

Legal aid reform in Moldova – prerequisites, progress, challenges and expectations
Nadejda Hriptievschi
Legal Consultant, Public Defender Office Chisinau
Consultant on access to justice with the Soros Foundation – Moldova

Paper prepared for the Foundation for Legal Technologies Development, Minsk, Belarusi

November 2008

The paper describes the reasons that determined the legal aid reform in Moldova, the stakeholders involved in the process and the main stages in the reform. It further reviews the key elements of the new legal aid system, established by the Law on State Guaranteed Legal Aid that entered into force on July 1, 2008, analysing the pros and cons of the chosen solutions, as well as giving some critics to certain provisions. It finally assesses the initial impact of the legal aid law and outlines a few recommendations for similar reform processes.

Prerequisites of the reform

The legal aid reform in the country was determined by a series of major problems in the delivery of legal aid, particularly the low quality of legal aid, chronic under-funding and lack of any reliable data for new policies.

The Soros Foundation - Moldova commissioned an analysis of the legal framework related to the legal aid system in 2003¹ and carried out a statistical study on legal aid delivery in 2004² in two court districts of the country. The 2003 legal analysis has identified important shortcomings, among which the vague norms on entitlement for legal aid, lack of procedural norms for implementing the right to legal aid in non-criminal proceedings, lack of rules on appointment of legal aid lawyers that, in practice, put the latter in dependence of the criminal investigation bodies and judges, cumbersome rules for payment for legal aid and low fees that did not motivate lawyers to do a good job for their defendants/clients. The 2004 study revealed additional appalling details about the practice of legal aid delivery, namely that legal aid was delivered only in criminal cases where the presence of a lawyer was mandatory, although by law it should have been delivered also in civil cases where legal assistance was mandatory; legal aid lawyers were appointed in a very high percentage of cases, while in practice these lawyers would often require additional payment from the clients, in-kind or in a monetary form, making impossible to do any reliable estimation on the needs and actual costs for legal aid; lawyers appointed in legal aid cases were very passively defending their clients; low

¹ See the legal analysis of the legal aid system, drafted by Eugen Osmochescu, Ion Vizdoaga and Viorel Rusu, based on the methodology provided by the Open Society Justice Initiative, Budapest and Law Program of the Soros Foundation – Moldova, October 2003, report available upon request (Romanian or English).

² See the statistical study on criminal legal aid delivery in Moldova, carried out by Victor Munteanu, Victor Zaharia and Ion Jigau, Soros Foundation – Moldova, 2004. The methodology was developed based on methodologies used in the studies on access to a lawyer carried out by the Bulgarian Helsinki Foundation in Bulgaria in 2002 and the Open Society Justice Initiative’s recommendations. Findings available upon request (Romanian).

payment for legal aid did not motivate good defence, but rather resembled a social assistance scheme for a category of lawyers that would not have otherwise a stable clientele.

Relying on these findings, the Soros Foundation – Moldova (*SFM hereinafter*) throughout the years of 2004 and 2005 carried out a series of events, varying from national conferences to small meetings, through which it attempted to raise the Government's and Bar's awareness on the state of affairs and incite a movement to reform. The Parliament proved the most responsive and a working group on preparing the national concept for legal aid reform, and further the draft legal aid law, was set up under the auspices of the Legal Commission of the Parliament. The Government, represented by the Ministry of Justice, embarked on this process too, by leading and participating in the working group, alongside representatives of the SFM and other public authorities and non-governmental organizations. The Bar, although represented in the working group, proved the least cooperative, manifesting incoherent positions towards the reform process. Since 2005 the Joint programme between the Council of Europe and the European Commission on increased independence, transparency and efficiency of the justice system of the Republic of Moldova has also engaged in the process, providing a draft expertise on the draft law and organizing a study trip to France for some members of the working group.³

Within the context of the reform, in 2006 the Law program of the SFM has set up a pilot Public Defender Office in Chisinau, to test this model in the Moldovan context and provide reliable data for the reform process.

The first pilot Public Defender Office (*hereinafter PDO*) was opened in Chisinau in April 2006 with the following main objectives:

- To provide qualitative legal aid to the clients of the office,
- To test the PDO model in the Moldovan legal and cultural contexts,
- To collect data on legal aid delivery that can be useful for reshaping the legal aid system in the country.

The particular characteristics of the Pilot Public Defender Office can be briefly described as follows:

- it is a joint practice of lawyers providing legal aid in criminal cases,
- the office has common principles of defence, based on the Law on Bar and Code of Ethics of Moldovan Lawyers, plus a few specific principles such as: representation by lawyers' office of only one defendant in cases with co-defendants, representation of the client as soon as possible after arrest, insistence on private meeting with the client before the first interview, team-work, continuous professional development and representation of the client until the final case resolution;
- the manager of the office, a lawyer with minimum 5 years of experience as a lawyer, is responsible for ensuring the quality of the office's services, which he ensures through the following methods: distributes cases to ensure an equal workload of the office lawyers, reviews every pending case at least once during which the weak points of the defence are discussed and the necessary follow up measures, reviews every closed case

³ See for details the information note on the "Role of the Soros Foundation – Moldova in the legal aid reform process in Moldova: activities and perspectives", Law Program, Soros Foundation – Moldova, presented at the first meeting of the National Legal Aid Council of Moldova, 09.04.2008, Chisinau.

- to give the necessary feedback to the lawyer, performs annual review of lawyers' activity and makes recommendations for improvement, ensures at least one annual training session on issues of most interest to the staff lawyers;
- each lawyer has a case file (defence file) for each represented client (it is not a common practice for all lawyers in Moldova, particularly the ones doing legal aid, to keep defence files for every client);
- the office lawyers work in teams, sharing information about the represented clients and discussing the most difficult cases in order to ensure the best defence to the client;
- the office gathers necessary data (except private data about the client and other confidential data according to the lawyer's standards), analyses them and provides to the SFM and the Ministry of Justice in the process of the legal aid reform.⁴

The experience to date proves that public defenders played an important role in the establishment of the new legal aid system. They informed the working group on various details of criminal legal aid delivery, providing both quantitative and qualitative data. For example, the office keeps track of all cases and records for every defence activity on the case, which allowed calculating the average time and costs, data that were used for drafting the preliminary regulation for payment for legal aid lawyers in September 2008. The office has also established some provisional caseload targets, which are being now used for estimating the size and expectations for new public defender offices to be opened in 2009.

