligible under the FLA system²⁶⁸.

B. Present legal and institutional gaps

Though the Constitution is noticeably clear about the advocates' monopoly, presently there is a draft law only on liquidation of monopoly of advocates, which was verified by the Constitutional Court and supposedly have been adopted in 2021. The text of the draft law providing for the requirement of exclusive representation shall be abolished. The advocates' monopoly will remain solely in criminal proceedings.²⁶⁹

Article 131 para 2 of the Constitution, as well as Article 60 para 2 of the Civil Procedure Code allow an exemption from the advocacy monopoly in the court room, namely in disputes of minor importance²⁷⁰.

Some stakeholders consider that the free legal aid system covers too many cases and gives right to free legal aid to an unnecessarily large number of people. Additionally, grounds for refusal of the secondary legal aid do not concern the applications relating to the claims deprived of any chance of success, abusive or vexatious claims. In this context, it is recalled that the Council of Europe standards specifically recommend the existence of merits testing schemes²⁷¹.

In addition, the Ukrainian legislation does not provide the right of a person to choose freely its advocate within the legal aid system. The fundamental right to a fair trial in criminal proceedings guarantees the right to defence by a lawyer selected by the applicant²⁷². Despite the fact that this right is not absolute²⁷³, imposing a lawyer on a defendant against her/his will, causes a risk that the trial might be unfair and violate the defendant's rights. Thus, the total deprivation of the right to choose one's own lawyer does not seem to comply with Article 6 (3c) of the ECHR and Article 48 para 2 of the EU Charter. The defendant's wishes must be considered and potentially entertained at the stage of the lawyer's appointment²⁷⁴.

²⁶⁸the Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law (&20).

²⁶⁹ Law of Ukraine on amending the Constitution of Ukraine (concerning abolition of a lawyer's monopoly) "1. Article 131-2 shall be worded as follows: "Article 131-2. The bar operates in Ukraine to provide professional legal assistance. The independence of the bar is guaranteed. The principles of organization and activity of the bar and the practice of advocacy in Ukraine are determined by law. Only a lawyer protects a person from criminal charges." <http://search.ligazakon.ua/>

²⁷⁰ Article 19 of the Civil Procedure Code determines disputes of minor importance as disputes in which the cost of the claim does not exceed one hundred times the subsistence level for able-bodied persons (according to the information received by stakeholders around 6 000 euro).

²⁷¹ The Guidelines of March 31, 2021 indicate that: "With a view to contributing to robust and financially sound legal aid schemes, procedures for testing an applicant's means and the likelihood of a successful outcome of the legal proceedings should be in place". (§ 10).

²⁷² Open Society Justice Initiative, *Legal aid in Europe: Minimum requirements under international law*, p. 8.

²⁷³ ECtHR, *Lagerblom v Sweden*, No. 26891/95, 14 January 2003, para. 54.

²⁷⁴ ECtHR, *Croissant v. Germany*, No. 13611/88, 25 September 1992, para. 29.

C. Gender equality and youth participation

As Article 18 of the Law on the Bar allows, the Ukrainian Women Lawyers Association “JurFem” is established. It is one of the first associations in Ukraine, that is intended to become a platform for exchange of knowledge, experience, development and support of women in the legal profession. According to the latest research (published on 11 May 2020)²⁷⁵ done by the Association, on gender aspects of childcare leave if the mother is a notary or advocates, women advocates are 20 839 that is about 38% of all advocates. The research puts as main problem that neither women advocates, nor their family member are entitled on maternity if they do not work on employment contract.

However, the stakeholders do not have a sense of imbalance and report the existence of gender balance in the profession. The acceptance of women in the profession by both colleagues and citizens is dignified. Women are very well presented as members of the self-governing bodies. The only problem that has been reported during interviews is that in big law offices, women reach middle level management positions, but rarely they are partners. The reason found behind this problem is that companies do not apply policies or mechanisms to support women realization after they return from motherhood.

Under the system of the free legal aid a gender equality approach is taken. The Strategy, adopted and implemented by the Coordination centre, aims at ensuring equal access to legal information and justice, strengthening the legal capacity of representatives of socially vulnerable groups, with special focus on women and domestic violence cases. In this regard, the gender approach is applied to all policies, procedures, and planning for implementation changes in the FLA system and is followed by all regional centres as well. All managers and staff are involved in the training and education process, on a permanent basis, on issues of gender equality to form and improve competencies in the field of implementation of gender equality policy and gender mainstreaming.

