



**UKRAINIAN NATIONAL
BAR ASSOCIATION**

LEGAL AID SYSTEM IN UKRAINE:

**Current Issues and
Recommendations
for Reform**

**A report prepared by the
Ukrainian National Bar Association**

KIYV



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PURPOSE OF THE REPORT

The purpose of this Report is to draw the immediate attention of the Government of Ukraine, civil society and the international community to critical issues within the system of legal aid in Ukraine, and the need for reform.

INTRODUCTORY REMARKS

Part 1 of Article 59 of the Constitution of Ukraine provides that everyone has the right to legal assistance. In the circumstances provided by law, such assistance is provided free of charge.

On 2 June 2011, the Parliament of Ukraine adopted the Law of Ukraine «On Legal Aid». The purpose of this Law is to define the right to legal aid, procedures for the exercise of this right, grounds and procedure for providing legal aid, state guarantees concerning legal aid and other issues concerning the provision of legal aid services.

Since the entry into force of the Law on Legal Aid, more than four years have passed. The application of the Law and the practice of legal aid to date have shown that the current law contains many shortcomings, and the legal aid system to be ineffective and bureaucratic, and one that violates both human rights and the professional rights and guarantees of attorneys. Ukraine's legal aid system, as it exists currently, poses a genuine threat to the independence of the legal profession, including the judiciary, and to the rule of law.

This Report, prepared by the Ukrainian National Bar Association, examines in detail these threats and challenges, and offers proposals to reform the administration of the system of legal aid.

This Report is based on the analysis of existing legal acts of Ukraine, statistics taken from official sources, publicly accessible information and on direct conversations with a number of representatives of the legal community, including from the central and regional self-governing bodies of the Bar, as well as interviews and feedback from persons who were granted legal aid. All figures, legislation, statistics and other information referred to in this Report are stated as of 18 October 2015.



EXECUTIVE SUMMARY

Pursuant to the Constitution of Ukraine and international legal obligations, the state must guarantee the right to legal assistance, which in circumstances stipulated by law is to be provided free of charge.

In July 2011, the Parliament of Ukraine adopted the Law of Ukraine «On Legal Aid» and set up a legal aid system under the control of the Ministry of Justice. However, this system has failed to protect defendants' basic human rights, undermined the independence of the legal profession, created or contributed to corrupt practices, and is a threat to the professional bar, judicial independence and the rule of law in the country.

Both the current Law on Legal Aid and ensuing legal aid system are consistent neither with the Constitution nor Ukraine's international commitments. The practice of legal aid in Ukraine fails to enshrine the principle of free choice of legal counsel, and allows for discrimination of persons based on economic and property status. At the same time, the legal aid system has currently no criteria for granting legal aid to low-income persons, and no set time-frames to determine a person's financial status, and as a result legal aid is offered to anyone who chooses, without regard to his financial means. Moreover, the criminal procedure code can be used to compel defendants to use legal aid, even if they do not require or want it, in order to expedite or influence proceedings. There are also problems in replacing legal aid attorneys, which can lead to a denial of a fair and speedy trial. Finally, there are numerous reports where the current system has led to corruption and abuse, including delays in receiving legal aid counsel, forceful assignment of legal aid, attorneys demanding side payments and selective assignment of cases by state officials.

The Law on the Bar and international standards call for the practice of law to be an independent professional activity, including independence from the state. The current legal aid system in Ukraine has, however, created a possibility for the state to have a dominant role in criminal proceedings through appointment of prosecutor and defense counsel. The principle of attorney-client privilege is compromised by the access of state officials to case information, and there are problems in attorneys' remuneration from the state for their work, the distribution of cases by state officials to attorneys, and excessive administrative or "paperwork" requirements for attorneys. There are also questions surrounding payments to attorneys as a percentage of the overall cost of legal aid, as opposed to costs of the bureaucracy and administration of this system.

The freedom of the legal profession is further undermined by the legal aid system's creation of additional, non-transparent testing and selection of attorneys, disregarding the fact that the testing and licensing function is already performed by, and is the legal function of, the Bar. The current system has also contributed to division in the professional bar, between those attorneys who are legal aid providers and those who are not. Moreover, there is an opportunity for the state to have influence over a significant number of legal aid attorneys who elect higher level representatives to the Congress of Attorneys, who in turn select representatives to both the High Council of Justice, the Higher Qualification and Disciplinary Commission of Judges of Ukraine and the Qualification Commission of

Prosecutors. Thus, the state is permitted improper and dominant influence in not only the attorney's profession, but also these institutions that are critical to the existence of the rule of law and judicial independence in Ukraine.

Given this unsatisfactory situation with the legal aid system in Ukraine, there is an urgent need for reform by transferring the administration of legal aid from the state to an independent body, with the broad involvement of the Bar as an independent constitutional institution, thereby eliminating opportunities for pressure and interference by the state with the professional activities of attorneys.

