

CHALLENGES OF LEGAL AID SYSTEM IN POLISH CRIMINAL PROCEEDINGS

Agnieszka Orfin, Aleksandra Woźniak

1. The notion and role of the injured party in criminal proceedings

The injured party plays an extremely important role in the Polish criminal procedure. However, there is a lot left to be desired in terms of binding statutory regulations and the way they are put to practice, especially when it comes to realistic possibilities of protecting one's rights and interests. The array of means available to the victim of a crime should be comparable with the array of means available to the perpetrator and furthermore they should be enforceable. One should bear in mind that the primary aim of a criminal proceeding, apart from identifying and prosecuting the perpetrator, is to respect the legally protected interests of the injured person. It should be noted the victim of a crime plays a crucial role in the criminal proceedings not only because he or she is the sole source of evidence but also due to the fact that this is the person most vulnerable to any kind of negative factors which can arise in the course of the criminal proceedings.

Contrary to the acts of the international law the Polish criminal legislation does not use the term 'victim of crime' but 'injured party of crime'. Thus, for example, the definition of the injured party of crime can be found primarily in the *The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, which defines as a victim of crime a person who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power (Art. 1). Whereas the Article 2 of the above mentioned legal act specifies more precisely the concept of a 'victim'; and also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. Moreover, under this *Declaration* a person may be a victim regardless of whether the perpetrator is identified. Different definition can be found in the *Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings* in the Article 1 which provides that a victim is a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law¹. In turn, under the *Polish Charter of Rights of Victims*, a victim is a natural person, and his or her nearest ones, whose legally protected interest has been directly violated or threatened by a crime². According to the Polish Code of Criminal Procedure (CCP) an injured party is a natural person or a legal entity whose legal interest (e.g. health, inviolability, property, virtue, good name, sexual liberty) has been directly violated or threatened as a result

¹Council Framework Decision of 15 March 2001 on standing of victims in criminal proceedings (2001/220/JHA).

² Polish Charter of Rights of Victims, Ministry of Justice, Warszawa 1999 r., p. 10.

of a crime (Art. 49 § 1 CCP)³. It is also important to emphasize that the Polish legislation accounts for the situation when the injured party cannot plead independently in the criminal proceedings and has to be represented by another person. In such case the rights of an injured party, who is a minor or fully or partially incapacitated can be exercised by a statutory proxy or a person who has the custody over the injured party (Art. 51 § 2 CCP). Similar regulation covers those who are incapable due to their age or health. In such case their rights can be exercised by a person who is legally caring for the injured party (Art. 51 § 3 CCP). Moreover, in case of death of the injured party his or her rights can be exercised by the closest ones and, when they are absent or unidentified, by the prosecutor (Art. 52 § 1 CCP)⁴. The Code of Criminal Procedure indicates, as well, that an injured party may be as well a state-run institution, local government or social institution even if it does not have legal personality. According to Art. 52 § 3 CCP, on the other hand, an injured party may be an insurance company in the scope within which it compensated for the damage caused to the injured party of the crime or is obliged to compensate for. Under specific circumstances the authorities of the National Labor Inspectorate or the state authorities can plead in the proceedings (Art. 49 § 3a and § 4 CCP).

The standing of injured party in criminal proceedings is different in different stages of the proceedings⁵. In the preparatory proceedings the injured person is a party in the proceedings regardless of his or her will (Art. 299 CCP). During the court proceedings in turn the functions in which the injured can plead are represented by the outline below:

³Act of 6 June 1997. Code of Criminal Procedure, Journal of Law no. 89, item 555 as amended. More on the evolution of the definition of injured party in Polish criminal proceedings: B. Gronowska *Ochrona uprawnień pokrzywdzonego w postępowaniu przygotowawczym (zagadnienia karnoprocesowe i wiktymologiczne)*, Toruń 1989, p. 11 and n.; W. Sych, *Wpływ pokrzywdzonego na tok postępowania przygotowawczego w polskim procesie karnym*, Kraków 2006, p. 19 and n., K. Dudka, *Skuteczność instrumentów ochrony praw pokrzywdzonego w postępowaniu przygotowawczym w świetle badań empirycznych*, Lublin 2006, p.39; M. Żbikowska, *Status pokrzywdzonego a popełnienie czynu zabronionego*, Palestra 2013, no. 5-6, p. 43-50.