Within the UNBA the Youth Committee "UNBA NextGen" was established in 2018. The purpose of the Committee is to develop a community of young lawyers and to introduce a platform for networking, exchange between different generations in the profession and support by more experienced colleagues.

The Forum of Young Advocates of all-Ukrainian public organization “Ukrainian Bar Association” is created to promote young advocates’ career and personal development; create conditions for communication between young advocates and their senior colleagues; intensify their participation in the activity and development of the Association. The membership is automatic when an advocate is applying to become member of the UBA and if is under category of a “young advocate”. All forum members have discount from the enrolment fee payment and on participation in paid events of the UBA.

Young advocates enter the profession without obstacles. The only issue that can be mentioned here is the low quality of internship of those graduates who have not assisted an advocate. The Bar Council has already proposed legislative amendments, so as to eliminate this practice.

D. Ongoing and future initiatives in a pragmatic fashion

In August 2019, a draft for amending Article 131-2 of the Constitution is introduced to the Parliament by the Ukrainian President. The amendment envisages to abolish the advocate's monopoly, namely, to exclude the provisions of the fourth part of Article 131-2 of the current Constitution of Ukraine, according to which only a lawyer represents another person in court.

Accordingly, it is proposed to remove the part five of Article 131-2, according to which the law may provide exceptions for representation in court in labour disputes, disputes concerning the protection of social rights, elections and referendums, minor disputes, as well as

²⁷⁵ See the infographics in English on <http://jurfem.com.ua/>

representation of minors and persons who have been declared incompetent by a court or whose legal capacity is limited. The draft is still pending for the Parliament's approval.

In February 2021, a draft law "On Amendments to Certain Legislative Acts Concerning Simplification of Access to Free Legal Aid and Improvement of the Quality of Its Provision" is also introduced aiming more effective implementation of the rights of children, incapacitated persons and persons with limited legal capacity, to receive high-quality free legal aid by simplifying the mechanism of providing such assistance, settling the issue of mandatory participation of an advocate in court proceedings to limit the civil capacity of an individual, declaring an individual incompetent and restoring the civil capacity of an individual; providing a person with compulsory psychiatric care, as well as improving the quality assurance procedure of free secondary legal aid.

Since January 2019, the Coordination centre for Legal Aid Provision participate in a pilot project "Recovery program for juvenile suspected of committing a criminal offence". The project aims at introducing restorative measures in criminal proceedings for criminal offenses and minor offenses committed by minors and is implemented together with the Office of the Prosecutor General. Lawyers included in the Register of Attorneys Providing Free Secondary Legal Aid, on voluntary basis, are trained to be mediators under the Recovery Program for juveniles who are suspected of committing a criminal offense. Regional centres receive from the prosecution offices applications for participation in the Program after which they decide on the application of the Program and issues an order for mediation to the respective mediator. Regional centres organize meetings between the parties and the mediator during which the mediator explains to the parties the procedure of the Program, its consequences, gives them the opportunity to agree on the terms of the agreement and the appropriate restorative measures. In order to determine the measures that may be provided for in the agreement, as well as to receive advisory support on their choice in relation to a particular minor, the regional centre may interact with the State Institution "Probation Center" and other institutions or organizations. The mediators transfer the information to the regional centre that on its turn, inform the prosecution office on the results of the minor's participation in the Program.

RECOMMENDATIONS

It is recommended to take several additional steps, as follows:

- An additional survey among judges and through court cases monitoring should be done so that to clarify the quality of legal representation during the so-called cases of minor importance, where the advocate's monopoly in the court room is not obligatory.
- A study should be done on the issue of how to fully develop the potential of women lawyers so that they have access to the top management of Bar associations in developing and implementing a strategy towards this direction.
- A new detailed assessment of the legal aid system in Ukraine in the light of CoE standards should be done as an upgrade of the previous one, prepared within the framework of the Council of Europe Project "Continued support to the criminal justice reform in Ukraine", funded by the Danish Government.²⁷⁶ The new assessment should focus on the status of the current legal aid system, evaluate in detail the quality of services and its efficiency, as well as checking how the recommendations given thereto are achieved. It also should provide recommendations as to potential changes and improvements.
- Reconsider the definition for cases of minor importance and either reduce the required amount or eliminate it altogether so that more citizens to be represented by an advocate.