Main challenges and disappointments in the first two years of activity (as pilot office):

- Recruitment and keeping of competent and dedicated lawyers – there are many lawyers willing to join the PDO, however very few are truly ready to give up at their practices and particularly at the private cases,
- Attitude of the police and prosecution - police and prosecution is used with bad quality of legal aid services and therefore often ignore the public defenders, calling them too late, do not inform of the relevant procedural actions etc,
- Attitude of the judges, especially of investigative judges⁵ – although many judges appreciate good lawyers, as this allows them carry out their neutral role and sticking to the correct procedure, there are also many exceptions. Particularly worrying is the investigative judges' attitude, which is often ignorant of the lawyers' motions for pre-trial release, although the reasons brought by prosecutors are unfounded or a simple repetition of the criminal procedure code's provisions,
- Rare private meetings with clients in police stations, often because there is no room available or the police office is simply not used to provide facilities for such a meeting,
- Dependence on law enforcement bodies for the caseload (before the entry into force of the new legal aid law the criminal investigation bodies were the ones practically in charge with appointing legal aid lawyers. De iure they were supposed to contact the law office to appoint a lawyer when such needed, but the facto they were contacting directly the lawyers the liked),
- Lack of data that would allow comparing the benefits of PDO with the private lawyers,

⁴ See for details the Manual of the Public Defenders, available in Romanian at www.avocatii-publici.md, an earlier version in English is available upon request.

⁵ Investigative judge in Moldova is responsible for issuing the arrest warrant and ensuring judicial control over the pre-trial stage of criminal proceedings, as well as other responsibilities.

- Technical and working conditions in the office, e.g. lack of a room that would allow private meetings of the lawyer with the client.
- Low visibility among clients and justice actors.⁶

Note: many of the identified challenges have been overcome at the later stage, with the entry into force of the legal aid law, see below.

Main lessons from the initial experience of the PDO:

- the appointment system of legal aid lawyers by law enforcement bodies directly place the lawyers in dependence on these bodies for caseload and reduces from the lawyers' willingness to raise the client's rights violations by the respective state authorities,
- eligibility test for criminal cases is very broad, as legal aid was provided to every defendant in a case where legal assistance was mandatory. According to the Criminal Procedure Code the presence of a lawyer was mandatory in any case where the defendant requested one.⁷ A considerably higher budget than the current one would be necessary to meet all the needs at a qualitative level,
- it is impossible to make a credible cost benefit analysis of the public defender versus private legal aid lawyers, since there are no credible data on legal aid needs and costs, legal aid lawyers request often additional payment from clients and therefore even the existing figures do not reflect the reality,
- ensuring good quality of legal aid is possible, but this requires adequate funding and consistent dedicated monitoring by a competent manager,
- current criminal proceedings are too complicated and need simplification, otherwise are very expensive for the state budget and unsustainable,
- lawyers are wasting enormous amounts of time waiting for the case examination, due mainly to a bad organization of the courts and changes are absolutely necessary if the state does not wish to pay in vain lawyers for waiting time,
- criminal investigation officers are not used to routinely calling lawyers immediately from the moment a person is arrested and cooperation of the leadership of these bodies is necessary in order to ensure prompt access to a lawyer for all arrested clients,
- awareness activities about the new law and rules will be necessary to target specifically the potential beneficiaries /public at large, the lawyers and the criminal investigation bodies and courts.⁸

The biggest achievement of the activities carried out from 2004 to the end of 2006 were the acknowledgment by the major local players, as well as relevant international ones, that legal aid in the country was provided at very low quality and changes were needed. The disappointment of these years was that a consensus on a concept for the legal aid scheme for Moldova among the concerned stakeholders was not achieved. Neither sufficient political will was obtained for piloting for a sufficient period of time a model legal aid management body, public defenders and private lawyers, results of which would have better informed the players on the best suited legal aid system for Moldova. Not even all findings of the 2003 legal

⁶ See for details the Interim Activity Report of the Pilot Public Defender Office Chisinau, for the period of May 2006 – July 2007, submitted to the Law Program of the SFM, July 31, 2007.

⁷ See article 69 para (2) of the Criminal Procedure Code, still the same. The legal aid law only excluded the requirement for providing legal aid according to p. 1 of para (2), referring to “any case when the defendant requires the appointment of a lawyer”.

⁸ See the Interim Activity report of the Pilot Public Defender Office, cited above.

analysis, the 2004 statistical study and the Pilot PDO experiences were taken into account in the process. Rather, in 2006 the working group was keen on proposing the draft law, which was adopted unanimously in its first reading in June 2006. Another major disappointment has been the Bar resistance to real changes in the provision of legal aid and indifference to the essence of the issue and new system, except the interest in the amounts of the legal aid fees.

The legal aid law

With all the drawbacks of the content and disappointments in the stakeholders' involvement in the legal aid reform process, the adoption on July 26, 2007 of the Law on State Guaranteed Legal Aid (*Legal aid law hereinafter*) was an important, qualitatively new stage in the legal aid reform in the country as it laid the background for the main bulk of work on creating a viable legal aid system in the country.

The focus in the country since then has been on taking the best possible efforts for a proper implementation of the law, even if it already became clear that several amendments are needed. It is, regrettably, a characteristic of the Moldovan legal system to have a law adopted rather quickly and then a series of amendments. Although it is a somewhat accepted practice, it is definitely not the best one and one can only hope that with time the legislative process will improve. As a recommendation for other countries engaged in legal aid reforms – it is worth spending more time on demonstration and analysis projects to prepare a more suitable law.

Below briefly the main innovations of the new law will be described. Responding to the main shortcomings previously identified, the Legal Aid Law brings changes in three major areas:

1. Types of and eligibility for legal aid,
2. Management of the legal aid system, and
3. Delivery of legal aid.

Types of and eligibility for legal aid

The Legal aid law provides for two types of legal aid:

- Qualified legal aid – legal consultation and representation in criminal investigation offices, courts and public authorities, which is provided by lawyers, irrespective of their type,⁹ and non-governmental organizations (*NGOs hereinafter*), except representation in criminal and misdemeanour proceedings;¹⁰
- Primary legal aid – basic information about law and assistance for drafting different acts, provided by paralegals and specialised NGOs.¹¹

The main difference between the two types of legal aid consists in their object: qualified legal aid implies provision of legal services that need the involvement of a lawyer. Qualified legal aid also implies or assumes the existence of a conflict that can be solved through courts or public authorities, before which the lawyer can represent the beneficiary. Primary legal aid

⁹ See articles 2 and 29 of the Legal aid law.