⁴ E. Bieńkowska, L. Mazowiecka, *Uprawnienia pokrzywdzonego przestępstwem*, Warszawa 2011, p. 21. More: W. Daszkiewicz, *Sukcesja procesowych praw pokrzywdzonego w postępowaniu karnym*, (in:) *Współczesne problemy procesu karnego i jego efektywności*, Toruń 2004, p. 19-38.

⁵ L. Falandyś, *Pokrzywdzony w prawie karnym i wiktymologii*, Warszawa 1980, p. 178.

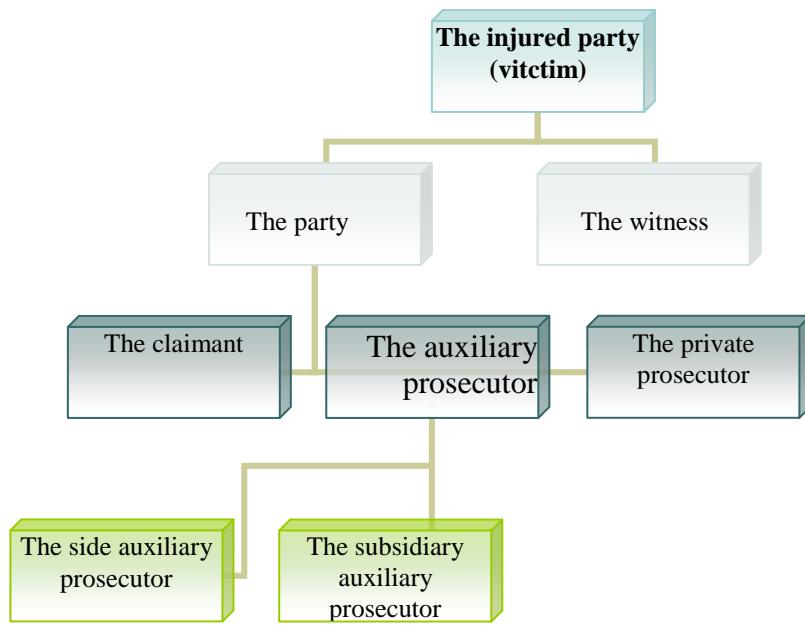


Chart nr 1. Victim's status during trial proceedings (before the court).

Source: own elaboration.

Generally the side auxiliary prosecutor is the injured person who participates in the trial before the court alongside the public prosecutor, while a subsidiary auxiliary prosecutor participates alone. The subsidiary auxiliary prosecutor is also a victim who independently files a subsidiary indictment, when the prosecutor has twice refused to institute or discontinue the preparatory proceedings, provided that the court has accepted an appeal against the first refusal of the proceedings (or discontinuance). Furthermore, a private prosecutor is the injured person who brings and support a private indictment (under special procedure). The claimant is the injured person who has filed a complaint during a trial proceeding, when his civil claims resulting directly from the offence⁶.

The distinction between stages of the process and the roles of process which may take the victim in criminal proceedings is crucial, i.a., for the nature of the rights during the process. The framework of this study do not allow for a detailed discussion about all the rights of the victims, however, by way of example, you can point out some of them. Crime victims' rights during the preparatory proceedings: right to notice of an offence, right to information about victims' legal situation, right to obtain legal aid (also free legal aid: an attorney ex-officio), right to participation in the proceedings conducted by the prosecutor or the Police, right to file a motion as an evidence, right to view the case files and make a copy of them, right to appeal against a decision, right to file a complaint on agencies conducting criminal proceedings.

⁶ P. Wiliński, *Handbook of polish law*, W. Dajczak, A. Szwarc, P. Wiliński (ed.), Warszawa - Bielsko-Biała 2011, p. 208-209.

Moreover, crime victims' rights during the trial proceedings (before the court): right to become a party in the trial, e.g. a subsidiary prosecutor, a private prosecutor, a claimant, or just only a witness, right to information about victims' legal situation, right to obtain legal aid (also free legal aid: an attorney ex-officio), right to obtain information about the planned hearing, right to participate in court operations, right to view the court files and make a copy of them, right to an interpreter, right to appeal against the decision of the court. And crime victims' rights during executive proceedings e. g.: right to obtain information each time the convict leaves the correctional institution⁷.