²⁷⁶ <https://rm.coe.int/>

- Improve the mechanism for assessing the quality of the provision of free legal aid in line with the CoE standards that envisage the possibility of assessment of the quality of free legal aid for all advocates that provide free legal aid²⁷⁷.
- Provide the defendants with option to choose its advocate when the latter is provided free of charge by the legal aid system.
- Include the costs and fees of other professionals, such as notaries, bailiffs, technical experts, legal translators²⁷⁸ or interpreters, whenever the case requires it as part of the free legal aid. The same applies to the fees that are related to the enforcement of judicial decisions.

²⁷⁷ The Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law indicate that as well.

²⁷⁸ Upon this subject, CJEU (C- 670/15, *Šalplachta*, 26 July 2017, ECLI:EU:C:2017:594), interpreting Articles 3, 8 and 12 of Council Directive 2003/8/EC, has ruled that “legal aid granted by the Member State of the court hearing the particular case, in which a natural person domiciled or resident in another Member State has submitted a legal aid application in the context of a cross-border dispute, also covers the costs paid by that person for the translation of the supporting documents necessary for the processing of that application”. Although, the ruling of CJEU refers to legal aid in cross- border disputes, it also indicates the legal aid standards in Europe.

COMPARATIVE ASPECTS OF LEGAL REPRESENTATION AND LEGAL AID

This section provides a summary of the analysis of the legal framework of the systems of legal representation, including legal aid and the monopoly of advocates in Armenia, Belarus, Georgia, the Republic of Moldova and Ukraine.

A. The comparative perspective of monopoly of legal services

As regards the monopoly of legal services, in Armenia, the Republic of Moldova and Ukraine, the monopoly of advocates is absolute in criminal cases. The same does not apply in Belarus and Georgia, where the criminal procedure code allows representation before courts to be provided by another person, not only by advocates.

In civil and administrative matters, in most of the participating countries representation before courts is allowed from advocates and other representatives. In Armenia though, only advocates, including advocates of foreign states authorised to practice, may represent individuals before the courts of general jurisdiction.

In Ukraine, the general rule is that a court representative may be an advocate or a legal representative. Certain exceptions from this rule exist limiting the advocates' monopoly. Presently, there is a draft law amending the Constitution for liquidation of the monopoly of advocates that supposed to be adopted in 2021. The advocates' monopoly will remain solely in criminal proceedings. The latter raises issues regarding the quality of legal representation.

B. The comparative perspective of national legal frameworks

The institutional setup and the legal framework in the participating countries are generally in compliance with the existing European standards.

The right of legal assistance has a constitutional basis in all participating countries and is specified under several laws and regulations. The exercise of the legal profession is generally a paid activity. There is no discrimination in access to the legal profession.

C. The comparative perspective of legal aid

C1. General observations

Free legal aid is available in all participating countries. The principle of free legal aid is outlined on the constitutional level and gives a basis for the adoption of laws and by-laws in that field. In most of the countries there is a specialised law on free legal aid (Republic of Moldova, Georgia, Ukraine). Most procedural codes also supplement the regulation of free legal aid. In Armenia and Belarus, the right to free legal aid is specified under the Law on Advocacy and the Law on the Bar respectively.

Free legal aid in all participating countries is provided in the following forms: legal consultation; preparing procedural and other legal documents; representation or defence.

In all participating countries, equality and non-discrimination in regard to legal aid provision is ensured. Pro bono legal services are generally provided on a voluntary basis.

C2. Similarities and differences

Types of legal aid

In the Republic of Moldova and Ukraine, the Law provides for two types of legal aid: primary and secondary legal aid.

- Primary legal aid is focused on informing persons on their rights, giving legal

information and consultations;

- Secondary legal aid includes defence of legitimate rights and interests, drafting legal documents, and court representation.

The Armenian law lacks preliminary legal assistance, namely initial legal advice for the right to use legal aid. In this field, the legislation in Belarus and Georgia provides for legal consultation in general.

Institutional Framework. Legal Aid Providers. Qualification mechanism.

Generally, in the participating countries there is an independent or mixed authority, which is in charge of the setting up and functioning of the legal aid system.

In Armenia, the institutional setup and functioning of the legal aid system are implemented by the Office of the Public Defender (OPD), which is a structural unit within the Chamber of Advocates.

In Belarus, the Republican Bar Association unifies regional practice through internal instructions. To get free legal aid, a citizen needs to contact an advocate from a legal consultation at one's place of residence. This is a specific form of providing legal assistance created by local bar associations that provide full financial and organisational assistance. In addition, the local bar association may determine the procedure for providing legal assistance from advocates bureaus, as well as advocate that carries out advocacy activity individually.