¹⁰ See article 35 of the Legal aid law.

¹¹ See articles 2, 15-17 of the Legal aid law.

means provision of legal information or help with drafting legal acts, but which does not require representation by a lawyer before courts or public authorities.

Depending on the type of legal assistance, the legislator has provided the following *eligibility criteria* for legal aid:

1. Primary legal aid:

Primary legal aid is provided to any person on any issues s/he might have, without being limited to a certain legal field. Any person can benefit from primary legal aid without having to prove his or her financial status. The legislator has chosen the „open” option for the primary legal aid based on the considerations of promptness: the issues falling under primary legal aid are supposed to be simple issues that can be promptly clarified by a person with some education but not necessarily a qualified lawyer. The purpose is to give a quick solution to a question that can be quickly solved, without imposing some eligibility requirements that would only deter the population from using this opportunity. Hence, primary legal aid should be provided immediately upon request or the latest in 3 days after the request was filed with the paralegal/NGO.¹² If the client’s issue is a complicated one or the paralegal / NGO does not know the answer, the person should be advised to contact a lawyer or invited to come later if the provider can have an answer in maximum 3 days. The paralegal / NGO providing primary legal aid should explain the person the possibilities to apply for qualified legal aid.

The main goal of introducing the primary legal aid in the law is to increase the population’s legal awareness, provide prompt response to simple legal issues, help solve conflicts as they appear and in the long run prevent escalation of small issues to complex legal problems, reducing also the caseload of cases that reach the court.

Although not requiring any proof for the financial status, primary legal aid is intended for poor persons that can’t afford getting a lawyer. To prevent its misuse, the legislator has provided that the same person cannot come twice with the same issue, unless there are new circumstances.¹³ The National Legal Aid Council should have a good information campaign for the population to know and use this opportunity, at the same time emphasize that it is for the poor so that the ones that need get to use it rather than spreading the resources too broadly.

A final note on this type of legal aid – the law provides it under a so-called permissive provision, meaning that the state will implement it when funds available. So far (only 4 months since the law entered into force) the state has focused on implementing the new rules regarding criminal legal aid, but it is expected that from 2009 steps will be taken for providing primary legal aid too. Lawyers can by default provide primary legal aid, but their services will not be paid by the state, following the goal of using lawyers’ services, which are more expensive than paralegals or specialized NGOs, for legal issues that indeed require the intervention of a lawyer. The lawyers can provide primary legal aid pro bono or use it as a means for finding potential clients.

2. Qualified legal aid:

¹² See article 18 of the Legal aid law.

¹³ See article 18 para (3) of the Legal aid law..

Qualified legal aid is provided in the following fields: criminal, civil, misdemeanour and administrative proceedings.¹⁴

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

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

Financial criteria: in order to benefit from legal aid the beneficiary should have a lower income than the level provided by the Government for benefiting of legal aid,¹⁵ except those persons that can get legal aid irrespective of their financial status. For calculating the level of the income for benefiting from legal aid the income received in the last 6 months of the month preceding the request for legal aid is taken into account. The detailed methodology for calculating the income and determining the level for benefiting from legal aid, as well as the template declaration that should be filled by the person requesting legal aid are provided for in the Government's Decision Nr. 1016 of 01.09.2008.¹⁶ One note has to be made here about the presumption and the need checking the applicant's financial status. The Government's decision states a presumption of trust in the data provided by the applicant. Thus, for taking a decision about the financial suitability of the applicant, it is sufficient for the latter to complete and sign the template declaration about financial means and submit it to the Territorial Office of the National Legal Aid Council. The respective office can request additional documents proving the financial status in cases when the sincerity of the person raises concern. Also, it can take a decision to provide legal aid and request the respective proofs to be brought later on during the case examination. This presumption is a very important one, as gathering the necessary proofs of the financial status might take up to 2 weeks, while the Territorial Office has to take a decision about legal aid in maximum 3 days from the moment of receiving the request. To ensure that the applicant provides the correct information, the declaration has a provision about the possibility of criminal liability in case of provision of false information.

Legal aid is provided *irrespective of the person's financial status* in the following circumstances:

1. persons in need of urgent legal aid upon arrest (zaderjanny) in a criminal or misdemeanour procedure,¹⁷
2. cases where the presence of a defence lawyer is mandatory (mandatory defence cases) according to article 69 para (1) p. 2) – 12) of the Criminal Procedure Code of Moldova (*CPC hereinafter*), and
3. cases where legal assistance is mandatory according to art. 304 and 316 of the Civil Procedure Code of Moldova (*CiPC hereinafter*).¹⁸

In such cases the persons are eligible for legal aid irrespective of their financial status. The legislator has chosen this option due to the following considerations. For urgent legal aid (legal aid at police station) it is not practical to have a test for checking the financial situation of the person given the urgency of the procedure and the practical difficulties to have any check in a

¹⁴ See article 19 of the Legal aid law..

¹⁵ See article 20 of the Legal aid law.

¹⁶ See the Government's Decision Nr. 1016 from 01.09.08 regarding the approval of the Regulation on the methodology for calculating the income for providing state guaranteed legal aid, published on 05.09.2008.

¹⁷ See article 19 para (1) l. b) of the Legal aid law.

¹⁸ See article 19 para (1) l. c) and l. d) of the Legal aid law.

short period of time. Another consideration might have been the will of the state to reduce the police abuse at the initial stages of proceedings, when the client is most vulnerable. For the cases when the presence of a lawyer is mandatory, the legislator perhaps provided the right to anyone irrespective of their financial status due to the fact that by imposing mandatory representation the state should not expect the person to bear the costs of representation herself. Provision of legal aid irrespective of financial means to any person facing proceedings where legal assistance is mandatory is definitely a positive provision for the person. In practical terms, however, it raises a legitimate concern about the sustainability of the state budget to cover all the needs adequately. Will the state have sufficient funds to provide legal aid to all eligible persons, given the fact that especially the CPC provides a broad list of mandatory defence cases?¹⁹ The Legal aid law does provide the possibility for recovering legal aid expenses if the person's financial situation is improved, or if the person provides falls information. However, it only refers to "other persons" as free legal aid is formulated as a right for mandatory legal assistance cases. For ensuring sufficient sustainability in terms of finances, the legislator might consider reformulating these provisions, as well as the CPC and CiPC, clarifying that mandatory legal assistance does not equal free legal assistance and providing for a possibility of recovering legal aid expenses in case of conviction/ the legally aided civil party losing the case.

