

innføringen av en rendyrket kompetansebasert modell, ville dette gjøre at vilkårene for tvang i stor grad ville ha blitt de samme i psykisk helsevernloven som i pasientrettighetsloven: Er pasienten beslutningskompetent kan tvungen psykisk helsevern ikke anvendes – annet enn ved fare for andre. Mangler pasienten beslutningskompetanse, kan tvang anvendes kun for å forhindre vesentlig helseskade, eller ved fare for andre.

Med en slik tilnærming mellom psykisk helsevernloven og pasientrettighetsloven ville man også tatt avgjørende skritt for å kunne oppnå det som bør være det klare mål ut fra diskrimineringshensyn, nemlig å samle reglene om bruk av tvang i helse- og omsorgstjenesten i en felles tvangslov, og å oppheve særregulering av psykiske helsetjenester.

I tillegg vil LDO fremheve betydningen av at et samlet utvalg har gått inn for at modell for «supported decision-making» må utredes videre. Skal CRPDs intensjon om å styrke autonomi, selvbestemmelse og frihet til å ta egne valg for personer med nedsatt funksjonsevne sikres i praksis, bør staten forplikte seg til et system som gir dem som trenger det, den støtten de kan ha behov for, for selv å utøve sin rettslige handleevne.

PEER REVIEWED ARTICLE

The Development of Legal Aid Systems in the Western Balkans. A Study of Controversial Reforms in Croatia and Serbia

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1 INTRODUCTION

Many European countries are in the process of reforming their systems of legal aid and assistance. The right of access to justice is granted by the provisions of the ECHR and its importance is underlined by the jurisprudence of the European Court of Human Rights, in particular since the 2000s. The need to establish a fair and efficient system of legal aid is particularly important for countries in transition. In the process of EU accession, the European Union *inter alia* urges the candidate countries to reform their legal aid systems as a part of the rule of law criteria that were among the most critical parts of the EU accession process. The development of legal aid systems in the two largest successor states of the former Socialist Federative Republic of Yugoslavia – the Republic of Croatia and Republic of Serbia, are the focus of this article.

What we intend to demonstrate is that the lack of serious commitment to the implementation of emerging “soft” standards regarding the quality of legal aid systems, both on the side of the international community and on the side of national governments, may lead to reforms that are off-target with

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respect to their primary objectives. The new legal aid legislation that was enacted and implemented in Croatia and similar legislation that is currently under the process of deliberation in Serbia, instead of enhancing access to justice threaten to have a negative impact on the scope and effectiveness of the existing legal aid mechanisms. Thereby, it seems that the laudable intention of the European negotiators may produce adverse consequences – entirely missing the point and the declared goals.

How is it possible that legal aid reforms aimed at improving the situation arrive at completely opposite results? And how is it possible that the European observers, who are bound to monitor the success of the national reforms, approve such reforms and give a green light for the continuation of the accession process? One answer to this question arises out of the fact that the standards for legal aid systems are far from being harmonised and unified. No universally accepted “best models” of legal aid systems are available, and no definite benchmarks and indicators exist.

In this paper, we express the view that some formulas nevertheless exist, and that they may be used as a model with a few key, general guidelines which will enable us to assess the success and effectiveness of legal aid systems.² Where then in one to look for such models and guidelines? For Europe, there are basically two such main sources: international (European) sources, and those drawn from comparative research of national best practices. At the European level, the most important are the instructions that may be extracted from the case law of the European Court of Human Rights, but there are also other recommendations and guidelines, such as those issued by the Council of Europe. The second source, comparative research of best practices, may refer to the countries that traditionally show a high level of interest and understanding for the access to justice issues. The Scandinavian legal aid systems are, in this respect, among the best candidates for the role model, as it is broadly recognised that legal aid systems in Finland, Norway, and other Northern European countries are among the most comprehensive and accessible.

It is of interest that the reforms in the European South, while occasionally quoting some of these sources, rarely followed the essential principles contained in such recommendations and best practices in a serious fashion. This will be clearly demonstrated in the examples of Croatia and Slovenia. In the effort to prove that they are making progress in the legal aid field, Croatian and Serbian lawmakers faced an enormous challenge with respect

2 Some of the ideas in this article were developed under the influence of a collaboration by the authors with Professor Jon T. Johnsen. We have profited greatly from our discussions and joint work with Professor Johnsen. Some of the methodological starting points and findings of this text are direct transplants from the study that evaluated the Croatian legal aid system which was jointly produced for the Croatian Human Rights Centre in 2010 by Professor Johnsen (as the leading expert) and Professor Uzelac and Georg Stawa (Johnsen et. al 2010, full citation available at the end of this article). See also *infra*, note 39.

to reconciling the demands for efficient protection of human rights with the universal pledge to spare the already strained public funds and governmental budget from the strain of additional expenses. As often happens, the result has been favourable for the stronger (budgetary) side, while best practices and human rights largely remained phrases only, empty words not worth the paper on which they are written.

2 THE PRACTICAL IMPLICATIONS OF LEGAL AID STANDARDS:

BASIC ELEMENTS OF A WELL-ORGANISED LEGAL AID SYSTEM

We will attempt to sum up the outlined legal aid standards and connect them in one set of guidelines on the organisation of national legal aid systems. The following summary specifies the starting point, the target, and the basic principles regarding the constitutive organisational elements (providers, procedures, and funding).

It is of key importance that each country wishing to establish an efficient system of legal aid pay due attention to the actual needs of its citizens (*needs oriented systems*).³ That implies *continuing to monitor* the citizens' needs, and calls for *regular empirical research* aimed at identifying all relevant changes in circumstances. The legal aid system has to react to the research findings promptly and adequately. If the research shows that action is needed, the system should be adjusted accordingly. The research should deal with all key elements of a legal aid system: it should consider subjects eligible for legal aid, the scope for providing legal aid, the types of available legal aid services, and the appropriate funding for legal aid activities.⁴

In line with the above described legal and conceptual framework, legal aid schemes are supposed to be *generous* in defining their target population, with the aim *to provide practical and effective access to justice*. Economic obstacles to legal proceedings, especially for those in an economically weak position, have to be eliminated. Providing practical and effective access to justice means also taking into account the individual's capacity, as well as the individual's financial status.⁵

How is one to design a system that would be consistent with the statement that “legal aid is an obligation of the community as a whole”? In our opinion, this requires legal aid policy that encourages *comprehensive participation of legal aid providers from all segments of society*. The potential providers are independent *lawyers* who regularly provide legal services; non-governmental organisations and associations (*NGO's, civil society organisations*) who

3 Johnsen et al. 2010, p. 11.

4 For examples of such research in Norway, see Johnsen 1987. See also Genn 1999 and Genn & Paterson, 2001 on such research in England and Scotland.

5 Resolution (78)8 on legal aid and advice; CJ-EJ (2002)2; Uzelac 2012, pp 6; Johnsen et al. 2010, pp 7–8; p. 29.

work with the specific segments of the society and protect vulnerable groups; *bar associations; legal advice centres; various offices of state and local administration; courts and court employees; other legal professionals* (judges, notaries, bailiffs, *Rechtspfleger*); *volunteers from various segments of civil society; legal clinics* at law schools and other organisations, etc.⁶

In order to maintain effective access to the courts and efficient protection of the legal rights of the citizens, it is very important that procedures for obtaining legal aid are *accessible* and *efficient* for all those who apply for available legal aid and assistance options. In spite of the necessity to control financial and other applicant eligibility requirements, in order to save unnecessary expenditures and optimise on the use of available resources, the processes and procedures to be adhered to in order to obtain legal aid *should not be unnecessarily complex*.⁷ The approach to the provision of legal aid should be clear and well organised, distinguishing also the nature of the services provided. The procedures should also be adjusted to the nature, level, and complexity of the legal assistance needed (e.g. they should be proportionate to the costs and scope of various services, distinguishing clearly simple legal advice from legal aid through representation in complex cases). All those involved in the legal aid process – the organisers, actors, and users of legal aid – should instantly see what legal aid and assistance is available and appropriate, and should be able to identify what steps have to be taken in order to enforce their rights.⁸

An essential precondition for the effective legal aid system is *adequate funding*. The responsibility for financing the legal aid system *should be assumed by the state*, but it is advisable that the funds available for this purpose not be exclusively collected from the state budget.⁹ Funding of legal aid should be diverse. It should be supplemented by means from other sources, including the volunteer contributions by various organisations from the civil sector. The financing of legal aid providers and initiatives should be evenly distributed, avoiding a sole focus on one or only a few elements and actors in the legal aid system.