2. The legal aid granted to the victim of crime

The concept of defending the victims of crime developed rather slowly in Polish legislation. The development of the victimology coincides with the beginnings of the criminal law that came to existence after the II World War and is related to the so-called social defense movement. Its framework encouraged the idea of the reduction of the suffering and damage caused to the victim of crime which was reflected in the proposal to introduce to the penal code the obligation to redress the damage done to the victim⁸. Despite that as early as in the 50s the needs of the victims were apprehended, it was not until the 70s and 80s that Poland began to take specific measures in order to improve their standing. Those measures included the possibility for the victims and their families to benefit, under special circumstances, from the Penitentiary Aid Fund, the creation of the Victims of Crime Aid Fund and the adoption of the Alimony Fund Act of 18 July 1974. The breakthrough, however, came when the criminal code of 1997 mentioned for the first time that the criminal proceedings should also protect the interests of the injured party. Further initiatives were put forward by the Ministry of Justice and thus in 1999 the afore-mentioned Polish Charter of Rights of Victims was prepared and in 2003 the Day for Victims of Crime was established following the example of other European countries. As a consequence, a Week for Victims of Crime was introduced (its present name is the Week for Aid to the Victims of Crime), under which free legal advice is offered throughout the country, and also the Network of Aid to the Victims of Crime was created⁹.

Naturally, the turning point for the improvement of the standing of the victims of crime came when Poland joined EU which resulted in the necessity to take measures for adjusting Polish legislation to that of the EU, including creation of many state and non-government institutions,

⁷ E. Bieńkowska, L. Mazowiecka, *Uprawnienia pokrzywdzonego przestępstwem*, Warszawa 2011.

⁸ B. Gronowska, *Ochrona uprawnień pokrzywdzonego w postępowaniu przygotowawczym (zagadnienia karnoprocesowe i wiktymologiczne)*, Toruń 1989, p. 14.

⁹ A. Augustyniak, *Działania Ministerstwa Sprawiedliwości na rzecz ofiar przestępstw*, (in:) *Pozycja ofiary w procesie karnym – standardy europejskie a prawo krajowe*, Szczytno 2008, s. 224. It is pointed out the primary activity of the project ("network of aid") is the creation of 16 Centers of Aid to the Victims of Crime. At present there is such aid institution in each province. The centers operate at the NGOs, local government and church institutions which have been selected by the Ministry of Justice in the course of a public competition and they have years of experience in aiding the victims of crime. The centers render free legal and psychological assistance. The volunteers who function as the carers of the victims are also involved in the Centers of Aid to the Victims of Crime.

foundations and associations who render legal assistance¹⁰. Putting aside the details of the EU regulations addressing the needs of the victims of crime it has to be pointed out that it is only recently that one can observe a tendency in the politics that focuses on the rights of the victims of crime in the criminal proceedings¹¹. Its manifestation is, among others, the adoption of *the directive establishing the minimum standards within the rights, support and protection of victims of crime (2012.29/EU)*. A wide range of initiatives that intend to broaden the victims' access to the legal assistance and information are also put forward by, among others, the NGOs.

Taking into consideration the above it has to be indicated that the Polish criminal legislation lacks general provisions regarding the legal aid rendered to the victim of crime¹². Above all there are no regulations establishing the minimum of the aid to be rendered. The diagnosis of the current legal, instrumental and organizational status allows even to make a claim that there is no system of aid to the victims of crime. The rights of the injured party are spread throughout the whole Code of Criminal Procedure and in several acts on criminal proceedings (as mentioned before). Legal assistance is also rendered to the injured parties by a number of NGOs whose statutory objective is precisely to render aid to the victims. However, one can notice the above mentioned range of initiatives and social campaigns that are undertaken by NGOs and associations and that aim at increasing the access to the legal aid and information¹³.

Despite this fact, it should be assumed that the legal aid covers, above all: the possibility to have the assistance of a proxy and the possibility to be exempted from paying for the legal aid rendered. In accordance with the provisions of Art. 87 and 88 CCP the injured party can have a proxy - an attorney or a legal advisor (during the whole proceedings). The injured person can select the person to represent his or her interests independently. The right of the injured person to have access to the legal aid is granted once a specific proceeding begins. Naturally, when a proxy is appointed his or her expenses are covered by the injured person, however, it is

¹⁰ E. Bieńkowska, L. Mazowiecka, *Prawa ofiar przestępstw*, Warszawa 2009, p. 27.

