

RECOMMENDATIONS FOR THE EUROPEAN LEGAL AID SYSTEM

Paweł Wiliński

1. Disappearing Victims

If we check the statistic data, official numbers from yearbooks, we can see a very surprising factor explaining actual position of a victim in the assessment of the official bodies. Almost none of them contain indication of the number of crime victims. We may find detailed information about a number of crimes committed in a specific country, region, district. Without much effort we can get information about specific types of crimes committed in a given year or a period, detailed information on the amount of damages, etc. There will be a lot about an offender, a suspect, an accused, about people' age, vulnerable groups, etc. However, no information can be found about the group of victims facing those crimes and about the way their interests are protected. For example, in Poland there were 1.063.906 crimes reported (identified) and 438.820 suspects in 2013. In 2012 the number of reported crimes was 1.119.803 and there were 500.539 suspects identified. However, in the same data there is no given number of victims of those crimes. It is similar, with some exceptions, in all EU countries.

We know that the number of victims is significant. It is at least as big as a number of crimes reported. At the same time victims are very rarely a full-fledged subject of a process of settlement of the crime, participating to the criminal trial as a person that calls for the protection of their rights infringed by a crime. In many cases it results from the content of existing legislation, placing a victim only in a position of a witness.

We not always identify properly all reasons why a victim is not a desirable participant of the proceedings. All, or at least majority of professionals – the judges, the prosecutors, the police officers, the legal representatives, participating to any activities that result from crime (like investigations, trails), confirm that a victim is not always welcomed or desirable if he wish to seek actively the compensation of a crime or a restitution.

Anyone who has ever been a victim may confirm that the position of a crime victim is very powerless. It is weak not because of a lack of formal guaranties and procedural safeguards, constitutional rights and freedoms. The formal list of provisions is sometimes quite long. The main reason comes from two factors:

- 1) victims' lack of the knowledge,
- 2) victims' lack of understanding of their own rights.

Formal guaranties and procedural safeguards have itself no value for victims. It is mostly because victims do not know what and how they can protect their interest.

2. Access to Information or to Legal Aid?

Awareness of personal rights is the foundation of an attentive and effective protection for victims. For that reason all activities aimed at ensuring access to information are of a great importance. In recent years, an increasing number of initiatives can be noticed. Research grants, special brochures, information leaflets dedicated to victims, internet guides, actions pushing legislators to formulate instruction in an understandable way are the tools that may bring some positive effect. Yet, we should have no illusions. All this will not bring a desirable effect. It should be rather understood as the first and necessary step that should be supported but not replaced.

All previous experience and activities taken during a grant programme *Improving Protection of Victims' Rights: Access to Legal Aid* implementation, i.a. a comparative study conducted in the EU Member States and before ICC, trainings of practitioners (the judges, the prosecutors, the police officers, the NGO members) and meetings with citizens, clearly lead to the point that there is nothing more important for a victim than an access to a legal aid.

The access to a legal aid allows a victim to understand the complex situation, current legislation, jurisprudence, existing practice, legal language, activities of state organs, meaning of behaving of other participants. It is the most effective tool for victims.

3. Common access to legal aid for victims.

The real answer for the problem of a lack of victims' protection system in the EU is a common access to a legal aid for victims. **We need not only an access to legal aid but also a real Legal Aid System.** So far, we have been ready, as every Member State separately and the EU together, to establish and develop legal acts on:

- a) the minimum rights of a suspect, an accused, deprived of liberty, the minors;
- b) special instruments or cooperation in criminal matters – i.a. European Arrest Warrant, European Evidence Warrant;
- c) principles of mutual trust and mutual recognition.

There is a discussion, but in my opinion still not very successful, about the European standards on the access to a lawyer for a suspect and an accused.

Common access to legal aid for victims was removed from the table when the final version of *DIRECTIVE 2012/29/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2012* establishing minimum standards on the rights, support and protection of victims of crime was decided. This guarantee we can find in Commission Recommendation of 27th November 2013 on the right to legal aid for suspects or accused in criminal proceedings, 2013/C 378/03, but the right to legal aid is only restricted to a suspect or an accused person.

There is no doubt that we should seek for instruments similar to those introduced in directive on right of access to a lawyer in criminal proceedings (2013/48/UE, from November 22 2013). Therefore, the following crucial question arises: Why the common access to a legal aid was deleted from a discussion on victims' rights and restricted to suspects and accused only? The answer seems very simple. It was because of money, of course.