3. REFORM OF LEGAL AID IN CROATIA AND SERBIA:

THE BACKGROUND AND EVOLUTION OF THE CURRENT LEGISLATIVE PROJECTS

In the last few years, the legal aid reform was given high priority on the agenda of judicial reforms in the Republic of Croatia and the Republic of Serbia.

⁶ Uzelac 2012, pp 7.

⁷ See Legal Aid Best Practices, CJ-EJ (2002)2.

⁸ Uzelac 2012, pp 8.

⁹ Resolution (78)8 on Legal Aid and Advice.

Those who participated in sometimes heated debates were legal practitioners, lawmakers, and members of legal academia and the civil society.

The increased interest in legal aid, apart from the European integration process, is based on the fact that after several decades when access to justice was practically a non-issue, the need for legal aid suddenly emerged, both due to the war in the Western Balkans, and to the social changes that made justice more important, complex, and expensive.

During the period of the Socialist Federal Republic of Yugoslavia (SFRJ), in the spirit of Socialist egalitarianism, access to courts was cheap and procedures for obtaining legal aid were simple. The court fees were low, attorney services and expert reports were inexpensive, and the price that had to be paid for issuance of various certificates and documents was negligible.¹⁰ Apart from that, courts and other public authorities were generally obligated to assist the legally illiterate parties. This assistance included the provision of legal advice, occasional help in the drafting of simple submissions and applications, as well as directions to unrepresented parties in the proceedings.¹¹ Of course, not everything was ideal: the quality of adjudication was low, many important matters were not decided in formal legal proceedings, and if they were, the duration of such proceedings was often long. However, the failures of the system could definitely not be attributed to the economic obstacles in access to justice.¹²

The dissolution of the SFRJ in the 1990s was accompanied by the fall of Socialism. For some time, certain social elements remained in procedural laws, but they were gradually abandoned, like the parties' right to self-representation in legal procedures, free choice of legal representatives, and the public authorities' obligation to provide legal advice to legally illiterate citizens. Simultaneously, the total overhaul of the legal system meant that the law became increasingly complex and difficult to follow and comprehend. There was also a trend towards greater formality and bureaucratisation in all sorts of legal procedures. On the whole, a wide circle of citizens suddenly found themselves deprived of the previous easy access to the judiciary and other public authorities.

On the other hand, the process of alignment of national law with the *acquis* of the EU led to internationalisation of legal aid discussions. Legal aid reform became one of the political criteria for the accession to the European Union.¹³ The European negotiators often reminded the national authorities that "an integrated legal aid system for both criminal and civil proceedings

¹⁰ See more in Uzelac

¹¹ *Ibid.*

¹² *Ibid.*

¹³ With respect to Croatia, legal aid was assessed according to the criteria contained in Chapter 23 (Judiciary and fundamental rights) and Chapter 24 (Justice, freedom and security). See Butorac 2008, p. 18.

still needs to be put in place”, and that “[legal aid] legislation needs to be adopted as soon as possible”.¹⁴

The “integration” of legal aid legislation might have been a reflection of the fact that the legal aid and assistance regulations, insofar as they still existed, were fragmented in a number of different acts, which sometimes resulted in lacunas and a poorly functioning interaction with the legal system.

What was the result of the international assistance efforts and the internal discussions on legal aid in Croatia and Serbia? When presenting the situation in Croatia and Serbia, one has to keep in mind that the developments in these two countries progress at different paces. The negotiations between the EU and Croatia started in 2004 and were finished in 2011, with the planned accession date of July 1, 2013. Serbia, on the other hand, did not acquire the full candidate country status until February 28, 2012, and even by the most optimistic forecasts, will be ready for the accession no earlier than 5 to 7 years after that date.

The first of the two countries that has enacted new “integrated” legal aid legislation was Croatia. The Croatian Legal Aid Act¹⁵ was passed after five years of discussions and failed attempts to reach a consensus among the stakeholders. At the end of 2003, at the initiative of the civil society and human rights organisations, the Ministry of Justice announced its intention to start a legislative project in this area. Some studies on access to justice were produced at this time¹⁶ and the Croatian government formed a working group that had to work on the draft act. After several years characterised by the lack of agreement (and the lack of real political will to proceed), this project failed. It was restarted by the Government only after the EU warnings, as a matter of fulfilling Croatian obligations in the framework of the EU negotiations. The first draft of the act was brought before Parliament in July 2007, but was removed from the agenda. A new draft bill was produced in September 2007.¹⁷ Despite heavy criticisms directed at the final draft¹⁸, the Legal Aid Act (LAA) was finally adopted on 7 June 2008.¹⁹

The first feature of the LAA was the fact that almost nothing was left from the ambition to “integrate” the system at the legislative level. Instead of combining and simplifying the existing laws and regulations in the legal aid field, the Act was just another regulation added on the top of the existing normative framework. Soon after its enactment, it became apparent that its

14 See Progress Report Croatia 2006, p. 53.

15 Legal Aid Act (*Off. Gaz.* 62/08).

16 See *inter alia* Uzelac

17 Jelinić 2008, p. 134.

18 See Legal Aid Draft Act Review 2007.

19 Clauses of Articles 15 and 16 of the Free Legal Aid Act concerning the claim for granting legal aid are in effect as of 1 February 2009, while the clauses of Articles 45-52 regarding the special clauses on granting legal aid in cross-border disputes will be effective as of the day Croatia enters the European Union.

complexity, its bureaucratic nature, and the restrictive requirements have an adverse effect on the improvement of the access to justice. The civil society organisations, the bar association, and the Ombudsman heavily criticised the law. An expert study of an international group of experts confirmed the existence of serious deficiencies.²⁰ Moreover, barely two years after its enactment, the Constitutional Court ruled on the unconstitutionality of several key provisions of the Act, ordering their change within a period of three months.²¹ The amendments of the law were passed within this time limit, but the Ministry of Justice again disregarded the proposals of a coalition of legal aid organisations and pushed changes through Parliament that have further restricted the availability of legal aid in some issues. The fight for improvement of the scheme continues, and the newly elected Croatian government has announced in 2012 that further changes in the legal aid system may be necessary. The most recent contribution to the assessment of the Croatian legal aid scheme was produced by the Lithuanian experts that worked within a twinning project with the Croatian Ministry of Justice. In the Lithuanian report, critical comments by previous evaluators were confirmed and profound reforms of the system were suggested.

In Serbia, the plans to reform the legal aid system are at an earlier stage. The Serbian government is still in the process of preparing the legal aid bill. Apparently, the Serbian authorities have relied heavily on the Croatian experiences, as the approach (a single legal aid act which effectively fails to integrate the system) is very similar. Its history is also similar, which started with the initiatives from the civil sector: in 2006, legal experts from the Centre for the Improvement of Legal Studies, a non-governmental organisation, drafted the first “model” legal aid legislation.²² That was a project that was never considered by legislator, and was also in substance not adopted²³, in spite of its strong emphasis on legal aid as a human right.²⁴ The new initiative to draft the bill started in 2010 with the strategic documents on legal aid development.²⁵ The first drafts of the Serbian Legal Aid Act have been drafted and are currently being discussed and evaluated by the experts of international organisations such as the World Bank and the Council of Europe.

20 The international study was procured in 2010 by the Croatian Centre for Human Rights; it was conducted under a project financed by the Embassy of Finland to Croatia from October to December 2010. See Johnsen et al. 2010, p. 3-5.

21 The Decision of the Constitutional Court no. U-I-722/2009 of 6 April 2011. This decision struck down as unconstitutional clauses of five LAA articles (Article 5, item 2; Article 8; Article 10, para. 2; Article 37; Article 53, para. 2).

22 The text of the *Model of the Legal Aid Act* is available in Serbian and English in Gajin et al. 2007, p. 293-317.

23 For the project of free legal aid see Glogonjac et al. 2004, p. 79-86.

24 Vodinić 2007, p. 33-34.

25 See Legal Aid Strategy Serbia 2010.

3.1. The beneficiaries of legal aid under Croatian and Serbian legal aid acts

In Croatia, legal aid may be requested by Croatian citizens and certain categories of foreigners.²⁶

If a person is among those who fulfil the nationality condition, two tests must then be passed: a means test and a merit test.