¹¹ See also C. Kulesza, *Realizacja europejskich standardów dotyczących traktowania ofiar przestępstw w polskim prawie karnym*, (in:) *Pozycja ofiary w procesie karnym – standardy europejskie a prawo krajowe*, Szczytno 2008, p. 24-46.; J. Beata Banach-Gutierrez, *Prawa pokrzywdzonego – normy europejskie a uregulowania krajowe*, (in:) *Pozycja ofiary w procesie karnym – standardy europejskie a prawo krajowe*, Szczytno 2008, p. 54-56.

¹² The research of the current legal instruments, that the victims are entitled to, and their efficiency was conducted by the professor at UMCS Katarzyna Dudka, Hab. Ph. D. The conclusion was the victims of crime do not show interest in the preparatory proceedings and usually do not exercise the rights that they are entitled to, e.g. the right to participate in the procedural acts or to review the case records. Professor K. Dudka concluded as well that the way the victims are informed about their rights is insufficient. The research proved that the instructions are not comprehensible and intelligible for the injured parties. It has also been emphasized that the judicial bodies rarely show the initiative to give advice and aid to the victims in terms of the rights they are entitled to. Furthermore, it has been pointed out that the standards protecting the rights of the victims (in the preparatory proceedings) are rather adequate except the provision on how the victim is informed about his or her rights (art. 16 CCP) – K. Dudka, *Skuteczność instrumentów ochrony praw pokrzywdzonego w postępowaniu przygotowawczym w świetle badań empirycznych*, Lublin 2006, p. 287-290.

¹³ More: T. Cielecki, *Lokalne ośrodki wsparcia ofiar przestępstw Ministerstwa Sprawiedliwości – jako kolejna próba utworzenia systemu pomocy ofiarom przestępstw w Polsce*, (in:) *Pozycja ofiary w procesie karnym – standardy europejskie a prawo krajowe*, Szczytno 2008, p. 83.

established that those costs can be reimbursed (in case of judgment of guilty or conditional discontinuation of penal proceedings). In such situation the costs are awarded from the convicted to the injured person. However, if the injured person cannot bear the costs related to the legal aid he or she was rendered without a financial damage to the well-being of him/herself or the family, a court-assigned attorney can be appointed (all circumstances have to be proven appropriately). In such situation the cost of the legal aid is incurred by the State Treasury. It should be added that it is always the court's decision whether such attorney would be appointed. Furthermore, the actions on the side of the proxy do not exclude personal engagement of the injured person.

When it comes to the possibility of exemption of the injured person from paying for the legal aid it has to be pointed out that according to the Art. 626 § 1 CCP in the decision concluding the proceedings the court indicates to whom, in which proportions and to what extent the court costs shall be charged. Until the concluding decision is reached all costs are provisionally covered by the State Treasure (Art. 619 CCP)¹⁴. The court decide to exempt from the court fees if it establishes that it would be too arduous for the injured person to pay them and also when the rules of equity apply, e.g. severe illness. The exemption can be full or partial. The exemption from court fees does not exempt from the obligation to reimburse the opposite party the costs that are justified (e.g. the cost of appointing an attorney). It is also possible for the injured person to apply for exemption from putting in the money for the proceeding (e.g. from the fee for private indictment). In addition, just to mention, in specific situations a victim of crime also can apply for financial compensation: state compensation, damage reparation, civil law suit for damage compensation included in the criminal trial.

3. Practical aspects of legal aid in Poland

Within the project *Improving protection of victims' rights: access to legal aid*, co-financed by European Commission which addressed the priority *Supporting victims of crime* (VICS) the open ended questionnaire was distributed among Polish law enforcement authorities - Prosecutors' Office, Lawyers (bar associations) and academics. There were 35 detailed questions asked. The diversity and different points of views of stakeholders were vital tools in gathering information concerning knowledge and practices in helping victim. Stakeholders were chosen on the basis of experience in working with victims of crime and their knowledge in this field. Respondents, despite of their busy schedule, showed extensive knowledge of the problem. The survey was conducted by Chair of Criminal Procedure, Adam Mickiewicz University in Poznan from 23th of April 2014 till 5th of May.