As far as the *merit test criteria* required by the law, in criminal cases „the interests of justice” should call for the appointment of a lawyer. An additional criteria is provided for civil, misdemeanour and administrative cases, namely „when the case is complex from the legal or procedural points of view”.²⁰ The „interests of justice” criteria is based on the jurisprudence of the European Court of Human Rights (*ECtHR hereinafter*), which usually refers to the gravity of the allegation and the possible sentence, complexity of the case and the person's ability to represent herself.²¹ The ECtHR has further found that “when liberty is at stake, interests of justice in principle require that the person is represented”.²² Based on these conclusions and the analysis of the Legal aid law's provisions on urgent legal aid and proceedings when mandatory legal assistance is necessary, one can conclude that legal aid in Moldova should be provided in any criminal case where the person is detained or risks deprivation of liberty or where legal assistance is mandatory in any civil case. Legal aid should also be provided to any arrested person in a misdemeanour procedure.

¹⁹ Art. 69 para (1) of the CPC states the following: “Participation of a lawyer in criminal proceedings is mandatory in the case when: 1) requested by the defendant (*note: this provision is very broad, encompassing practically any case. this was the reason for its exclusion from the legal aid law*); 2) the defendant cannot defend him/herself because of deafness, blindness, dumbness or other serious the physical or mental disabilities, 3) the defendant does not know well the language in which the case is conducted, 4) the defendant is a minor, 5) the defendant is an enrolled soldier (military), 6) the defendant is charged with a grave, very grave or exceptionally grave offence, 7) the defendant is arrested or is sent for a psychiatric expertise in a medical institution, 8) the interests of the co-defendants are contradictory and at least one is represented by a lawyer, 9) the victim's lawyer takes part in the respective case, 10) the interests of justice require the participation of a lawyer at first instance, appeal or recourse, or during the extraordinary ways of appeal (*Note: quit a broad provision, which can be applied quite broadly by the judge*), 11) the defendant is mentally irresponsible person, 12) the criminal procedure refers to rehabilitation of a deceased person at the moment of examining the case.

²⁰ See article 19 para (1) l. a) and l. e) of the Legal aid law.

²¹ See *Quaranta v. Switzerland*, 24.05.1991

²² See *Benham v. United Kingdom*, 10.06.1996.

As far as the „complexity from the legal or procedural points of view” is concerned, the legislator does not explain it further, leaving it for future further clarification. It has to be noted that legal aid in civil, administrative and misdemeanour proceedings will enter into force only in January 2012,²³ therefore until then the National Legal Aid Council shall prepare explanatory guides for its territorial offices to be able to apply this criteria properly, without too much discretion and avoiding arbitrariness. Given the complexity of establishing appropriate eligibility criteria for non-criminal cases, it was perhaps better to have a flexible provision that can be amended responding to the practice requirements, which vary as the society’s needs are changing.

Depending on the procedure and stage when provided, the qualified legal aid in Moldova is of two types:

- *ordinary legal aid*²⁴ and
- *urgent legal aid*.²⁵

These types do not differ substantially, the difference being only in the procedure of appointing lawyers to provide it and the eligibility requirements. Urgent legal aid is provided to any arrested person in a criminal or misdemeanour procedure and it is provided up to the moment when the person’s status is clarified when: released or detained during pre-trial proceedings. Usually it is provided up to the first hearing when the arrested person is brought before the investigative judge, unless the criminal investigation body or the body that arrested the person decides to let her free before bringing to the judge. The purpose of the urgent legal aid is to provide the lawyer as soon as possible after person’s arrest, ensuring the fundamental right to defence, as well as preventing any possible abuse by the detaining authority. Urgent legal aid should be provided maximum in 3 hours from the moment the person is arrested: the body that arrested the person shall contact immediately, maximum within 1 hour from arrest, the Territorial Office of the National Legal Aid Council, that has to appoint a lawyer immediately, but not later than 2 hours from the moment it received the request for appointment from the body that arrested the person.²⁶

Prompt access to a lawyer is crucial from the point of view of client’s rights, given her vulnerability during the first hours of detention and the tendency of the respective bodies to extort confessions. Prompt access to a lawyer is also important from the point of view of good administration of justice, as the lawyer can appeal the cases initiated wrongly, with the possibility of ending them early rather than spending public funds on proceedings without merit. Presence of a lawyer is also a guarantee for the prosecution that the statements given in the presence of a lawyer can be further used or at least confronted with during case examination in case the client changes her position and statements in court. According to Moldovan criminal procedure law the statements given at pre-trial stage cannot be read in court, only the statements given in court are admissible as evidence. However, if the client changes her statements, she can be questioned about the reason and the credibility of such

²³ See article 37 para (1) of the Legal aid law.

²⁴ The legal aid law does not use the term „ordinary” legal aid, but I use it here for a better distinction from the urgent legal aid.

²⁵ See article 28 of the Legal aid law.

²⁶ See articles 28 and 26 of the Legal aid law, as well as the amendments to the CPC. Also see the Regulation of the National Legal Aid Council on the procedure for requesting and appointing a lawyer to provide urgent legal aid, approved on 16.07.08.

statements can be questioned accordingly. Defendants often change their statements claiming that the statements given at pre-trial stage were given under criminal investigation bodies' pressure.

Ordinary legal aid is provided in 3 working days from the moment the request for legal aid was received by the Territorial Office of the National Legal Aid Council. The request can be submitted by the potential beneficiary (the legal aid applicant), any relative, criminal investigation bodies or the court.²⁷

In terms of covered costs to the client, qualified legal aid can be of two types:

- *free qualified legal aid* – the costs are fully covered by the state, and
- *partially free qualified legal aid*, which is provided in cases when the person's income is higher than the income level established by the Government for benefiting from legal aid and the person can cover partially the legal aid costs.²⁸ Such a provision is a good one for the clients that do not have sufficient resources for covering fully the legal aid fees. It is also a good provision for the state as it gives it a chance for covering a bigger proportion of legal aid needs in the country. A partial contribution can also deter clients that do not really have a valid claim from going to court.