Under the means test, legal aid shall be granted only after full financial screening of the applicant. He and the members of his household have to meet several conditions:

- The total monthly income and total monthly assets of the legal aid applicant and/or the adult members of his household must not exceed the minimum wage;
- The legal aid applicant or the adult members of their households should not own assets and property, except real estate, which exceeds the amount of twenty months of minimum wage;
- The applicant or the adult members of their households should not have immovable property (an apartment or a house or other real estate, except an apartment or house in which they live);
- the applicant or the adult members of their households should not own means, the value of which exceed six times the lowest monthly amount providing the basis for the calculation and payment of contributions for compulsory insurance.²⁷

Exceptionally, legal aid will be granted to applicants who do not meet the aforementioned requirements if their financial conditions are such that payment of litigation costs would threaten their maintenance or maintenance of their household members.²⁸

Another test for legal aid applicants is the merit test. According to the merit test, primary legal aid shall be granted only if:

- The legal aid applicant does not have sufficient knowledge and ability to exercise his right;
- Legal aid is not granted under the provisions of special regulations;
- The legal aid applicant has no ability to protect his interests;
- The legal aid application is not manifestly ill-founded;
- The case is not being conducted for vexatious or capricious reasons.²⁹

²⁶ Art. 7 CLAA.

²⁷ Art. 8 para. 1 CLAA. According to the criticism forwarded by international experts and local legal aid providers, the means testing in the Croatian legal aid system seems strict. It is apparently lacking in flexibility; the exemptions from the means test embedded in the "fairness" criteria are not broad enough to compensate for the limitations in access to legal aid. See Johnsen et al. 2010, p. 27.

²⁸ Art. 8 para. 2 CLAA.

²⁹ Art. 5 a CLAA.

The international evaluation of the CLAA made reference to the fact that there are no statistics that would show how extensive the legal aid coverage is under the CLAA – how widespread poverty is in Croatia, and what percentage of poor people are covered according to the existing limits. There are only a few potential indicators that raise some concerns about the sufficiency of the legal aid coverage. Namely, under the latest CEPEJ data, in 2008 Croatia had a per capita GDP of EUR 10 583, and an average gross annual salary of EUR 12 533. In 2009 the average monthly net salary was about EUR 730.³⁰ If we compare these indicators with the criteria for means testing in CLAA, it is evident that they do not match.³¹ Although the monthly income as an indicator may be comparable, there are three further criteria that have to be met, which include the ownership of various assets, including the ownership of a flat or a house. This would exclude from potential coverage all persons who live on the verge of poverty in their own houses, which is often the case, especially in rural areas with elderly, single-person households.³² A further limitation is that of the need for all members of the household to pass the income and property test, which further weakens the chances the applicants have of obtaining legal aid and makes them dependant on other household members. Under all these conditions, it seems that a significant percentage of the people who live on the verge of poverty would not qualify according to the CLAA means criteria.³³

In comparison, under the Serbian draft law on legal aid (SDL), all persons shall be entitled to primary legal aid, in any legal matter, based on request (verbal or written) addressed to the legal aid provider.³⁴ Under the conditions established by this Law, international agreement or generally accepted rules of international law, every person whose rights, obligations, and legally established interests are decided upon before a court of law or other national body would be entitled to secondary legal aid.³⁵

Serbian draft law separates eligibility criteria for primary and secondary legal aid. For primary legal aid, no eligibility checking is needed (and also no test of "interests of justice/equity"); however, it is questionable how extensive this form of legal aid is, and to which level it is supported by the State.

For secondary legal aid, the applicants have to meet the criterion of economic status by which legal aid shall be provided to individuals who "given their economic status and economic status of the members of his/her

³⁰ See Johnsen et al. 2010, p. 27.

³¹ Johnsen et al. 2010, p. 28.

³² Johnsen et al. 2010, p. 27.

³³ Johnsen et al. 2010 p. 27.

³⁴ Art. 8, para. 1 SDL.

³⁵ Art. 8, para. 2 SDL.

household³⁶ could not afford to pay legal costs without jeopardising their own support and that of the household members or persons whom they are legally obliged to support".³⁷

The SDL does not stipulate any concrete monetary levels of applicants' income or property. It only states that for eligibility, the competent authority has to take into consideration "ownership on movable and immovable property, regular and *ad hoc* earnings, and other income at the time of submitting the application".³⁸ The economic status has to be established both for the applicant and for the members of his/her household.

Since the law does not provide any concrete figures, it is to be concluded that the body deciding on legal aid should evaluate whether granting legal aid would be justified by the economic status of the applicant in every case on the basis of concrete circumstances.

Compared to the Croatian law, the Serbian approach to the eligibility criteria is rather flexible, taking into consideration the economic status of the applicant and his ability to cover the necessary legal costs without undue hardship. This method of determination of eligibility is in principle compatible with the human rights standard as found in the ECHR and in the ECtHR jurisprudence. On the other hand, due to the flexibility of this criterion, it is virtually impossible to make an assessment of the part of the population that will be covered by the legal aid scheme. Some special categories of applicants, such as social aid beneficiaries, satisfy the eligibility criteria automatically, but there are no available data showing the percent of the population that would fall within the categories that are automatically eligible for legal aid.

Some aspects of the criteria that relate to members of the household appear to be questionable. Similar to (and as equally problematic as) the Croatian approach, it is required to establish the economic status of the applicant and all members of his/her household, irrespective whether there is any special or mutual obligation to provide support between such members.³⁹ Even the parents of grown-up children still living in the parental home due to a lack of the resources to rent or buy an apartment, alienated spouses in divorce proceedings, or distant relatives who happen to share the same living space, should be checked for their property status. Moreover, the household members have to actively consent to full right of inspection on their property holdings and income; although the consequences of refusal were not elaborated, it may happen that any such refusal could mean an absolute veto on legal aid application. Both the too broad circle of household members whose property status has to be taken into account, and the compulsory requirement for

36 The household members are defined as "spouses, unmarried partners, children, adopted children and other relatives living with the applicant or supported by the applicant". Art. 10, para. 3 SDL.

37 See Art. 9 para. 1 p. 1; Art. 10 para. 1 SDL.

38 Art. 10, para. 3 SDL.

39 Art. 10 para. 4 SDL.

their consent, are unfair and may seriously jeopardise the access to justice in individual cases (there have already been cases of this under a similar legislative regime in Croatia).⁴⁰

3.2. The scope and forms of legal aid: primary and secondary legal aid

Both Croatian and Serbian regulations distinguish between two forms of legal aid: *primary legal aid* and *secondary legal aid*. However, they are defined differently in Croatia and Serbia.

In Croatia, primary legal aid includes legal advice, the preparation of submissions to government agencies, representation in proceedings before the government agencies, and legal assistance in the peaceful resolution of disputes out of court. Secondary legal aid includes legal advice, drafting pleadings in court proceedings, legal assistance and representation in court cases, and legal assistance in the peaceful resolution of disputes.⁴¹ Approval of secondary legal aid also includes exemption from payment of court fees and exemption from payment of litigation costs.⁴²

The type of legal aid is also made dependant on the legal problems for which the aid is sought. The beneficiaries can only obtain State subsidised primary legal aid for a relatively narrow group of matters (matters regarding personal status; matters arising from pension and invalidity insurance; social welfare rights, and employment).⁴³ Secondary legal aid is granted in procedures that are related to property rights, employment disputes, family law disputes, enforcement proceedings, insurance proceedings, and some forms of the ADR.⁴⁴

Another analysis highlighted the fact that due to the deficiencies in the process of applying for legal aid and assistance, people ask for help more often when the legal proceedings have already been initiated. This means that people do not have consultations (or do not have any possibility to have them) at the outset, when solutions other than court litigation would have been possible. An implication is also that procedural documents are often not professionally prepared. On the whole, such an approach is contrary to human rights standards, as it encourages unnecessary litigation, and contributes to delays in the court procedures.⁴⁵

Similar conclusions were reached at the round table of legal aid providers and the national institutions for human rights protection. In the conclusions of

40 Uzelac 2012, p. 15.

41 Art. 4 para. 4 CLAA.

42 Art. 4 para. 4 CLAA.

43 Art. 5 para. 2 a-c, e CLAA.

44 Art. 5 para. 3 a-e CLAA. The international evaluation notes that the scope of legal problem criteria is too narrow to secure everyone proper access to the courts. In practice, the scheme has not been very effective in providing legal aid. See Johnsen et al. 2010, p. 32.