The scope of questions which were asked was supposed to enable recognition of dysfunctions in the current legislation and practices in delivering help to victims of crime in Poland. Answers given by respondents helped in the process of defining differences in legal aid systems in

¹⁴ P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz do artykułów 468-682, Tom III*, Hofmański P. (ed.), Warszawa 2012, p. 1090.

different Member State as well as defining main challenges of delivering help to victims. Given answers could also serve as a help in creating tools, which would improve process of harmonization of state legislation with European Union's legislation. These tools could also be a great facilitation in building mechanism providing help to different groups of victims of crime.

4. Advantages of legal aid system

First of all, it has to be noticed, that respondent pointed out many advantages of the Polish legal aid system. For example, the majority of practitioners believed that there are certain, special regulations concerning especially vulnerable groups of victims (for example sexual, gender and juvenile). Another important information is that the vast majority of stakeholders believed that the state legislation in Poland includes legal norms contained in EU directives on victims' rights.

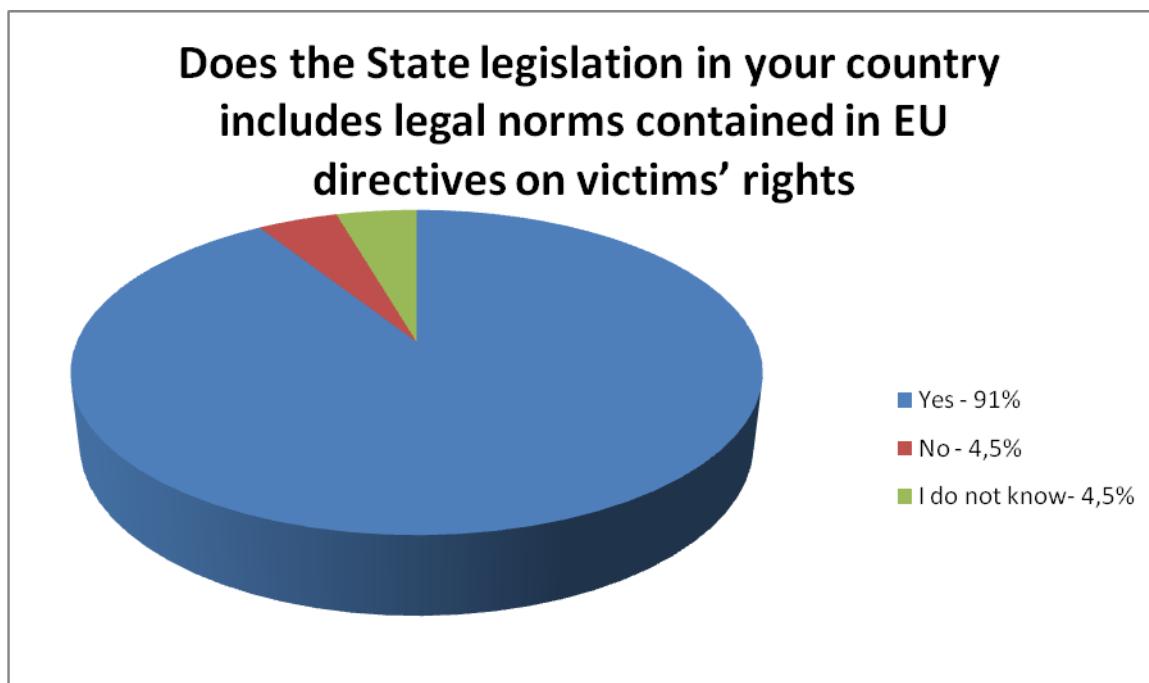


Chart no. 2. Answers given by stakeholders to question: *Does the State legislation in your country includes legal norms contained in EU directives on victims' rights?*

Source: Own elaboration.

It was also stressed out that Polish legislation protects victims in his or her interaction with accused – by means like expelling the accused from courtroom during the hearing of victim or the institution of so – called “little incognito witness”.

Respondents acknowledged that Polish system is familiarized with the “victimless crime” concept (like trafficking, massive environment pollution, corruption and large-scale consumer fraud) and is responding effectively to the visible victims of the crimes mentioned above especially by enabling victims to participate in proceeding.

Respondents believed, that in Poland there is a system of protecting victims against accused actions in the criminal proceedings in order to prevent them from double-victimization. Stakeholders mainly pointed out tools such as special conditions of hearings of minor witness or minor victim (in absence of perpetrator). Practitioners also mentioned the meaning of mediation and keeping in secret identification data, as well as significance of restraining orders. Respondent acknowledged that the free legal advice is given to victims in Poland. The structure of legal aid is composed of legal aid of proxy covered by government and organizing initiatives such as Week for Aid to the Victims of Crime or Network of Aid to the Victims of Crime by Ministry of Justice.

