

# National Report

## Bulgaria

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#### 1. Historical remarks

Until 2006 the Bulgarian system for provision of legal aid shared many of the plagues and shortcomings of the typical post-socialist legal systems. At normative and positive level legal aid was perceived as instrument of the criminal procedure, designed and implemented to guarantee equality of arms for defendants who were unable to secure adequate level of protection of their procedural and substantial rights. In the year 2000 - almost 8 years after Bulgaria ratified the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the Bulgarian legislation recognized the right of indigent defendants to request appointment of *ex officio* defence counsel. In civil and administrative cases publicly funded legal aid was confined to cases of minors with conflicting interests with their legal guardians and cases with missing parties.

At policy level the pre-2006 system could be described as decentralized and underfunded. The legal aid budget was split between the Supreme Judicial Council and Ministry of Interior. The former covered cost of legal aid in court hearings and pre-trial cases run by investigating magistrates. From the latter were covered costs for appointment of *ex officio* defence counsels in the pre-trial criminal cases investigated by police officers. Both Supreme Judicial Council and Ministry of Interior did not have designated budget lines for legal aid but were referring the expenses to aggregated budget lines. Hence the overall amount of money spent on legal aid was subject to discussion and speculations. Research<sup>1</sup> in 2004 on 900 archived criminal court files showed that based on the proportions of cases in which an *ex officio* defence counsel was present the approximate figure of public funds spent on legal aid for 2003 is somewhere close to 3 425 000 BGN or roughly 0,23 eurocents per capita.

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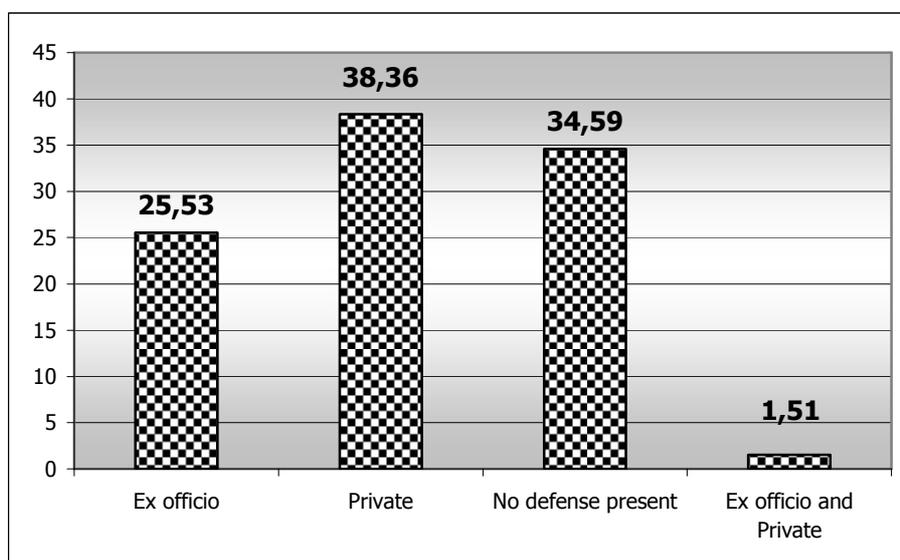
<sup>1</sup> Marinova, Gergana (ed.), 2006 *Access to Justice: Ex-officio legal aid*, Sofia: Open Society Institute

Despite the legal aid budget was vested in two central institutions the actual means and merit tests were carried out by judges, investigating magistrates or police officers. Neither Supreme Judicial Council nor Ministry of Interior exercised any policy making functions in the field of legal aid. Hence the standards for means and merits tests varied along the different courts as well as the procedures used for appointment of ex officio defence counsels. Some judges and pre-trial officers had formed a pool of reliable attorneys and appointed lawyers from that pool whenever appointment was necessary. A few respected the provisions of the Bar Act stipulating that appointment should be carried out by the local Bar Councils.

Great deal of variation was also identified in remuneration of services rendered by *ex officio* defence counsels. Research from 2004 demonstrates that for services in similar cases the different courts in Bulgaria were paying the attorneys significantly different fees. One plausible explanation for the variation was the fact that when a judge decides on the legal aid fee she also must take into consideration the annual budget of the court, available budget till the end of the fiscal year and prognosis for upcoming legal aid needs. Hence many judges were reluctant to pay according to the Bar regulation on minimum fees, claiming that bylaws issued by the Bar cannot be legally binding for the courts. In fact the remuneration policy in many districts was influenced by the outcome of constant conflicts between the local Bar Council and the respective Court.