4. Is legal aid for victims really too expensive?

Is legal aid for victims really too expensive? No one knows that for sure. No one has ever calculated such a cost. THE COST. The real costs. Not only economic costs. Even when speaking about economic costs, not only the direct one, most visible and countable, that is the money that had to be paid to a lawyer. No one has ever counted real COSTS of a lack of legal aid! This failure relates not only to a victim's protection but also to a protection addressed to an accused or a suspect.

Governments have some unclear calculations of this direct economic cost (in a short term perspective) and they usually use them in a discussion as a convenient and easy to manipulate argument. This kind of arguments are obviously difficult to overturn because no one else carries such calculations. No doubt that Governments are and will be against the extension of the legal aid system in both, inner (national) and the EU legal systems. This approach is not a surprise and can be easily understood. Any extension of the legal aid system means real money from the EU budget to be spent on legal aid in a country.

However, the point is that these direct numbers are always misleading. They do not take into account the real economic costs of ignorance, fraud, incompetence, mistakes (all that create the hidden costs of ineffective legal aid).

5. Can we really afford "the Hidden Costs of ineffective legal aid"?

Some EU countries deal with the "legal aid system" with great results and efficiency (see Portugal). Some are traditionally recognized as strong in legal aid support system and active voluntary sector with citizens advice system supplementing somehow legal aid (England, Wales). Yet, the discussion that has taken place in the UK in recent years, financial cuts and reduction tasks show that nothing is given for good in this field.

For all above reasons we should start to discuss about real costs of the legal aid system. We should speak about: the financial, the social, the justice system, the individual and all other kind of such costs.¹⁵⁷ What we have to do at the very beginning is:

- a) to estimate costs of the legal aid changes;
- b) to estimate costs of the lack or ineffective legal aid.

The evaluation of the direct economic costs must concentrate not only on the estimation of amount of money necessary for employment of legal aid. Also, additional costs of prolonging the proceedings should be calculated. They are not as visible but this costs exist (costs of additional court proceedings, salaries, costs of courtrooms, service, correspondence, etc). It has to be focused on real analysis of few crucial questions:

- **Is this really true that participation of a lawyer in a trial is more expensive than its absence?**
- **Is this true that most violations of victims' and accused rights in due process result from the absence of a lawyer during a trial?**
- **What is the cost of actions taken as a result of lack of legal aid?** - effective appellate proceedings, extra proceedings, long term imprisonment, usage of preventive measures, cassations, resumptions of proceedings, compensations, etc.;
- **What are the costs of the Justice System?** The costs of lengths of proceedings are difficult to assess, time consumed can not be used for other cases, excessive lengths increases;
- **What are social costs?** Trust to the justice system is crucial for proper existence of society, community, country. The cost of loss of confidence is always very high (visible in the attitude towards the state and its community);
- **Individual, human costs are probably the highest costs**, arising from the isolation from the society, feelings of abandonment or helplessness in the face of the state mechanisms, the lack of support. All this creates passive attitude towards society, breaking individualism by so called the justice system which breaks individuality as a value in the society.

All this questions must be answered before we can finally decide about the future of the legal aid in the Europe. However, I strongly believe that answers will give us irresistible financial, social and human reasons for necessity of the European Legal Aid System.

6. The basics of the European Legal Aid System

Creation of the European Legal Aid System is a long term perspective. Many legal, political, economic, social issues should be discussed and taken into account. We should not forget about existing activities in the third sector (voluntary sector), citizens advice systems, social advice service supplementing public service in many countries, legal pro bono programs,

¹⁵⁷ More on that topic P. Wilinski, *Ineffective Legal Aid: the Hidden Cost or How to Fill the Barrel*, ECBA conference, June 2014.

activities of legal clinics in some EU countries. All of these initiatives should be the basis for the creation of a coherent system of legal aid.

The European Legal Aid System should be based on at least following assumptions:

- a) **Legal aid and Access to a lawyer “are twins” that should be inseparable.**
- b) **Legal aid is the fundamental right. Without it most of fundamental rights have no value. The right to defense by a lawyer is a part of such a legal aid right.**
- c) **The access to legal aid to every victim and accused should be granted on the basis of the same criteria (the merit test, the means test, the quality test, the rights to review decisions).**
- d) **The access to legal aid to every victim and accused does not always mean legal aid for free (see Polish example).**
- e) **The obligation to all EU Member States to introduce legal aid for victims and accused as equal minimum standard.**