The law provides for the possibility to *refuse provision of qualified legal aid* in the following cases: the request is manifestly ill-founded, the person does not have the right for which defence/ representation is required, the value of the claim is significantly smaller than the expenses for providing qualified legal aid on state expense, and if the person has the possibility to cover the legal assistance costs from her property, except goods that cannot be forcibly sold according to the civil law.²⁹ These provisions are referring mainly to civil, administrative and misdemeanour proceedings, although the law does not make this clarification. It might need further details if practice shows that it is a dead provision or a controversial one. For example, it is not clear if the Territorial Office of the National Legal Aid Council can refuse providing legal aid in criminal cases based on the reason that „the client can cover the expenses from her property”.

The law also provides for the possibility to *recover the costs related to legal aid* in the following cases: payment of legal aid costs by the party that lost the case in civil or administrative proceedings; restitution of costs by the person that provided false information about her financial situation; improvement of the financial situation of the person that received legal aid, which allows her to cover the legal aid costs, if the improvement occurred during the case examination or the enforcement of the sanction.³⁰ This provision is necessary for allowing the state to control the budget needed for legal aid, especially in civil and administrative cases. However, for being able to effective use the recovery/ compensation option by the Territorial Offices, these provisions need revision and clarification, coordinated with other legislative provisions. E.g. for criminal mandatory defence cases when legal aid is provided irrespective of the defendant's financial status it shall be clarified that it does not mean that the state cannot

²⁷ See articles 26 and 27 of the Legal aid law.

²⁸ See article 22 of the Legal aid law.

²⁹ See article 24 of the Legal aid law..

³⁰ See article 23 of the Legal aid law.

later on recover the cost if the person is found guilty. For this, however, the beneficiary shall always be warned before being provided legal aid about the possibility of recovery of the legal aid costs (e.g. a note can be made in the letter of rights that is provided to every defendant). For any type of proceedings, the term during which the state can recover the legal aid costs should also be extended.

Management of the legal aid system

One of the main critiques of the old legal aid system was lack of a clear management structure in charge of planning and organizing the legal aid delivery.³¹ The Legal aid law provides for such a structure, creating the National Legal Aid Council, a legal entity of public law, in charge with administering the legal aid system in the country.³²

The National Legal Aid Council is on the one hand responsible for elaborating the legal aid policies in the country and on the other hand is responsible for their implementation. The Ministry of Justice remains the policy making body in the field, reporting to the Government and the Parliament, with the National Legal Aid Council helping the Ministry of Justice to adopt relevant legal aid policies.³³ This new provision is important, as it spares the Ministry from handling functions that are not appropriate for a Ministry, e.g. administering legal aid fees to all lawyers doing legal aid throughout the country. The Ministry is and should focus on policy making and not administration of payments. This separation of functions between the Ministry and the National Legal Aid Council is also important for ensuring a correct and independent application of the legal aid law, as well as the impartial image of the legal aid system in the country. The National Legal Aid Council, being a separate entity from the Ministry, will decide, through its Territorial Offices, on who is and who is not eligible for receiving legal aid, including in cases that are challenging the state's authority, including the Ministry's. The creation of the National Legal Aid Council also spares the Bar Council from administering the legal aid system, a function that is not appropriate for the body that is in charge with providing legal aid, concerned with ensuring high standards of representation rather than watching over the rationality of spending for legal aid. It is hoped that the intentions for which the National Legal Aid Council was created will prove right and implementable, and it will indeed contribute to a rational policy making in the field and increase of the accessibility and quality of legal aid services in the country.

The National Legal Aid Council is a collegial body with the status of a legal entity of public law, composed of 7 members. The members are proposed by: 2 – Ministry of Justice, 2- Bar Council, 1 – Superior Council of Magistrates, 1- Ministry of Finance and 1 is chosen by the

³¹ See the legal analysis of the legal aid system, drafted by Eugen Osmochescu, Ion Vizdoaga and Viorel Rusu, based on the methodology provided by the Open Society Justice Initiative, Budapest and Law Program of the Soros Foundation – Moldova, October 2003, report available upon request (Romanian or English). See the Assessment report on the provision of free legal aid and legal assistance in Moldova, prepared by the Council of Europe experts Ms. Nadine Benichou, Ms. Alison Macnair and Mr. Karel Cermak, in 2003, within the framework of the Joint programme between the European Commission and Council of Europe for Moldova for the year 2003. See also the conclusions of the conference „Management and Delivery of Legal Aid in Moldova: policies, legislation and practice. Comparative experience”, organized by the Law Program of the SFM and the Open Society Justice Initiative, Budapest (agenda and conference materials available upon request).

³² See article 11 of the Legal aid law.

³³ See article 9 of the Legal aid law.

Ministry of Justice through a public competition among the members of NGOs and academia.³⁴ A diverse representation in the National Council was chosen on purpose, as an additional guarantee of its independence. The National Council's members are not employed by this body either the Ministry of Justice, they only meet for the Council's meeting, which shall be organized not less than once every three months.³⁵

The National Legal Aid Council's main functions are the following:

- Implements the legal aid policy in the state. This means overseeing the implementation of the legal aid law and other relevant laws, implementation of the Government or Ministry's decisions, as well as of its own decisions. It also implies National Council's participation at drafting the legal aid policies, being entrusted with the function of collecting and analysing statistical data, making proposals about relevant legal aid policies and submitting the proposals about the legal aid budget to the Ministry of Justice;
- Determines the financial criteria and mechanisms for benefitting from legal aid, to be later on approved by the Government;
- Establishes the admission criteria for lawyers willing to be included in the national registry for legal aid providers. Previously anyone who wanted to provide legal aid could do so. The criteria that the Council have adopted in 2008 are also quite broad, allowing any candidate to enrol. However, if later on proved that the lawyer does not provide legal aid according to the rules, she can be excluded from the registry;
- Determines the payment mechanism and amounts of fees and other costs to be paid to legal aid lawyers. Until now the payment rules were established by the Ministry of Justice in consultation with the Bar Council and the Ministry of Finance. Payment is, perhaps as everywhere, the most debated issue between the public authorities and the legal profession that is unhappy with the fees and payment procedure. The Council has so far adopted only a provisional payment regulation, valid until the end of 2008, with the goal of collecting necessary information and testing some of the new provisions in order to prepare a new payment mechanism that would both attract lawyers and ensure their dedication to qualitative services. The temporary regulation has already improved the mechanism of payment by annulling the obligations of the lawyers to bring evidence signed by the criminal investigation bodies, courts or prosecutors about the legal aid they provided, condition that to a large extent simply put the lawyers in dependence on these actors. The regulation also provided a fixed payment for being on duty, which is hoped to raise the lawyers' interest to respond quickly to any police/prosecutor/court/client request for providing urgent legal aid. The amounts of fees and the covered procedural actions are still being debated and the Council and the experts it works with are now in search of new payment models;
- Ensures the quality of legal aid services, including by establishing standards for activity of the subjects involved in the legal aid system and determining assessment criteria for monitoring the legal aid services, in cooperation with the Bar, etc. The mechanism is not yet elaborated but is on Council's agenda.

³⁴ See article 11 of the Legal aid law, as well as the Regulation of the National Legal Aid Council, adopted on 24.01.08, The Regulation regarding the procedure of selecting the member of the National Legal Aid Council from the NGOs and academia, approved on 11.02.08.

³⁵ See article 13 of the Legal aid law.

The model of a collegial legal aid management body has proved functional and efficient in other states, for example England and Wales, Scotland, the Netherlands, South-African Republic, Israel, models that were looked at when drafting the legal aid law and modelling the new legal aid system in Moldova. However, the Moldovan legislator chose to create a collegial body based solely on member's pro bono participation, as the legal aid budget does not provide any remuneration for the National Council members, not even compensation for their time dedicated to the Council. The various recommendations on the draft legal aid law referred to some compensation, however, these have not been taken into account in the final draft law.

Moreover, the National Legal Aid Council does not have permanent personnel or staff, the secretarial assistance being provided by the Ministry of Justice according to the Legal aid law. Because the National Council is a collegial body and its main form of operation are the meetings that should not be organized less than once in three month, and because of the high responsibilities that it was entrusted with, it is a legitimate expectation to have a permanent staff that would prepare the draft documents for approval and would ensure the Council's work between the periodic meetings. The legislator approved the Ministry's proposal, namely the secretarial assistance to be ensured by the Ministry of Justice. It would have been a more or less acceptable option (with questionable operational independence though) if the Ministry had at least a specialised Department dedicated to legal aid. But so far this is not the case. Moreover, the Ministry does not even have a full-time person to act as the Council's secretary, the function being carried out by one person that is also responsible for notaries and Bar issues in the Ministry. Since the National Legal Aid Council was created (March 2008) three secretaries have already been changed, which once again proves that the chosen solution is not the best one.

So far the National Legal Aid Council has managed to work well and achieve impressive results, given all the constraints it has, due to the dedication of some of its members, particularly the chairman, and the fact that it received technical assistance from the Soros Foundation – Moldova and the Joint programme between the Council of Europe and the European Commission on Increased Independence, Transparency and Efficiency of the Justice System of the Republic of Moldova.

It is hoped that after the initial period of operation the necessary changes will be done both to the legal aid law and the legal aid budget to provide some remuneration to the National Legal Aid Council members and to create an apparatus for the Council, both these conditions being crucial for ensuring the effective operation and sustainability of this body.

One good provision and innovation of the legal aid law was the creation of 5 Territorial Offices of the National Legal Aid Council, set up in the 5 appeal court jurisdiction districts covering the territory of the country. These offices have a distinct legal personality, being organizationally subordinated to the National Legal Aid Council. Their purpose is to implement the legal aid policies adopted by the National Legal Aid Council in the territory of their jurisdiction. They are in charge with eligibility determination, appointment of legal aid lawyers, making the duty schedules of lawyers for urgent legal aid, reviewing the lawyers' reports and making the payments, coordinating the primary legal aid in their jurisdiction, collecting necessary statistical data and submitting activity reports to the National Legal Aid Council every three months.

The detailed functions of the National Legal Aid Council and its Territorial Office are provided in articles 12-14 of the Legal aid law and the Regulation of the National Legal Aid Council and that of its Territorial Offices.³⁶

Legal aid delivery system

The Legal aid law provides a mixed system of delivery, including paralegals and specialised NGOs for primary legal aid and public defender offices, private lawyers and specialized NGOs for the qualified legal aid. The reason for choosing a mixed model was mainly to increase the quality, accessibility and ensure a reasonable cost of legal aid services. This is hoped to be possible in a system where different providers compete for the best cost and quality they provide. In addition, public defenders and paralegals, to be paid by the state, would ensure a good back up for the state in case the private lawyers increase unjustifiably the costs of legal aid or simply refuse to provide legal assistance.

Primary legal aid can be provided by:

- *Paralegals.*³⁷ This is a new concept for Moldovan legal system, a new profession that still needs to be created. The goal is to have a shorter training period than a law degree requires, preparing the persons that have already received a medium or high degree of education, who are based in the rural areas and are not likely to leave it. The paralegals are meant to be created for rural areas, providing their population a chance for solving their basic legal issues in the village, without having to travel to the nearest urban centre to find a lawyer. It is also expected from the paralegals to engage with the local community in implementing various initiatives in the community, taking leadership and teaching the local members how to become more active in asserting their rights. Lawyer can also provide basic legal advice, but they will not be reimbursed for their time,
- *Specialized NGOs* – these were introduced in the legal aid providers' list given the rich experience of NGOs providing legal aid we have in Moldova, especially in areas where few or no lawyers are specialized.

Qualified legal aid can be provided by *public defenders, private lawyers that provide legal aid on request and specialised NGOs.* The last ones can provide qualified legal aid only in civil and administrative cases.³⁸ Besides the reason indicated above, inclusion of NGOs as legal aid providers was determined by the current legal framework that allows representation in court in non-criminal proceedings even by a non-lawyer. The state is interested to use such resources given their expertise in a series of fields, as well as the additional sources they have for legal aid, as so far NGOs mostly operate on foreign money.