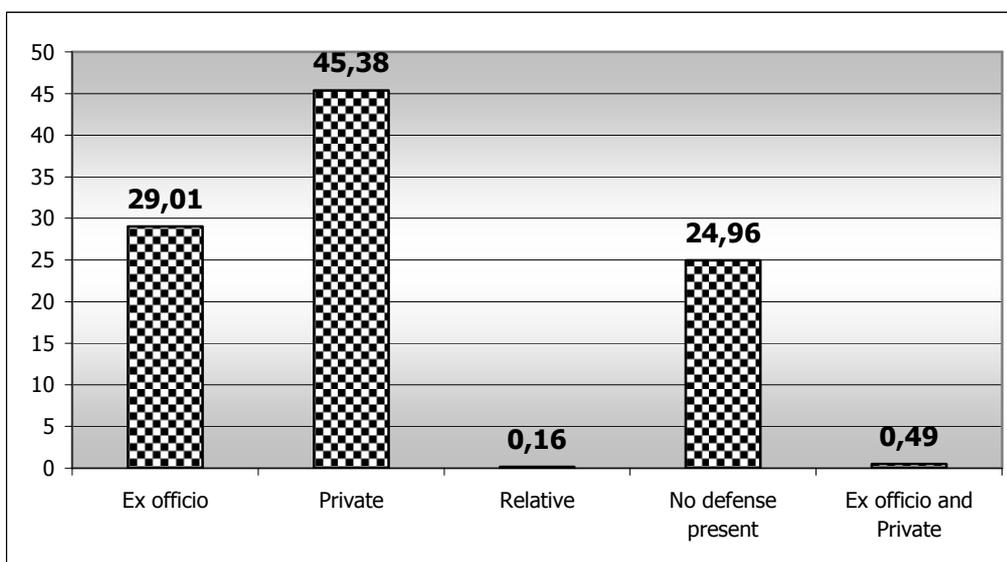
Under funding of the pre-2006 legal aid system and lack of policy making and policy implementation infrastructure was often blamed for the narrow access to legal aid. Research from 2004 revealed that in the pre-trial phase of criminal procedure one in three defendants had not been represented by attorney (**Fout! Verwijzingsbron niet gevonden.**).

Figure 1: Type of defence at pre-trial phase



At the first trial phase the ratio between represented and unrepresented defendants is improved but still one in four defendants goes through the first trial without relying on advice and representation delivered by professional. As Figure 2 suggests between pre-trial and trial some of the unrepresented defendants hired private lawyers or requested appointment of *ex officio* defence counsels. Structure of Bulgarian criminal procedure is such that most of the evidence is collected at the pre-trial phase and is only repeated in the first instance court. Hence the lack of professional advice and representation in the pre-trial could severely harm the rights and legal interests of defendants.

Figure 2: Type of defence at first trial phase



Interesting finding of the research was that the introduction in 2000 of the indigence as ground for appointment of *ex officio* defence counsel in criminal procedure improved access to publicly funded legal aid. In 1999 the Bulgarian Helsinki Committee carried out research on cases concluded in the period 1996-1999 and found out that in cases at the pre-trial phase in which a defence counsel was identified 71,7% were private defenders and 28,5% *ex officio* appointed defenders. After 2000 the indigence ground for appointment was expected to increase the scope and proportion of publicly funded legal aid. Research on cases concluded between 2000 and 2002 found evidence that the indigence ground was quickly introduced and out of all cases in which defence counsels were present private attorneys were 61% whereas in 39% the defendant was represented by *ex officio* attorney.

Accessibility of legal aid should also be discussed from a perspective of effectiveness and quality of legal services. Decentralized nature of legal aid system resulted in actual lack of control for quality of the provided legal services. Often judges and investigating magistrates

were complaining about the substandard services performed by *ex officio* defence counsels. The 2004 research on archived court files clearly demonstrated that private lawyers consistently outperformed *ex officio* lawyers in quality dimensions such as pro-activeness, evidence collection, meetings with clients etc. Research in which 680 randomly selected detainees and inmates were interviewed, confirmed the findings that *ex officio* appointed defenders were less motivated, spent less time to meet clients and overall performance satisfaction was significantly lower as compared to private attorneys.