45 Ibid.

the meeting held in November 2011, *inter alia*, it is emphasised that primary legal aid (in particular: legal advice and information provided before and outside of formal court, administrative, and other proceedings) has a special importance for an effective legal system that ensures equal protection of the rights of all citizens.⁴⁶ Primary legal aid has a preventive function, contributes to legal certainty, decreases the number of unnecessary legal proceedings, and relieves the burden on the courts and administrative bodies. Legal information and advice (primary legal aid) has to be encouraged and funded by the state budget for a very broad selection of legal problems, irrespective of their nature. Because everyone has the right to equal protection of all of his/her rights, limitations of topics for primary legal aid are permissible only in exceptional cases.⁴⁷

Regarding the exemption from paying the costs of proceedings in CLAA, it is not provided which documents are necessary in order to grant a beneficiary an exemption from paying the costs of proceedings and when they should be delivered to the court.⁴⁸ There is no explicit provision that shows that exemption from paying the costs of proceedings can only be applied in courts proceedings. However, other provisions regarding exemption from paying the costs of proceedings indicate that regulations related to the application of exemption from paying the costs of proceedings can apply only in the court proceedings.⁴⁹ Accordingly, rights and responsibilities regarding the exemption from paying the costs of proceedings should be clearly defined in the law.⁵⁰ In order to ensure the equal protection of rights in civil matters as well as in administrative matters, the coverage of the costs of proceedings should be clearly stipulated.⁵¹

The fact that *Serbian* SDL in principle excludes only a relatively narrow list of legal problems is in itself good, and can be taken as an advantage in comparison with the Croatian, rather restrictive list of legal problems that qualify for legal aid. On this particular point, the *Serbian* SDL apparently corresponds better with the above-mentioned standards (except in relation to the disregard for legal problems arising outside of the context of formal legal proceedings, see *infra*).

The *Serbian* draft law defines a broad scope or areas of legal problems that are covered by legal aid or that are the subject of legal aid. The problem areas are defined in relation to the types of proceedings, and expressly include: criminal and misdemeanour proceedings; civil proceedings (litigation, enforcement and extra-contentious proceedings); administrative proceedings (including administrative disputes); constitutional proceedings (appeals before

46 Conclusions 2011, p. 2.

47 Ibid.

48 See Twinning Project Report 2012, p. 12.

49 Ibid.

50 Ibid.

51 Ibid., p. 13.

the constitutional court); proceedings regarding enforcement of criminal sanctions; mediation proceedings; other procedures before independent or regulatory bodies.^{52, 53}

With regard to the stage of proceedings, the SDL recognises the right to legal aid in first instance and appeals proceedings, until the final decision, but also in proceedings regarding special legal remedies, and in the proceedings of enforcement of court judgments and other enforceable documents. In principle, the right to legal aid also exists in the proceedings before the international tribunals and bodies.⁵⁴

For all types of legal aid cases it is required that provision of legal aid be in the interest of justice (*orig: pravičnost*, equity/fairness), or that legal aid be “of invaluable importance for effective protection of the applicants’ rights”.⁵⁵

The *Serbian* draft law also distinguishes primary and secondary legal aid. Primary legal aid is defined as “the right of the legal aid beneficiary to general legal information, initial and other legal advice, in any legal matter, which shall be exercised on the basis of a request addressed to the free legal aid provider, free of charge”.⁵⁶ Secondary legal aid is everything else, including the drafting of documents and motions, and representation before all kinds of courts and state authorities.⁵⁷

It is worthy of note that the definition of primary legal aid in the SDL is very narrow. It covers in practical terms only some forms of short, initial advice, and overlaps with the secondary legal aid as regards legal advice. While “initial and other advice” is regarded as a part of the primary legal aid,

52 Art. 7 para. 1 SDL.

53 In Art. 34, the following legal problems are specified as reasons for dismissal of legal aid applications: proceedings before commercial court; the procedure for obtaining construction and other licenses in an administrative procedure; registration of commercial entities, citizens’ associations and foundations; compensation of immaterial damages for the offence of honour and reputation; procedure against a legal action for decreasing child support when the person bound to pay the alimony failed to do so. See art. 34 SDL.

54 Uzelac 2012, p. 11.

55 Whether or not this condition is fulfilled has to be assessed in each specific situation, taking into consideration: importance of the object of proceedings (rights or goods that are protected or claimed) for the applicant, and particularly the level of possible punishment, the amount of the indemnity claim, type of dispute, and similar; factual complexity of the case or complexity of regulations that are applied in the proceedings, especially if a great number of laws are applied in the proceedings, if there are many participants in the proceedings, if the application of law requires specialised expertise, and similar; ability of the applicant to defend and represent the rights and interests by him/herself based on the age, mental or physical health condition, literacy, affiliation with vulnerable groups, family situation, economic status, and similar; economic power or monopolist position of the opposed party on the market; the need to ensure legal and equal legal protection in the proceedings. For some cases, e.g. for cases related to children without parental care, or for certain other cases related to personal status and family rights (the exact list is still under construction), the SDL provides the presumption that awarding legal aid is in the interest of justice. Art. 16 SDL.

56 Art. 5, para. 2 SDL.

57 Art. 5, para. 3 SDL.

legal advice “in connection with concrete subject matter in the proceedings” is considered to be a part of representation, and is therefore defined as a part of the secondary legal aid. The background reason for this narrow definition may be found in the fact that the Serbian draft effectively provides that only secondary legal aid may be subsidised from the central budget. As such, it seems that primary legal aid is more an element of a *pro bono* system than an element of the legal aid system funded by the state and local government (see more *infra* at 3.5).⁵⁸ This may be an indication that both in defining legal problems and (more importantly) in funding, the Serbian draft is focussed solely on formal legal proceedings, and fails to recognise the importance of every type of legal work that arises outside of the context of the pending civil/criminal/administrative proceedings. In this sense the Serbian approach is also not in line with the international legal aid standards that hold that legal advice, information, and preventive extrajudicial work are equally (if not more) important as *ex post facto* aid in formal court and other legal proceedings.

3.3. Legal aid providers

The participation of various categories of legal aid providers was (and still is) among the most contested points in the legal aid reform, both in Croatia and in Serbia.

In Croatia, four categories of persons and organisations are authorised to provide legal aid: attorneys-at-law (advocates), non-governmental organisations registered in the registry of legal aid providers (NGOs), legal clinics established at law faculties⁵⁹, as well as state administration offices (SAOs) at the county level.⁶⁰ Attorneys may offer both primary and secondary legal aid, while NGOs, legal clinics, and the state administration offices are authorised

58 See Art. 18 para. 2: “Primary legal aid shall be provided free of charge and for secondary legal aid, the providers shall be paid in the amount and manner in line with this law.” See also Uzelac 2012, p. 21.

59 There are two Legal Clinics registered on the list of free legal aid providers: Legal Clinic of the Faculty of law of Zagreb University and Legal Clinic of the Faculty of law of Split University. Both are endeavouring to combine teaching with legal practice. However, there is no unified model of legal aid provision in these Legal Clinics. The Legal Clinic in Zagreb consists of students and teaching staff. Provision of legal aid is a part of the study programme of semester IX for students at the legal clinic. Students provide legal aid in different fields of law under the supervision of qualified academic and professional mentors. All of them have a university degree in law. Legal aid consists of questioning the client and writing explanatory notes or procedural documents for them. They provide only written advice. All written advice provided is checked and signed by academic or professional mentors. See Twinning Project Report 2012, p. 57, [www.pravst.hr](http://pravst.hr), <http://klinika.pravo.unizg.hr/>.