The main providers of legal aid remain the lawyers, of two categories:

³⁶ See the Regulation of the National Legal Aid Council. See also the Regulation of the Territorial Office of the National Legal Aid Council, approved on 30.07.08.

³⁷ See article 2 of the Legal aid law.

³⁸ See article 35 of the Legal aid law.

- *the public defender* – is a person that qualified as a lawyer according to the Law on Bar and was admitted to provide legal aid on the basis of special admission criteria”.³⁹ For acting as public defenders they receive a fixed monthly remuneration from the relevant Territorial Office of the National Legal Aid Council.
- *the lawyer that provides legal aid on request* is the person qualified as lawyer according to the Law on Bar and who can be requested to provide legal aid. The lawyers interested to provide legal aid can apply to the Territorial Office and sign the contacts for legal aid delivery with the competent Territorial Office.⁴⁰

The main difference between these two types of lawyers consists of the scope of services and remuneration: public defenders specialize in legal aid and get a fixed monthly remuneration for this, including the costs for maintaining their office. The private legal aid lawyers provide legal aid only when they wish or according to the duty schedule they agreed to and get paid per case and day of duty. The public defenders’ activities are regulated both by the Law on Bar and the Legal Aid Law. Thus, irrespective of the fact that public defenders receive a fixed remuneration, they maintain all their guarantees of independence as lawyers.

Although the legal aid law and the Regulation of public defenders adopted by the National legal Aid Council provides for associated and individual law offices, as organizational form for public defender offices, the experience from the first pilot Public Defender Office in Chisinau, as well as the experience of other countries, demonstrate that associated offices are more efficient given the economy of scale they can achieve due to shared resources and mutual replacements for urgent cases. So far there is only one public defender office in Chisinau, of 10 lawyers and 1 administrator. Plans are being made for opening at least 2 more offices, one for the Northern and one for the Southern legal aid districts of Moldova. Practice will show if individual or associated offices will be created.

Acting as a group of individuals, the public defenders can institute and manage an in-house mechanism for quality assurance and can systematically promote common goals and strategies for defence. Acting as a collective of lawyers they have better chances of influencing and disciplining the local justice actors to adequately respect and ensure the right to defence than if fighting alone. Thus, the public defenders are specialized in legal assistance for the poor, treating all clients with the same respect and not differentiating depending on who pays more. Working as a collective/ associated bureau they can cover a higher volume of cases, as they can team up and replace each other, responding to all requests for legal aid. They can be cheaper if they share efficiently the common resources and with time can become cheaper due to their specialization and experience in handling a certain type of cases. The public defenders, being created by the National Legal Aid Council, provide the best insight into how legal aid functions in reality, feeding the Council with relevant and accurate information and helping it adopt relevant policies and draft accurate legal aid budgets. Public defenders are best suited for communities with a high volume of cases or where the offer of lawyers is very low, thus the state practically subsidizing legal aid services there. At the same time, for ensuring its proper functionality and efficiency, the public defender office should be carefully implemented and overseen. Firstly an adequate budget should be allocated for attracting good lawyers. Especially during the first years, until the office gets well integrated in the local justice system,

³⁹ See article 2 of the Legal aid law.

⁴⁰ See article 31 of the Legal aid law.

one should be prepared for higher costs due to a lower caseload. Also attention should be paid to the caseload to prevent the office from becoming a "machine" that does not have sufficient time for handling the cases qualitatively. Turnover of staff is expected given the implied stress (working only with poor clients, usually most marginalized of the society groups) and limited opportunities for growth, as well as limitations to take private clients.

For ensuring that lawyers apply for the public defender office, the state covers all expenses related to the office. In the case of Moldova working for a public defender office is attractive firstly to persons interested and committed to helping the poor, for young lawyers seeking experience, for lawyers that prefer working in teams and/or for lawyers interested in specializing in criminal defence. The level of remuneration is higher than in the state offices (e.g. the medium public officials in the Ministry of Justice) or what an average private lawyer would get providing only criminal defence, but lower than what an active experience private lawyer would make. Thus the salary is not the main attraction for joining the office, except the fact that it is stable and guaranteed for at least a year. The well-equipped office is also a good point of attraction. The fact that the office receives the clients from the Territorial Office and thus does not have to look for clients is another attractive part. And lastly, but not least, the in-house quality assurance mechanism is one of the most attractive aspects of the Public Defender Office operation, especially for young lawyers. The office manager is responsible for case distribution, overseeing the equal workload and ensuring the quality of the office' services. The manager reviews every pending case at least once, advising the lawyer on the measure that the latter can take for improving his/her performance in the case and reviews the case before finishing. The manager is also available at any moment for consultation by any lawyer of the office. The lawyers are encouraged to work in teams and help each other. The most difficult and interesting cases are regularly discussed at the office meetings, which both helps the relevant lawyer and her client, and teaches the others about the relevant issue. The lawyers also benefit from on-going in-house training targeted to improve their professional skills. In a context of dominant solo practice in criminal cases, as Moldova is so far, practice in an office that shares experiences, encourages team work and learning from each other is a very useful place to start for any young lawyer.

The private lawyers providing legal aid on request have the advantage of having their own office, the state only paying their fees and transportation costs when relevant. Also due to the payment per case the Territorial Office can monitor each case and take action when appropriate, either by calling on the Bar Disciplinary Commission or the National Legal Aid Council. The disadvantage is that processing each case requires considerable administrative resources and time on behalf of the Territorial Office of the National Legal Aid Council. Also this is an unreliable source of provision of legal aid, compared to public defenders, as they can always refuse providing legal aid. E.g. if a lawyer has enrolled in the legal aid national registry but at some point got sufficient private clients, she is not bound by any obligation towards the National Legal Aid Council except a notice about withdrawal to leave time to find another lawyer. The biggest disadvantage consists in the dispersed profession and the tradition of law standards of legal aid in the country. Lawyers that used to provide legal aid as ex-officio lawyers are used to very little monitoring on behalf of any state authority and very little if none responsibility towards the client. For example, it is acknowledged that previously legal aid lawyers could enter the case after the client had been interrogated and could easily sign as being present at the first interrogation, or could enter the case as ex-officio lawyer while in

reality also requesting remuneration from the client.⁴¹ Also ex officio lawyers are not used with consistently representing the client from the beginning till the end of the case, which is a principle in the new legal aid law.