Identified problems with quality of publicly funded legal aid could be related to the lack of appropriate infrastructure of institutional mechanisms for control and monitoring. The two funding institutions rejected to play any role in the process of quality assurance and establishment of standards for adequate legal aid. Central Bar Council and its local branches only saw in the legal aid a funding opportunity and did not interfere with its ethical and professional dimensions.

Since 2002 the Open Society Institute - Sofia and the Justice Initiative - Budapest played an active role in the process of evaluation and reform of the existing legal aid system. In March 2003 in the city of Veliko Tarnovo was established and became operational Bureau for Legal Aid. The BLA is essentially an "institutional" arrangement for delivery of legal aid. In criminal cases that require appointed legal defence (that is, cases requiring mandatory or optional defense according to existing legal requirements), legal services are provided by attorneys specializing in criminal law working full time on a fixed monthly remuneration in the BLA office. The model resembles to some extent a "public defender" model – in that there is a "staff" of attorneys providing aid – but the Bureau attorneys are not, strictly speaking, BLA employees. This pilot project provided valuable in-depth information on the system for delivery of legal aid in Bulgaria.

## **2. Legal Aid Act of 2006**

In 2005 the reformist efforts of the Open Society Institute - Sofia and the Justice Initiative - Budapest were transformed into a working group for drafting of legislation designed to amend the legal aid system in Bulgaria. Several conceptual models were publicly discussed and analysed, including a model of mixed system of PDOs and *ex officio* appointed lawyers. The whole legislative process was marked by constant resistance from the Bar. Initially the demands of the Bar were directed towards preservation of the status quo. Later on when the political will of the Ministry of Justice to reform radically the legal aid system became apparent the Bar voiced interest to take over both policy making and administration functions and delivery of legal aid. Through trade offs and concessions the Legal Aid Bill was introduced in

Parliament in August 2005. On 4 of October 2005 the Legal Aid Act was published in Official Journal and became effective on 1 of January 2006.

The LAA succeeded to some extent in its attempt to streamline the institutional framework of the legal aid system in Bulgaria. Its major achievement is the establishment of public authority, responsible for the policy making and policy implementation in the field of legal aid - National Legal Aid Board. Its composition reflects the turf war between the Bar and Ministry of Justice during the drafting of the act. NLAB has 5 voting members of whom one is chairman and one vice-chairman of the body. Both the chairman and vice-chairman are appointed by the prime-minister upon motion of the Minister of Justice. The three other members are elected by the Bar itself. LAA allows the Bar appointed NLAB members to be acting attorneys and the first appointees are not deeply involved in its functioning.

NLAB is vested with policy making and controlling functions. It manages the legal aid budget, maintains the register of attorneys who can act as *ex officio* appointed counsels, decides on the quality and cost of delivered legal aid. In performing its functions NLAB is supposed to be supported by the local Bar Councils (27 in total). Inclusion of local Bar Councils in the administration of the legal aid system was result of the active lobbying of the Bar during the legislative process. As result of that the functions of Local Bar Councils were enlarged to cover appointment of providers of legal aid and initial quality control. In fact the NLAB is a central authority with limited administration (21 employees) which has budgeting and controlling functions but due to the lack of adequate human resources is concentrated on accounting and remunerating delivered legal aid.

According to the LAA local Bar Councils have to appoint *ex officio* counsel following written request by judge, investigating magistrate or police officer. In the initial versions of the Legal Aid Bill there were provisions according to which the means and merits test should be carried out by the NLAB. With the delegations of certain functions to the local Bar Councils NLAB authorities were limited and part of the decision making remained with judges, investigating magistrates and police officers.