While judging forms of compensation available in Poland stakeholders pointed out that there is a financial compensation as well as non –financial one like apologies. Majority of respondents claimed that victims receive their redress during the executive phase of criminal proceeding. Practitioners also pointed out that beyond the criminal proceeding victims can also get the compensation during the civil proceeding.

5. Challenges of legal aid system

Main challenges of legal aid system for victims, exposed by practitioners can be divided into few, different groups. First of all, stakeholders believed that there are serious problems with the efficiency of the system of victims' compensation in Polish legislation and many times victims are not provided with actual compensation. There was also no clear standpoint on transparency of system of compliant for victims' whose rights have been violated.

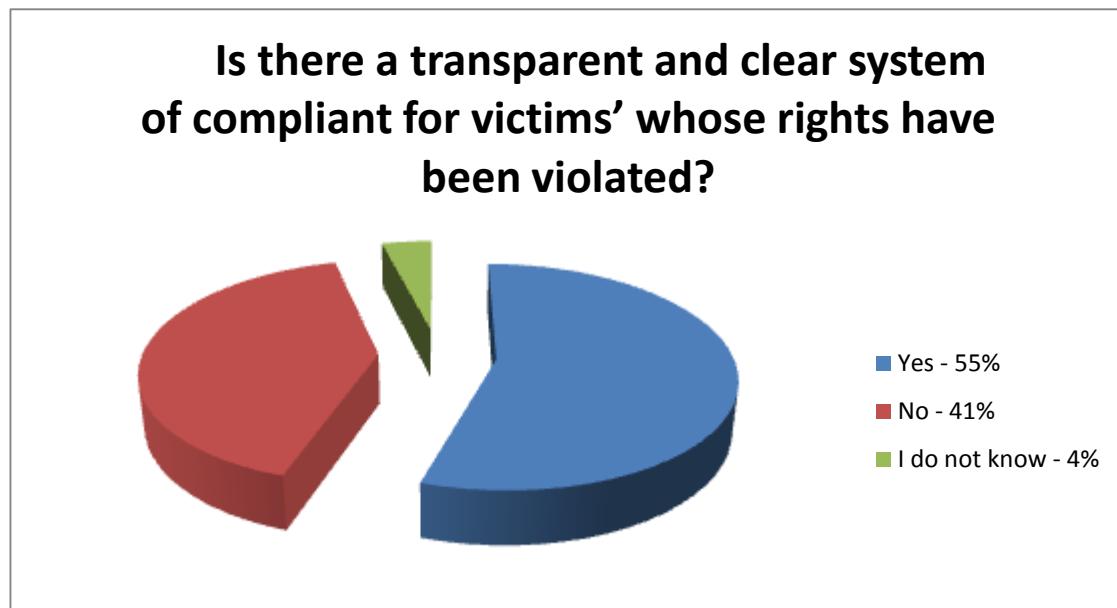


Chart no. 3: Answers given by stakeholders to question: *Is there a transparent and clear system of compliant for victims' whose rights have been violated?*

Source: own elaboration.

Relatively many stakeholders believed that the legal aid provided in Poland is not sufficient. Some respondents claimed that the help is regulated only by legal norms but does not really work properly in practice.

Moreover, on one hand practitioners believed that there is a special approach in treating victims of crime in Poland and they recognized that authorities involved in helping victims have special programs for different kinds of victims such as “blue card”, programs created for victims of sexual crimes or juveniles. Stakeholders even appreciated the engagement of State authorities in implementing these special programs. It was also noticed that there are a lot of non-government organizations specialized in helping victims. On the other hand, relatively not so many stakeholders had any knowledge concerning special trainings created for practitioners dealing with victims in everyday practice. Respondents also did not have knowledge about creating units specialized in contact with different groups of victims.



Chart no. 4: Answers given by stakeholder to question: Do authorities involved in helping victims have special programs for different kinds of victims?

Source: own elaboration.