In Georgia, there is an independent body, namely the Legal Aid Service, which functions under the supervision of the Parliament. There is also the Legal Aid Council, which is a collective body founded to administer the activity of the Legal Aid Service, as well as to ensure its independence and transparency. Besides the bureau's representative, three persons in the Council are represented by the Bar Association and Public Defender's Office.

In the Republic of Moldova, there is a mixed system that separates the functions between the Ministry of Justice, an independent legal aid authority, namely the National Legal Aid Council and the Union of Lawyers which guarantees an impartial and independent implementation of the legal aid law and a higher quality of the system. There are also territorial offices ensuring a more effective function of the legal aid system.

In Ukraine, the Coordination Centre for Legal Aid Provision is established as a governmental agency to form an effective legal aid system in Ukraine. Territorial offices of the Coordination Centre are also organised.

In Armenia the legal aid is delivered by the Public Defender's Office with the Chamber of Advocates. The Armenian legislation does not have a uniform set of requirements for the provision of qualified legal assistance. However, since 2015 the OPD has been operating the "Electronic Public Defender" (EPD Program). This database is a quality assurance tool.

The legal aid is carried out in Belarus through advocates of legal consultations, advocates bureaus, as well as advocates that carry out advocacy activity individually. After the recent amendments in the legislation regulating the activities of advocates, legal aid will be carried out only within legal consultations. The Belarusian legislation does not have separate set of requirements neither for qualified advocates nor for monitoring the quality of the free legal aid.

In Georgia, legal aid is delivered by the Legal Aid Service. The Legal Aid Service has a monitoring system which works as a quality evaluation system. Specifically, legal aid services guarantee the quality of the services the advocates provide through Quality Assurance System, developed based on so called "Peer Review" methodology.

In the Republic of Moldova, there is a mixed system of legal aid delivery by the Public Defender Office alongside private lawyers. Primary legal aid in the Republic of Moldova can be provided by paralegals or NGOs. Secondary legal aid can only be provided by the public defenders, by private lawyers who deliver legal aid upon request and by NGOS. There are new rules

regarding the selection criteria for legal aid providers, the sanctions for lawyers that break the rules and the appointing of lawyers. There is a lack of quality though due to low fees.

In Ukraine, the state guarantees a legal aid provided by qualified advocates delivering professional services under the Free Legal Aid Coordination Centre. The right to professional legal aid means a person's ability to receive high-quality services of a legal professional as guaranteed by the national constitution, which only a trained professional advocate and no other person can provide. In order to provide free secondary legal aid, an advocate must take part in a competition, go through a distance learning course on the legal aid system prior to being formally engaged. For the quality system the Coordination Centre uses the model of Alain Paterson.

Eligibility

The provision of legal aid is generally related to the financial situation of the beneficiary. However, legal aid is sometimes granted regardless of the beneficiary's financial means.

For example, according to the Armenian law, in civil, administrative and constitutional cases, legal aid is granted if the applicant falls within an exhaustive list of individuals meeting certain social criteria, namely the arguably weaker and/or belonging to a vulnerable group of people. Thus, the eligibility system is disconnected from a financial means test. In criminal cases though, any person (the victim, the suspect or the defendant) lacking sufficient means is entitled of a State-funded advocate.

In Belarus, no financial criteria are being applied when deciding who is entitled to legal aid and there is no mechanism in place for checking a person's income for legal assistance purposes.

According to the law of Georgia, in civil and administrative cases, representation is provided if the person is insolvent and registered in the Unified Database of the Socially Vulnerable Families. In exceptional cases legal is granted to individuals belonging to a vulnerable group of people.

In the Republic of Moldova primary legal aid is granted to any person regardless of his/her financial means. The same does not apply to qualified (secondary) legal aid which is granted to persons who do not have sufficient means to pay in all criminal, civil and administrative cases. There is also a regulation on the methodology of income calculation. However, legal aid is also provided irrespective of the beneficiary's financial means where the presence of a lawyer is mandatory.

In Ukraine, the eligibility to both primary and secondary free legal aid is based on the financial situation of the applicant. Moreover, certain categories of the population can benefit from free legal aid irrespective of their financial situation (war veterans, refugees etc.).