Another setback in the LAA is the missing competition at the level of delivery of legal aid. Again after intense lobbying from the Bar, the Ministry of Justice abandoned the alternative models of service delivery such as block contracting to specialized law firms, public defenders offices etc. In 2006 in Bulgaria there are slightly more than 11 000 practicing attorneys. Out of this number some 3 507 (appr. 32%) have registered to act as *ex officio* attorneys. NLAB data for 2006 shows that 2 025 (appr. 57%) of all registered under the LAA had actually been appointed in one or more cases as *ex officio* counsels. It is difficult to say what the reason is for the estimated 43% of registered lawyers who did not provide legal aid in 2006.

In terms of the scope of publicly funded legal aid the LAA is a significant step forward as compared with the previous legal framework. Art. 1 of the law stipulates that the legal aid system covers legal needs in criminal, civil and administrative cases. Art. 23 (4) regulates the right of indigent parties in civil or administrative cases to request from the court appointment of *ex officio* counsel. The LAA imposes *lax means test* in civil and administrative cases according to which the party should prove its inability to pay the legal fee. Nevertheless the implementation of LAA shows that application of legal aid in civil and administrative matters is extremely limited. On the one hand, still not many civil and administrative judges are familiar with the LAA and on the other hand public awareness in the right to request appointment of *ex officio* counsel in cases other than criminal is still very low. NLAB could exercise important policy making role if it has authority to estimate standards for the means test in civil and administrative cases. Again it must be said that the limited capacity of NLAB handicaps its abilities to be active policy maker in the field of legal aid.

Apart of the extension of legal aid into civil and administrative matters the LAA introduced another expansion of the legal aid system. Art. 21 (1) and (2) regulates the primary legal aid in civil and administrative matters. In these cases the competent authority which has the authority to grant or reject appointment of *ex officio* counsel is the chairman of the NLAB. As in the case of legal aid in civil and administrative cases the primary legal aid is still an option rather than a functioning mechanism.

From the one year implementation of the LAA a series of problems could be identified. Most of these problems are systemic and have their roots in the legal framework. Impact assessment<sup>2</sup> of the LAA reveals that although the legal aid budget is now transparent and subject to more public scrutiny and there is an institutional infrastructure for implementation of the legal provisions, the two most critical aspects of the legal aid system in Bulgaria are largely untouched. Access to legal aid and quality of services could be described as substandard. Above in the text was discussed that the normative enlargement of the legal aid system is in collision with the lack of awareness and information. Before the new law in 2006 on annual basis there were approximately 18 000 cases of appointments of *ex officio* counsels in criminal, civil and administrative cases. Data from NLAB shows that for 2006 the same number of appointments was made. One can make the conclusion that in terms of accessibility the LAA did not cause any significant change to the status quo. The first 5 months of 2007 show some increase in appointments which could be attributed to both lagging cases from 2006 but also one cannot rule out the hypothesis that one year after entering into force the LAA is starting to widen the accessibility of the legal aid system.

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<sup>2</sup> Ongoing research project funded by the Open Society Institute - Sofia and the Justice Initiative - Budapest

On the other hand the adoption of the LAA was deemed to influence positively quality of delivered legal services. Local Bar Councils and NLAB were vested ambiguous powers to control for quality of the publicly funded legal aid. The LAA does not specify how exactly quality assurance mechanisms should be put in place. NLAB leadership has serious concerns about quality but admits that its scarce personal resources limit its ability to perform any meaningful form of control. Bar Councils on the other hand are reluctant to exercise any control over their members. Moreover in each of the local Bars there are attorneys who at the same time sit in the Bar Council or some of its commissions and perform as ex officio defence counsels. For example in 2 of the local Bars some 30% of the attorneys registered under the LAA also take positions in the Bar Council. Unwillingness of Bar Councils to get involved in setting up performance standards and a rigid quality assurance scheme to a large extent could be explained by the eminent conflict of interests which exists at local level. As a result of the complete failure of the institutions to address the issue there are numerous concerns expressed mainly by judges on the effectiveness of delivered legal aid services.

In March 2007 NLAB and Ministry of Justice convened a working group to draft amendments of the LAA. Philosophy of the proposed amendments regresses towards strengthening the powers and capacity of NLAB to implement the legal aid policy and split between the functions of administration and delivery of legal aid. Amendments envisage establishment of regional NLAB structures which must take over appointment of ex officio counsels and control on their performance. As expected the Bar faced the proposed amendments with fierce resistance raising the arguments of attorneys' independence.