60 The main function of the SAOs was, in the initial version of the CLAA, to check eligibility of legal aid applicants. They were only included as legal aid providers in their own right by the amendments issued in 2011, but in practice they still operate mainly as a filter, and not as a provider.

to provide primary legal aid only.⁶¹ Primary legal aid can also be provided by labour unions (on the same terms as NGOs).⁶²

Attorneys are in principle obliged to provide legal aid if so requested by the authorised applicant.⁶³ However, they may refuse to provide legal aid in cases prescribed by the law.⁶⁴ Attorneys also have the right to provide legal aid *pro bono* under their own statute. But, this does not happen often, and they have provided legal aid *pro bono* for legal aid applicants whose applications were rejected by the SAOs only on a couple of occasions.⁶⁵

NGOs obtain the right to provide legal aid by registration in the register of legal aid providers at the Ministry of Justice. In order to register, associations have to prove that they have enlisted as collaborators persons with a law degree that have passed a special state or bar exam, with at least two years’ work experience in the profession. They also have to provide evidence that they are insured against liability for damages caused to users in cases of malpractice.⁶⁶ In comparison, there is no requirement for the personnel of SAOs to have a legal education or special exams in order to be prepared for the provision of primary legal aid.⁶⁷ The exacting requirements for registration of NGOs as legal aid providers are in crass contrast with the fact that most of them specialise in legal advice and out-of-court work; also, the financial implications of employing qualified lawyers and insuring against malpractice are rather discouraging, as the financial support from legal aid schemes so far has proven to be negligible – far below the costs of satisfying the legal conditions for registration.

The survey also shows that for NGOs that provide legal aid, from 0.4% to 25% of their legal aid cases qualify under CLAA. However, their impact on proper functioning of the legal aid system and spreading of information for potential beneficiaries is huge, because the NGOs mainly operate in the areas

61 Art. 10 para. 1, Art. para. 11/1 CLAA.

62 Art. 13 para. 1 CLAA.

63 See Art. 10 para. 2, Art. 11 para. 2 CLAA. The Croatian Bar Association holds a non-mandatory list of the attorneys who expressed their interest to provide legal aid for each county. However, not all counties have such a lists – according to IPA Twinning Survey it was assembled for only 7 out of 21 counties. Twinning Project Report 2012, p. 52.

64 Art. 10 para. 3 CLAA. The right of the legal aid providers to refuse provision of legal aid seems to be quite imbalanced. While there are many options which allow attorneys to refuse provision of legal aid (even in cases where such refusal would be definitively inappropriate), the other legal aid providers such as associations have an absolute duty to assist all of the applicants to whom an order was awarded – also when their request is entirely outside of the special field of expertise of the association. See Johnsen et al. 2010, p. 35.

65 Twinning Project Report 2012, p. 53.

66 Art. 11 para. 3 CLAA.

67 The survey undertaken by the Lithuanian experts shows that the qualifications of SAO personnel are not satisfactory, because most of them do not have any legal qualifications. Three out of eleven SAOs pointed out that their collaborators face problems because of a lack of legal knowledge. In 2009, only 7 out of 21 Offices had any professional legal aid training. Twinning Project Report 2012, p. 30 and 58.

where the number of provided legal aid cases is the highest.⁶⁸ Participation of legal clinics in providing legal aid under the CLAA scheme is also very low.⁶⁹ In most legal cases qualified under CLAA as legal aid cases the legal aid is provided by attorneys.⁷⁰ The main reason for low participation of NGOs and legal clinics in the CLAA scheme is not their lack of qualifications, but rather the procedures that are complex and discouraging, with unnecessarily difficult requirements, both regarding the conditions for registration and for the provision of legal aid in each individual case.

In *Serbia*, the SDL also distinguishes the providers of primary and secondary legal aid. For primary legal aid, there is a broad list of providers, which includes lawyers, notaries and mediators, legal aid offices of the local administration, associations and legal clinics, public authorities at all levels, and legal aid call centres. However, it seems that all of these have to provide primary legal aid *pro bono*, under the schemes that are outside the paid legal aid scheme of the SDL.⁷¹

The secondary legal aid may be provided by various legal aid providers, but the extent to which they are entitled to offer it is regulated by complex and somewhat difficult to understand provisions. The attorneys are the only ones who may provide any form of secondary legal aid. Moreover, they are the only ones who are entitled to compensation for their secondary legal aid.⁷² The legal aid services of the local government may engage in representation "in line with the law", under several conditions that should be met cumulatively: that the aid is provided by a licensed lawyer who has passed the bar exam and has work experience; that the case does not involve "a complex legal matter that requires specialised legal knowledge" or where "a significant number of regulations are applied", and if representation "does not involve conflict of interests" or jeopardise the beneficiary's interests in any other way.⁷³ Notaries may only engage in drafting motions and documents.⁷⁴ The same goes for mediators who may hold informative sessions and conduct mediation procedures.⁷⁵ NGOs and legal clinics may provide "specific forms of secondary legal aid only on the basis of the decision of the competent body and under the requirements provided by this Law".⁷⁶ This formula is not further elaborated and its aim therefore remains unclear. The bottom line is that only attorneys are entitled to compensation for secondary legal aid provided under SDL.

68 Twinning Project Report 2012, p. 50, 54.

69 Twinning Project Report 2012, p. 57.

70 The beneficiaries most frequently choose a lawyer at their own discretion: 49.9% selected a lawyer personally, 37.9% from the list, and 12.2% a lawyer suggested by other people. See Twinning Project Report 2012, p. 50.

71 Uzelac 2012, p. 21.

72 Art. 23 para. 1 SDL.

73 Art. 22 para. 2-3 SDL; optional – Art. 22 para. 3 SDL.

74 Art. 23 para. 4 SDL.

75 Art. 24 para. 6 CLAA.

76 Art. 23 para. 5 CLAA.

Their registration and participation in the legal aid scheme is fully voluntary, and depends solely on whether they have an interest (social or economic) in registering as a legal aid provider.⁷⁷

With respect to other organisations, the applications are processed directly by the Ministry. The association that wishes to register has to provide documented proof of its legal status; of the experience and specialisation of the employees and hired staff for provision of legal aid in a specific field; that it has employed at least one lawyer who has passed the bar exam and has experience in representation of at least three years, who shall supervise the provision of legal aid; of possession of technical equipment (e.g. offices) needed to provide legal aid; of its financial plan. With respect to legal clinics, the faculties of law which organise such clinics have to *inter alia* submit evidence on the experience of the clinic, the work programme, proof of specialisation, data on teaching staff, attorneys and other lawyers engaged in the work of the clinic and their written declarations, names of supervisors (who need to be lawyers who have passed the bar exam), information on technical equipment and financial plans. In addition to all of these requirements, the organisations that apply for registration also have to submit an analysis of the legal needs of particular groups of beneficiaries.⁷⁸

Even if all of the above requirements are met, the Ministry will only allow registration "if it determines the need for free legal aid provision and if the funds from the budget of the Republic of Serbia or the budget of autonomous province and local self-government units are allocated."⁷⁹ The need will exist only if it is established that legal needs cannot be satisfied by the Bar and the legal aid offices at the units of local self-government.⁸⁰ Under the SDL, the procedure for determination of the need is complex, and includes annual consultations between the Government and the units of local self-government, the collection of opinions from the Bar Association and local administration, occasionally also opinions from the Ministry of Human and Minority Rights, state administration and local self-government, or other ministries competent for a specific field.⁸¹

All in all, one may claim only at a very superficial level that legal aid schemes in Croatia and Serbia allow and support the participation of a diversity of legal aid providers. The excessive, cumbersome and discouraging conditions for the participation of legal aid providers outside the ranks of professional attorneys *de facto* are at cross purposes with their work. It may even be the case that both national governments included all "external", "non-professional" actors to create an impression of an open and permissive scheme for outside spectators, while counting on the gradual retreat of all of them,

77 Uzelac 2012, p. 21.

78 Art. 26 SDL.

79 Art. 26 para. 1 SDL.

80 Art. 26 para. 2 SDL.

81 See Art. 26a SDL.

which might lead to a pure lawyer-based system within the period of the next few years.

3.4. Procedures for obtaining legal aid

The application process for receiving legal aid in Croatia is complex, what has been the cause of much criticism. In principle, each procedure for approval of any kind of legal aid and assistance has to be instituted by submitting an application to a legal aid office of the county administration (SAO).⁸² The application has to be filed on a form which contains a number of questions about the applicant and the case for which aid is sought. *Inter alia*, the applicants have to express their options with respect to technical matters, such as the type and level of the proceedings for which legal aid is being requested, the form of legal aid (primary or secondary legal aid) and its sub-type ("legal advice", "drafting documents in legal proceedings").⁸³ Only one form of legal aid may be indicated on the application form.