At the same time, private lawyers should always be involved in legal aid at least for handling the cases of conflict of interest that the public defenders cannot, as well as for creating a balance to the public defenders so that the National Council can compare the two models and maintain a right balance between costs and quality.

Given the specific context of Moldova, where the quality of legal aid was too low, creating the public defender office as an additional model of delivery was crucial in order to be able to create a critical mass of new lawyers, concerned primarily with ensuring quality for their clients. It is believed that after several years of operation, the public defenders, even if not established throughout the country, will positively influence the practice of all private lawyers to ensure effectively the right to defence of any individual.

Preliminary conclusions and expectations

Given the short time since the legal aid law entered into force and short activity periods of the new system, it is hard to draw any conclusions yet. However, some preliminary conclusions can already be drawn regarding several aspects of the legal aid system.

Increase in the persons eligible for legal aid. While previously legal aid was practically provided only in cases of mandatory representation in criminal (though note it is a very long list, encompassing a high % of the criminal cases) and civil cases, the new legal aid law provides for criminal legal aid for poor persons when interests of justice so require, even if these do not fall under mandatory legal representation. Although previously legal aid at police station was supposed to be provided, the practice showed it was provided with a series of shortcomings.⁴² The new law provides for “urgent legal aid” and the implementing regulation provides for a separate payment for just being on duty, trying to interest lawyers to participate in the scheme.

The creation of the National Legal Aid Council and its Territorial Offices should lead to a better management of the system and increased quality. They have already proven their usefulness by revealing many shortcomings of the established practice in the field and the steps taken to end the old practice, e.g. the new rules for lawyers’ appointment, insistence on criminal investigation bodies to request the appointment of a lawyer in advance, except for urgent proceedings, insistence on the courts to request the presence of a lawyer in advance

⁴¹ See in this respect the Analytic Report: Observance of Fair Trial Standards and Corresponding Rights of Parties During Court Proceedings (analyzed the findings of the trial monitoring programme for the one-year period of April 2006 through May 2007, OSCE Mission to Moldova, available on www.osce.org/moldova.

⁴² See for example the Institute for Penal Reform Preliminary report on the situation of defendants in pre-trial detention, carried out for the period of April 2007 – March 2008 in 4 pre-trial detention facilities, interviewing 363 defendants. The report found that 70% of the interviewed defendants have talked to the police before seeing their lawyer (although the law expressly states the right to a lawyer prior to the first police interrogation) and 40% of defendants have stated that they signed various procedural acts without having a lawyer.

cutting on the practice of appointing shortly before a hearing with no time to prepare for defence. The Territorial Offices have also started influencing the criminal investigation bodies to call for appointment of lawyers upon arrest, otherwise they risk of not finding a legal aid lawyer willing to enter the case later on at the risk of not getting paid for that. Finally, the Territorial Office are starting disciplining the lawyers too as they refuse payments for procedural actions and insist on lawyers to observe their own Code of Ethics and stay with the client until the case is solved,

The implementation of the Legal aid law has also determined an increase in the legal aid budget, which for 2008 is of 3,840,000 MDL / 274,286 Euro and for 2009 is planned to be of 6,946,800 MDL / 496,200 Euro.⁴³

The Legal aid law has also determined changes in the payment rules, which are expected to raise the lawyers' interest and commitment to provide qualitative legal aid. For example, the provisional payment rules provide fix payment (though very small so far, e.g. 40 MDL / 3 Euro) for being on duty and a fix amount for representation at police station up to pre-trial detention hearings where the person does not have a lawyer (160 MDL / 11 Euro). These amounts are 25% more if the lawyer is on duty on weekends (Saturday and Sunday).

Qualitatively speaking it is difficult to assess yet the impact of the legal aid law, but it is hoped that it will increase the independence of legal aid lawyers from criminal investigation bodies and courts, which should contribute to an increase in quality of the legal aid services. The independence of the legal aid lawyers shall increase as a result of the new appointing rules and payment: the Territorial Office of the National Legal Aid Council are in charge of appointing legal aid lawyers and they also make the payment, without any requirement for proofs signed by the criminal investigation bodies, as used to be under the previous regulations.

Quality of legal aid is hoped to be boosted also by the new selection rules for legal aid lawyers. While previously anyone could be a legal aid lawyer, the new system provides for some selection criteria and also sanctions for lawyers that break the rules. Although the first selection round accepted all who expressed interest, it is expected that later on the selection will be stricter and consequently help keeping only good lawyers.

Finally the quality of legal aid services is expected to increase as a result of introducing a mixed system of delivery, the public defender offices alongside private lawyers. The Public Defender Office Chisinau is the first model of a joint practice in criminal legal services, dominated by solo practitioners in Moldova. The joint practice has several advantages over the solo-practitioners, including economy of scale and most importantly increased quality by having an in-house quality assurance mechanism. Besides, the public defenders have set new standards of representation, e.g. have a case file on each client (still not a common practice for all the lawyers in the country), meet with the client before the first interrogation, collect evidence during pre-trial investigation, work in teams on complex cases – just to name a few examples of increased standards of representation by public defenders as compared to most of the ex-officio lawyers. It is expected that the practice of the public defenders will influence the practice of the private lawyers to generally increase legal aid representation per country. On

⁴³ Information about the budget – discussion with Ms. Alexandrianu, Accounting Department of the Ministry of Justice, 16.10.2008.

the other hand, keeping the private lawyers is also important for having a comparable option and even some competition to allow the state take better decisions about the appropriate payment rules and expected standards for representation.

As a final note, a few brief recommendations for a legal aid reform process in Belarusi, based on the Moldovan experience:

- analyzing and diagnosing the problems is key to finding appropriate solutions,
- genuine engagement of all stakeholders is important to ensure a good outcome of the reform, including the state authorities, the legal profession and the civil society,
- demonstration or experimental projects for testing the proposed solutions are the best tools in modelling the new systems according to the local context and needs,
- as to the solutions for improving the legal aid system, these should certainly be designed based on the country's own problems and context and any borrowed solution shall be carefully assessed and tailored to the country's context,
- finally, the law is important but it is not the key, a good awareness campaign and education of both the users (state authorities and legal aid providers) and the beneficiaries is crucial.