Respondents were also specifically asked to directly define problems of legal aid system. In describing main challenges of the current legal aid system respondents pointed out few different problems. First of all stakeholders underlined lack of professionalism in delivering help to victims. Members of authorities called to assist victims were described by stakeholders as often unprofessional and not specialized enough. It was also underlined that officials who are carrying out their duties assisting victims do not obey regulations established in order to protect victim's rights. Moreover, it was strongly pointed out, that victims do not have a proper law awareness. Citizens actually have no clue what rights exactly they possess and what kind of

assistance they might require during criminal proceeding. Stakeholders also underlined that many times victims believe that participation in process is really costly. The cost seems to be one of the main reasons for victims to chose not to participate in proceedings. Many times victims do not even decide to report the crime. Another very important disadvantage in creating transparent and sufficient system of legal aid seems to be improper wording of legal norms. In stakeholders opinion, regulations are often completely incomprehensible for victims. Because of the fact that victims do not understand their right they cannot exercise them properly.

Most of respondents believed the there are no special groups of victims deprived the legal aid. Nevertheless, in the same time some of stakeholders claimed that there are some particular groups which seem to be put in the worse position comparing to others. It was pointed out that special care should be delivered to group of undereducated victims and poor ones which are deprived form legal help. Moreover stakeholders underlined that there are certain group of victims which are helpless because of their personality and individual features. Respondents also noticed that foreigners are still underprivileged group when it comes to delivering help to victims of crime in Poland.

Respondents also emphasized that in Polish legal aid system there are means for the protection offered to victims of organizational crime. Nevertheless stakeholders were divided when it came to assess such measures. Some claimed that these tools are basically the same as ones used in proceeding with regular victims and they cannot be recognized as a relief for such crimes. Others believed that the institution of incognito witness might serve as a great solution to the problem of organizational crimes.

In describing position of victim during the criminal proceedings and actions which victims may undertake during the proceedings in order to secure his or hers position in the proceedings, respondents exposed another vital problem. Although it was noticed that victim can participate in proceedings as a part of it (both in pre-trail and judicial phase) it was also underlined that victim has not position equal to defendant. Majority of respondent pointed out that victims of the crimes are not entitled to intervene in all proceedings including in those establishing bail, pre-trial detention. Therefore it cannot be stated that in Poland there is a equality of arms between the victim and the defendant.

Stakeholders also recognized system of conciliation during the criminal proceedings between accused and the victim. The main, most important institution in this field, in respondent's opinion is mediation, which gives the victim status of the part of this proceeding. Unfortunately, stakeholders agreed that mediation is used very rarely during criminal proceeding. Therefore this institution seems to be underestimated by authorities and not properly understood and disseminated among citizens.

6. SUMMARY

Taking everything into consideration can say that we should not lose our focus on the exceptionally difficult position of the victim also due to the risk of being subject to primary and secondary victimization. In general the victims suffer from severe and long-lasting consequences of the crime. That is why the judiciary system and society as a whole cannot ignore their needs. It is the duty of the judiciary authorities to provide help to the victims, minimize the drastic consequences to their lives and to ensure that their dignity respected and they receive compassion and access to restitution and compensation. Therefore it has to be pointed out that it is necessary to disseminate the idea of defending the victims of crimes and protecting their rights and to act for the improvement of their situation in criminal proceedings. The primary task, on the other hand, is to raise the legal awareness of the society regarding the rights that the victims are entitled to during criminal proceedings¹⁵.

To sum up results of the questionnaires presented above, it has to be stated that the general respondents' assessment of Polish legal aid system is quite positive. Stakeholders believe that the current regulation are coherent and provide victims with the acceptable standard of delivered help during criminal proceeding. Nevertheless there are still some major problems and disadvantages of the system which is currently in force. Most serious difficulties that were acknowledge by respondents seems to be lack of knowledge about specialized programs and courses for practitioners, which makes it very hard to create specialized units prepared properly to deal with specific groups of vulnerable victims. Moreover, practitioners believe that the authorities do not always have a solid preparation for working with victims and they do not obey the regulation. What is more, citizens still do not have real, effective access to help, because of the lack of information and improper wording of regulation. The victim is also not a equal party in proceeding. There is also no clear standpoint on transparency of system of compliant for victims' whose rights have been violated. Moreover, the mediation, which could be an useful tool in criminal proceeding is not used in the proper way. In stakeholder's opinion there are also serious problems with the efficiency of system of victims' compensation in Polish legislation and many times victims are not provided with actual compensation.

¹⁵ E. Bieńkowska, C. Kulesza, *Jak postępować z ofiarami przestępstw? Poradnik dla praktyków*, Białystok 1992, p. 6.