On the form the applicant has to give a full statement of his/her financial status and that of the members of his/her household. For each household member, a number of details have to be disclosed, including the relationship, personal identification numbers (OIB), data on the average monthly income earned during the past 12 months, data on average monthly amount of the taxable income, names and addresses of the employers, data on immoveable property owned by the each member of the household, including their addresses, usable space in square metres and market value, and data on vehicles or vessels owned by them (including types, brands, models, years of production, registration plates and current market value of the vehicles or vessels). The amount of savings or liquid assets in banks should be disclosed as well, including the particulars such as the numbers of bank accounts and the SWIFT codes of the banks. All statements have to be accompanied with the prescribed documentary evidence, including signed written statements by all members of the household.

After submission of the application form and the required attachments, the office (SAO) will have to verify the facts given in the statement. Although it is not necessary to check every declaration of the applicant, the SAO is obliged to verify information provided in at least ten percent of the requests.⁸⁴

The legal aid offices should regularly decide on the application within 15 days from the dates of its submission.⁸⁵ If the application is granted, a voucher certifying the applicant's eligibility for legal aid is issued. The voucher gives

⁸² Art. 15 para. 1 CLAA.

⁸³ Art. 4 of the Regulation on the application process for legal aid (*Pravilnik o obrascu zahtjeva za odobravanje korištenja besplatne pravne pomoći, obrascu uputnice i evidenciji izdanih uputnica*), published at <http://www.mprh.hr>.

⁸⁴ Art. 21 para. 1-2 CLAA.

⁸⁵ Art. 23 para. 1 CLAA.

the right to use only a specific type and form of legal aid (advice/representation; specific proceedings, e.g. appellate proceedings). However, the issued order as such does not determine the legal aid provider: the beneficiary of legal aid should "freely" decide on the choice of legal aid provider, "bearing in mind the authority of the provider to offer specific forms of legal aid".⁸⁶ This means that the applicant is unassisted in finding an appropriate attorney or other legal aid provider, without any specific referral by the SAO.⁸⁷

Independent evaluation described this system of processing legal aid applications as "quite complicated" and "bureaucratic". It imposes a number of both procedural and substantive obstacles, which can have a negative impact, both because a significant number of applications that merit acceptance may be discarded, and because it discourages prospective applicants.⁸⁸ Another problem may be the dependence of the applicants on the good will of the members of their households. The refusal on the part of a member of the household to provide information on his/her assets or sign a consent form agreeing with inspection of her or his property can mean a veto on the applicant's claim for legal aid. The requirement that an applicant must opt for a specific type of legal aid already at the beginning of the process may be unfair and biased towards specific forms of legal aid. Legal aid applicants typically require legal aid before they know all the procedural options and before they are in a position to recognise in concrete terms their need for a specific legal aid provider. They are also more likely under such conditions to choose providers of secondary legal aid, because they are authorised to provide a broader scope of services – although in specific cases, providers from the non-governmental sector may have been more suitable. Any outside assistance (e.g. by the NGOs) in the process of filling out the applications is not recognised as a part of their legal aid work.⁸⁹

The Draft Legal Aid Act of Serbia plans to introduce a system in which primary legal aid (narrowly defined as initial and/or summary advice) would have to be delivered by the respective legal aid provider upon direct application by any applicant. There is no eligibility check, neither regarding the nature of the issue, nor the economic status of the applicant, since the right to primary legal aid is awarded to "any person" in "any legal matter".⁹⁰ It seems that the general obligation of legal aid providers to keep records of the rendered legal aid is also applicable to primary legal aid.⁹¹

In contrast, the secondary legal aid would be granted only on the basis of an act issued by the competent organ of legal aid administration. As is the case in Croatia, the application would have to be filed either directly or through the

⁸⁶ Art. 30 para. 3 CLAA.

⁸⁷ Johnsen et al. 2010, p 47.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ See Art. 8 para. 1 SDL.

⁹¹ For an opposing conclusion, see Art. 39 para. 4 SDL.

legal aid provider, using – in principle – the application forms prescribed by the Ministry.⁹² The court or other tribunal before which the (main) procedure is taking place should be notified of the legal aid application.⁹³ The submission of a legal aid application should extend the time limits for particular actions in the proceedings.

The applications for secondary legal aid would have to contain personal data, the data on the legal matter for which aid is being requested, declarations, other data and evidence of the economic status of the applicant and the members of the household, including the personal statements of the household members allowing full right of inspection on their financial record about their property.

If the decision on a legal aid application is positive, the applicant will be issued a voucher (*uputnica*, referral letter) which would authorise him/her to request respective services from the legal aid provider indicated on the voucher.⁹⁴ The provider would be paid only after delivering the service indicated on the voucher.⁹⁵

The evaluations of the Serbian draft law argued that awarding the right to primary legal aid to anyone in every matter would be very generous, however if this right were not matched by any direct investment or compensation from the legal aid budget, the command of *pro bono* work might turn out to be unfair for some legal aid providers.⁹⁶ Although legal aid providers are required to keep records on all legal aid provided, it seems that the main focus of the control of the provided legal aid is directed towards provision of secondary legal aid, and it is uncertain to which extent the rather broad (but unsupported) right to primary legal aid would be effectively controlled and enforced. No specific provisions on refusal of primary legal aid or its inappropriate provision are contained in the SDL. For secondary legal aid, sanctions are problematic due to the lack of direct power to impose disciplinary sanctions or fines with regard to private lawyers as legal aid providers.⁹⁷

The formal, multi-level procedure of processing legal aid applications under SDL raises doubts about whether applicants who are in need of legal aid would be capable of effective participation in the proceedings, or whether and how they will be able to request and receive legal aid for the process of deciding on their legal aid application. The process for obtaining legal advice and assistance under this system may be regarded as unnecessarily complex and burdensome.⁹⁸

92 Art. 32 SDL.

93 Art. 34 SDL.

94 Art. 41 para. 1 SDL.

95 Art. 41 para. 2, Art. 57 SDL.

96 Uzelac 2012, p. 25.

97 Uzelac 2012, p. 25.

98 Ibid.

Some criticisms addressed the substantive process of decision-making.⁹⁹ Flexible eligibility criteria and open standards of economic eligibility may be in line with the approach of the ECtHR, but also contain a high degree of discretionary decision-making, which may lead to unpredictability and may run against the principle of uniform application of law.¹⁰⁰ Another part of the screening process relates to the provision which authorises the competent legal aid administration bodies to reject “manifestly ill-founded” applications.¹⁰¹ Here, it is again questionable to which degree the administrative legal aid authorities will be able and qualified to assess appropriately whether a claim is manifestly ill-founded. In more complex cases such assessment would need a rather more thorough presentation of the case than the one that will be in front of the legal aid administration, and sometimes it would only be possible to see whether the case is manifestly ill-founded if the applicant’s case was already analyzed, supplied with appropriate statements and documents, and presented by a lawyer.¹⁰² Although these criticisms are not absolute, one has to beware of the possible dangers that could arise, as the SDL does contain only very general provisions in this regard.¹⁰³

In summary, it can be stated that both Croatian and Serbian legal aid models may not be qualified as “user friendly” or “providing practical and effective methods of accessing justice” which are not “unnecessarily complex”, to quote only a few lines from the applicable international legal aid standards.

3.5. Funding of the legal aid system under Croatian law and the Serbian reform plan

The failures and non-functioning of the legal aid system in Croatia may best be diagnosed when financing is concerned. The legal provision apparently grant rights to various legal aid providers to request compensation from the state budget, but the rules are such that the largest share of the legal aid budget is paid for administrative expenses, and only a very small part is actually paid for legal aid. The trend is also negative, as the legal aid budget – low from the very start – is constantly decreasing.¹⁰⁴

Formally, the funds for legal aid are either paid in arrears, on the basis of vouchers, or paid in advance, on the basis of projects. The secondary legal aid is paid in arrears, while the primary should be paid in advance. However,

99 Ibid.

100 Ibid.

101 Art. 35 para. 1/3 SDL.

102 Uzelac 2012, p. 25.

103 Art. 53 para. 1–3, 5 CLAA. See also Uzelac 2012, *ibid.*

104 The budget for legal aid provision is decreasing every year. The budget for legal aid provision is 72.05% lower in 2012 than in 2009, while the costs for legal aid provision are rapidly increasing. See Twinning Project Report 2012, p. 99.

the funds awarded on the basis of projects must be later justified by the issued vouchers, which proved to be discouraging and led to a situation in which most legal advice centres had to refund the sums paid out in advance, and many of them ceased to apply for state funds.