As for the merits test, it is not always applied. In Armenia and Ukraine, legal aid is provided with no merits test being applied. According to the Moldovan law, in criminal cases legal aid is provided where the interests of justice require so. In civil and administrative cases, legal aid is granted on the basis of the complexity of the case. However, there is no clear scope of the provision of the merits test, since there are scarce elements in the laws. The same applies in Georgia, where legal aid is provided in cases which are complex and important.

Early intervention in criminal cases. The right to choose one's own lawyer.

In all participating countries legal representation is provided in all stages of criminal proceedings, including the pre-trial proceedings. Specifically, according to the law of Ukraine, in criminal cases, there is a possibility for the defendant to be assisted by an advocate free of charge, but not for the victim.

There is a total deprivation of the right to choose one's own lawyer by the Armenian law. At the same time, is noticed that there is a problem in criminal proceedings due to double

appointment of lawyers, which has no legal basis. Moreover, there isn't a procedure for the replacement of legal aid lawyers, in case they fail to build a relationship of trust with the beneficiary or demonstrate deficient professional quality. In the Republic of Moldova, it is in the opposite direction: the Coordinator of the territorial office of the National Council for State Guaranteed Legal Aid shall take into account the applicant's request to appoint a certain defence lawyer. Additionally, the defence lawyer, assigned for the delivery of qualified legal aid in a certain case, can be replaced upon a written and grounded request of the applicant. In Belarus, although not explicitly stated in the law, the citizens do not have the right to choose their free legal aid advocate. In Georgia, the beneficiaries are able to choose the public defender. According to the legal framework in Ukraine, it is noted that there is no need to give citizens the right to choose its advocate.

Scope of the free legal aid. Exemption from court fees, enforcement fees and costs of other professionals.

According to the Armenian law, in the event that the beneficiary is not succeeding at the litigation stage, the beneficiary is not exempted from the court fees. In Armenia, there is lack of legal aid provision for the fees that are related to the enforcement of judicial decisions. However, the latter does not constitute a breach of the right to an effective remedy, since the enforcement agents in Armenia are paid state funded. In Armenia, legal aid is also not provided for the costs and fees of other professionals (notaries, translators interpreters, technical advisors or experts etc.) who may be involved in the case.

Moldovan, Belarusian and Ukrainian legislation do not provide for the exemption from court fees. There is also a lack of legal aid provision for the fees that are related to the enforcement of judicial decisions and the costs and fees of other professionals.

In Georgia is the only country where the legal aid covers other expenses necessary for the defence, besides the advocate's fees. Legal aid, though, is not granted for the fees that are related to the enforcement of judicial decisions.

Legal aid in mediation and other ADR proceedings

In Armenia, legal aid professionals cannot represent applicants in a mediation process assigned by the court or any other ADR process, whilst the legal system provides for private mediation, mediation assigned by the court and arbitration.

The Belarusian legislation does not explicitly provide for free legal aid during mediation and executive proceedings. There is no prohibition though on providing legal aid in such procedures.

In Georgia, the Law on Mediation does not explicitly say whether parties during a mediation proceeding have right of free legal aid as well.

In the Republic of Moldova, although legal aid professionals can represent applicants in judicial mediation process, the same does not apply to other ADR proceedings.

The Ukrainian Law on free legal aid provides for legal services, which include mediation.

C3. Summary

A major problem noticed in all participating countries is related to the low financial resources, which implies low cost per legal aid case and low quality of the legal aid services.

At the same time, the number of cases is constantly increasing. Thus, the participating countries should introduce filtering mechanisms on the basis of certain conditions. It is noticed, that in many cases legal aid is granted to a very wide list of beneficiaries, based on their affiliation to certain social categories of vulnerable groups. This leads to the paradox of granting legal aid to persons who possibly have sufficient funds to hire a lawyer. For this reason, the participating countries should create state-wide systems, containing credible

information about the economic situation of the applicants. Summarising the participating countries should establish financial means test and merits test for granting legal aid, where needed.

The participating countries should also establish qualification mechanisms for appointing legal aid providers and include in their legislation a procedure for replacement of legal aid lawyers under certain conditions.

The legal aid legislation should also provide legal aid for the exemption from the court fees, provide legal aid for the costs and fees of other professionals and the fees of the enforcement of judgments, in cases the enforcement agents are not state funded.

The participating countries should also promote legal aid in ADR proceedings.

The participating countries should also strengthen the pro bono legal services. This has been practiced in the Republic of Moldova, through the recruitment of young jurists, upon the initiative of the Bar Association.