According to the report by the MoJ for year 2011, a tender for legal aid projects addressed to NGOs and legal clinics was issued on 11 January. A total of 19 project proposals were submitted by the associations and the law clinic of the Faculty of Law of the University of Zagreb. On 16 May 2011 the Minister of Justice issued the decision according to which the funding for the provision of legal aid was approved for 12 associations. Hence, the duration of the approval of the funding was longer than 3 months and pre-payment for 2011 actually did not happen prior to the second half of that year.¹⁰⁵

Attorneys argue that a small number of attorneys want to provide free legal aid due to the extremely low remuneration.¹⁰⁶ Legal aid work is paid to the lawyer after completion of the litigations that may take several years.¹⁰⁷ Between that point and actual payment lawyers have to wait up to 6 months.

Legal aid can also be funded by the contributions of legal aid beneficiaries.¹⁰⁸ However, the system of contributions is practically irrelevant, as it does not stand in any relation to actual costs, but only refers to the obligation of certain users to pay a percentage of the (otherwise low) legal aid tariff.

There is a lack of consistent monitoring and reporting regarding the money actually spent on legal aid cases. MoJ has calculated the expenses for the 2416 orders issued from March 2009 until March 2010 to be 1 319 000 kn (approximately EUR 175 000). It would, in their view, mean that the cost per case was 546 kn (EUR 78). It is uncertain whether this information is accurate, in particular because all expenses are just a projection. Actual sums paid out to legal aid providers are ten times lower, and there is no guarantee that they will be paid in the future (also taking into account that the lawyers who will receive remuneration from the opposing, losing parties, do not have right to cash in the vouchers).

The international expert evaluation commented on the Croatian system of financing, stating that control of public spending must be strict to ensure sustainable funding, but should not overburden the process to get access to legal aid itself. The funds for the providers of primary legal aid are not a case of real project financing. For that to be the case, the system would have to take into consideration the total contribution of any qualified organisation to the goal, the equal protection of rights and legally protected interests of

¹⁰⁵ Twinning Project Report 2012, p. 70.

¹⁰⁶ See Twinning Project Report 2012, p. 75. The Lithuanian experts who evaluated the Croatian legal aid system made a remark that, in their opinion, the average remuneration for lawyers in Croatia is not so low: for one hour it is 250 kn, compared with Lithuania where legal aid attorneys receive only 40 litas (about 80 kunas).

¹⁰⁷ Twinning Project Report 2012, p. 75.

¹⁰⁸ Art. 2 CLAA.

the citizens, and award accordingly sums that would cover a substantial part of the actual costs of providing legal advice. The public money from state sources should complement the funds from other sources, such as the volunteer contribution of the providers, and the money awarded by foreign and international organisations (that are also gradually scaling down their humanitarian assistance).¹⁰⁹

The *Serbian* draft law provides for multiple public sources of financing, such as from the national (State) budget, the budget of autonomous provinces, funds from local self-government units, and means given by the organisations entrusted with public authorities. Legal aid may also be financed from contributions and from national and international donations.¹¹⁰ All public sources should be used primarily to finance secondary legal aid, while primary is excluded from the legal aid budget (*see supra* at 3.2.). The public authorities at the State level may subsidise legal advice, but only from the regular budget of the respective institution. The budget for (secondary) legal aid is allocated from the level of central government to be managed by the Ministry of Justice.¹¹¹ It should be used for the administrative expenses of establishment and maintenance of the legal aid system, and for the payment of secondary legal aid providers. At least 40% of the budget has to be spent on such payment, and up to 10% may go to the administrative expenses of processing legal aid applications.¹¹² The legal aid offices of local government are financed from the budgets of the local administration and autonomous provinces.¹¹³

It may be premature to assess the financial aspect of the Serbian draft of the legal aid act, as more detailed plans regarding the expenditures from the public funds, both at central and local level are needed. Keeping in mind the best practices and data on legal aid expenditures in the region, it should be expected that at this stage at least EUR 10–15 million should be allocated to the legal aid budget on the annual level. However, no available documents from Serbian public sources mention any concrete sums. There are also no concrete calculations regarding the costs per case (CPC), regarding the shares of particular actors in the system, or regarding the supplemental finances available from other sources.¹¹⁴

¹⁰⁹ Conclusions 2011, p. 2.

¹¹⁰ Art. 55 para. 1 SDL.

¹¹¹ See Art. 55, para. 1–2 SDL.

¹¹² The rest, i.e. 50%, is not specified and therefore relates to some other expenses (which should presumably also be included under administrative expenses).

¹¹³ Art. 55, para. 3 SDL. See also Uzelac 2012, p. 30.

¹¹⁴ Uzelac 2012 p. 30.

4. CONCLUSION

In the first part of this paper (see Ch. 2) we have tried to outline the content of the emerging international standards in the area of legal aid, and their implications on the organisation of the national legal aid schemes. The adherence to rule of law and protection of human rights were also among the main reasons why the international community had an interest in legal aid reforms in Southeast Europe.

However, when we assess the new legal aid schemes that have been developed in the two largest successor republics of the former Yugoslavia, it can hardly be stated that such schemes were inspired by the protection of human rights or by an intention to systematically increase access to justice and empower the underprivileged and legally illiterate members of the society so as to protect their rights. Instead of adherence to the international legal aid standards, these two countries are developing complex administrative and bureaucratic structures that are anything but functional and user-friendly. As elaborated in the preceding chapters of this paper, what is often neglected or absent are the basic elements of a well-organised legal aid system as described in Chapter 2, such as the orientation towards the needs of the users; continuous monitoring and empirical research; provision of practical and effective methods for accessing justice; generosity; support to multiple providers; avoidance of unnecessary complexity, and adequate funding.

Is this only further proof that countries in transition have difficulties with the institutional capacity needed to implement necessary reforms? Is it a simple example of incompetence and clumsiness? Or, is there a hidden agenda behind the dysfunctional schemes and the elaborate administrative maze that is created between the users and the legal services needed?

Avoiding any conspiracy theory, we would like to conclude by pointing out a few aspects of the Croatian and Serbian reforms that may be cause for concern.

As we stated in the introduction, the dysfunctional reforms do not only mean lack of progress; they may actually cause further deterioration of the situation. One of the reasons for this is the fact that brand new, "integrated" legal aid acts may create the illusion of a working system, which can send a message to external donors and sponsors of legal aid work that the need for their support is over. In particular, in Croatia only, the support for legal aid from international and foreign sources amounted to several million euros. After the CLAA was enacted, this support began fading away, to be replaced by virtually nothing (actual sums paid out to legal aid providers are practically non-existent).

Another point is that legal aid legislation is used internally as a tool in the battle for establishment or preservation of monopolies on legal services. Instead of empowering every willing organisation and individual capable of useful work in the area of legal aid and assistance, legal aid legislation is drafted

in a way that uses the pretext of quality control to prohibit some forms of legal aid work or reserve them for only one type of legal aid provider, irrespective of the sources of funding. Typically, the stronger and politically speaking more influential representatives of legal elites (such as Bar Associations) are using their lobbying power to assert their (more or less) absolute monopoly on any form of legal work. As the professional lawyers in the commercial sector are not the best solution for many types of legal aid work, many real legal needs may go unmet.

Similarly, the emphasis on legal work in the context of formal legal proceedings (e.g. legal representation in court litigation) suppresses the preventive elements that address legal problems at their roots and reduce the number of unnecessary proceedings, as well as the amount of unnecessary legal costs. As seen in both Croatia and Serbia (which generally tends to follow the Croatian approach in the EU accession process), the least amount of support is given or promised to the providers of primary legal aid. This is again in stark contrast to former practices and the real needs in society, as during the years of war and instability in 1990s the legal advice work provided by NGOs and humanitarian organisations proved to be by far the most developed and useful form of legal aid work in the Western Balkans.

The final paradox of such a development is that it gets, expressly or tacitly, the approval of the very European institutions that have initiated it, putting it in the context of their commitment to human rights and rule of law protection. Regarding Croatia, where the process of EU accession is in its final stage, this is most easily observed: at the same time, while the dysfunctional nature of the legal aid scheme is becoming apparent, the European Commission is closing the chapter on human rights, diagnosing that "Croatia has improved access to justice".¹¹⁵ Should this be interpreted as refuting our initial submission that human rights standards are adequate for interpretation as sufficiently precise guidelines in designing legal aid systems? Or, should this be taken as a sign that European governments do not regard legal aid as sufficiently important to at least insist on implementation of their own recommendations in this field before making strategic decision on future members of the EU? Or, is this showing that, in times of recession, every proclamation of the need to "improve" the legal aid system necessarily leads to cuts in the public expenses on legal aid? All these questions transcend the topic of this paper, but deserve further research.

¹¹⁵ Interim Report 2011, p. 7 (CBM 9).

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LEDER

Jon T. Johnsen 70 år

Professor Jon T. Johnsen fyller denne høsten 70 år. Vi i redaksjonen for Kritisk Juss ville gjerne hedre «Jon T.», og har valgt å dedisere et dobbeltnummer til ham. Artikkene i dette spesialnummeret tar opp temaer som alltid har stått sentralt i Jon T.s arbeid, nemlig straffeprosess og rettshjelp.

Rettshjelp har vært sentralt for Jon gjennom hele hans karriere. Han har vært engasjert i rettshjelpsforskning siden han var med på Troms-prosjektet i 1974, hvor Juss-Buss undersøkte rettshjelpsbehovet i distriktskommuner utenfor Tromsø. Dette førte ham videre inn i stillingen som prosjektleder for Juss-Buss. Her ble han i tolv år, fra 1978 til 1990, og satte sitt preg på organisasjonen. Dette var en viktig periode for Juss-Buss, hvor ideene og engasjementet fra de opprinnelige initiativtakerne ble strukturert, og Juss-Buss forandret til en effektiv rettshjelpsorganisasjon. Det meste av denne strukturen fra Jon T.s periode ligger fast i dag.

Det var også i perioden på Juss-Buss at Jon fikk ferdigstilt doktorgradsavhandlingen sin: Retten til juridisk bistand. En rettspolitisk studie.¹ I tillegg til å være en nyskapende undersøkelse av funksjonen av rettssystemet vårt er avhandlingen en av de første uttalt rettspolitiske doktorgradsavhandlingene her i landet. I tillegg var den gjennomgående tverrfaglig. Vitenskapelige arbeider som kombinerer rettsdogmatikk, rettspolitikk og tverrfaglighet, er siden blitt adskillig vanligere. På dette området var nok Jon forut for sin tid, med sitt fokus på problemer istedenfor en avgrenset vitenskapelig metode.

Jon ble videre professor ved Institutt for offentlig rett, UiO, med særlig ansvar for å undervise i straffeprosess. Straffeprosess kan se ut som å være et langt steg unna Juss-Buss og rettshjelpsforskning, men også straffeprosessen er et viktig område for en som er opptatt av rettsstillingen til svakerestilte grupper. Jon engasjerte seg aktivt i dette feltet, igjen gjennom forskning, undervisning og utredning. Som Jon selv skriver: «[Å] forstå svakerestilte grupper og utvikle kunnskap som tjener deres interesser i forhold til rettssystemet,

¹ Jon T. Johnsen (1987), Retten til juridisk bistand. En rettspolitisk studie, Tano, Oslo.

har vært viktig for meg.»² I denne stillingen har han lagt mye vekt på undervisning og veiledning, fremfor forskning innen straffeprosess.

Engasjementet for rettshjelp har imidlertid ikke sluknet etter at han sluttet som prosjektleder for Juss-Buss. Mye av arbeidet hans har fremdeles vært om rettshjelp, både forskning, veiledning av studenter og utredningsarbeid. I den senere tid har Jon også arbeidet med rettshjelp i internasjonale sammenhenger, blant annet i Finland, Kina og Kroatia. Engasjementet i CEPEJ³, Europarådets kommisjon for effektivisering av rettssystemer, har også ført med seg at Jon har fått jobbet bredt og internasjonalt med spørsmål om hvordan rettssystemer fungerer.

Jon har alltid vært opptatt av hvordan regler virker i samfunnet. Dette har gitt seg utslag i en mangfoldig tilnærming til spørsmålene han interesserer seg for, og han har ikke følt seg for bundet av rettsdogmatikkens strenge rammer. Han drar gjerne inn tverrfaglige perspektiver, og har kanskje spesielt vært interessert i empirisk forskning som grunnlag for juridiske og rettspolitiske analyser. Rettspolitikken føyer seg inn i dette mønsteret.

Mange av oss i redaksjonen for *Kritisk Juss* har jobbet i Juss-Buss eller på andre måter vært engasjert i rettspolitiske spørsmål. Vi har alle opplevd Jon T. Johnsen som tilstedeværende og engasjert i det rettspolitiske miljøet, og med et oppriktig ønske om å videreformidle kunnskaper og rettspolitisk engasjement til studenter og yngre jurister. Han har blant annet bidratt sterkt til flere av Juss-Buss' internasjonale prosjekter, hvor han har blitt kjent med og arbeidet sammen med mange av dagens Juss-Buss-ere. Vi tror et slikt faglig og sosialt engasjement har stor betydning for å gjøre nye generasjoner av jurister bevisste på rettspolitiske problemstillinger, og vi ønsker å takke for alt det arbeidet Jon har lagt ned i løpet av sine første 70 år.

2 Jon T. Johnsen (2010), «Kritisk Juss i mitt arbeid som rettsforsker», i: Kjell Å. Modéer og Martin Sunnqvist (red.), 1968 och därefter. De kritiska rättsteoriernas betydelse för nordisk rättsvetenskap, Museum Tusculanums Forlag, København.

3 Commission européenne pour l'efficacité de la justice.

FAGFELLEVDERT ARTIKKEL

Om rettspolitikk

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1 RETTSPOLITIKK – FØR OG NÅ

Ordet «rettspolitikk» er blitt sentralt i den skandinaviske rettsvitenskapens tekster. Historisk er termen sammenvevd med skandinavisk rettsrealisme. Dette er teori som har observert retten som noe faktisk, og fremholdt at grunnleggende verdiprioriteringer har et subjektivt og irrasjonelt grunnlag.² Teorien kan gjenfinnes i mange rettsvitenskapelige tekster publisert i Sverige, Danmark og Norge på 1900-tallet.³ Den er realistisk, i den betydning at den søker å forstå retten, slik den er i realiteten, som en sansbar virkelighet i tid og rom, uavhengig av forestillinger om hvilke verdier retten bør ivareta (idealisme).⁴ Det å ta stilling til hvilke ideelle forestillinger retten bør ivareta, kan ikke forankres i noen sansbar virkelighet. Realismen i skandinavisk rettsvitenskap gir av den grunn heller ikke mulighet for noen rasjonell analyse av hva retten bør beskytte.

I dette perspektivet har den realistiske rettsvitenskapen en oppgave i å avdekke hvilke verdier som beskyttes av gjeldende rett, men må samtidig ta disse verdiene for gitt. I tillegg gir realismen også rom for å avklare om bestemte rettsregler er rasjonelle midler for å fremme bestemte verdier. I skan-

1 Takk til Anine Kierulf, Thomas Horn, Inger-Johanne Sand og tidsskriftets anonyme konsulent, for konstruktive kommentarer til tidligere utkast av denne artikkelen.

2 Se også nedenfor i punkt 2.

3 Tre uttrykk for en realistisk tilnærming til retten, forfattet i henholdsvis Sverige, Danmark og Norge, er Karl Olivecrona (1939), *Law as Fact*, Copenhagen – London; Alf Ross (1953), *Om ret og retfærdighed: en indførelse i den analytiske retsfilosofi*, København; og Torstein Eckhoff (1954), «'Realisme' og 'Idealisme' i rettsvitenskapen», *Jussens venner*.

4 For denne måten å bruke termen «realisme» på, se Eckhoff (1954) og Rune Slagstad (1987), «Norsk rettsrealisme etter 1945», *Tidsskrift for Rettsvitenskap*, s. 385–403.