At the centre of these reforms is a proposed legal aid model which places the funding and maintenance of the system in the hands of the state through the Ministry of Finance, but whose operational control and functioning is the responsibility of the legal profession itself, through the Bar, with the state further represented through the Ombudsperson. This new model of legal aid will ensure efficient and transparent use of funds flowing into the legal aid system, respect for human rights and observance of professional rights and guarantees of attorneys on fair, transparent and non-discriminatory terms.



CURRENT SITUATION WITH THE LEGAL AID SYSTEM IN UKRAINE

Law on Legal Aid

Pursuant to paragraph «c» of part 3 of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (hereinafter «ECHR»), everyone charged with a criminal offense has the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require. In accordance with part 1 of Article 59 of the Constitution of Ukraine, everyone has the right to legal assistance. In the circumstances provided by law, such assistance is provided free of charge.

In compliance with the above provision of the Constitution of Ukraine, the international legal obligations which Ukraine had undertaken upon the ratification of the Convention, and the recommendations of the Council of Europe, on 2 June 2011 the Parliament of Ukraine adopted the Law of Ukraine “On Legal Aid” (hereinafter – “Law on Legal Aid”)¹, which became effective on 9 July 2011. The purpose of this Law is, inter alia, to determine the content of the right to legal aid, procedures for the exercise of this right, grounds and procedure for providing legal aid, state guarantees concerning legal aid and so on. The law envisages both primary and secondary legal aid.

Primary legal aid concerns the state obligation to inform people about their rights and freedoms, and means to protect these rights and freedoms through the legal system by appealing against decisions, actions or inaction of the state authorities, local self-government bodies, officials and officers. Primary legal aid includes such legal services as: providing access to legal information; advice and clarification of legal issues; drafting claims, complaints and other legal documents (excluding procedural documents); and assisting in the access to secondary legal aid and mediation.²

The subjects of primary legal aid are all persons under the jurisdiction of Ukraine, and the entities which offer such aid are the executive authorities, local self-government bodies, individuals and legal entities of private law, as well as specialized agencies.³

Secondary legal aid is the state’s obligation to provide equal opportunities for access of persons to justice, and includes such legal services as defense; representation of interests of persons in courts, other state agencies, local self-government bodies and before other persons; and drafting procedural documents.⁴

The law defines a wide range of subjects whom are eligible to receive secondary legal aid: persons whose average family monthly income is lower than the minimum subsistence level; orphaned children; children whose parents have been stripped of their parental rights; children who are victims of family violence (or potential victims); persons under administrative detention; criminal suspects detained by investigation agencies; persons taken into custody as a preventive measure; persons whose cases according to the criminal procedure code must be pleaded in presence of an attorney; refugees and persons

in need of additional or temporary protection; war veterans; persons who have rendered certain services to the country; victims of Nazi persecution; persons who face hearings regarding restrictions of their civil capacity; persons subject to court hearings on compulsory psychiatric care; persons who, convicted of a crime, have been officially exonerated by the state; citizens of countries with which Ukraine has signed relevant international agreements on legal assistance; and foreigners and stateless persons in accordance with international treaties to which Ukraine is a party, if such treaties oblige the state parties to provide certain persons with legal aid.

The entities which are to provide secondary legal aid in Ukraine are centres of secondary legal aid, which are the regional offices of the Coordination Centre of Legal Aid, and attorneys included in the register of legal aid attorneys.⁵ The management of the legal aid system and its financing is entrusted to the state, represented by the Cabinet of Ministers of Ukraine and the Ministry of Justice.⁶

Law on the Bar

On 5 July 2012, the Law of Ukraine «On the Bar and Practice of Law» (hereinafter – “the Law on the Bar”)⁷ was adopted. It defines legal principles of organization and operation of the Bar in Ukraine.

The law stipulates that the Bar of Ukraine is a public, self-governing institution which ensures provision of legal defense, representation and other types of legal services on a professional basis and independently resolves issues of organization and operation of the Bar in accordance with the procedure provided for by this Law. The Bar self-government operates in Ukraine for the purpose of ensuring the proper practice of law, compliance with the professional guarantees of attorneys, protection of attorneys’ professional rights, ensuring a high level of professionalism of attorneys and resolving issues of discipline.⁸

In particular, the Law provides for the establishment of the Ukrainian National Bar Association (hereinafter – «the UNBA»), a non-governmental, non-profit professional organization which brings together all attorneys of Ukraine (about 30,000 persons) and which is formed in order to achieve the objectives of the Bar self-government.⁹

CURRENT PROBLEMS WITHIN THE LEGAL AID SYSTEM OF UKRAINE

Since the entry into force of the Law on Legal Aid, more than four years have passed. The following is a brief summary of several problems and issues that have emerged under the current system as constructed. These issues are divided into those that violate human rights (generally of the accused), those which violate the freedoms and practice of attorneys

⁵ Article 15 of the Law on Legal Aid.

⁶ Articles 27 and 28 of the Law on Legal Aid.

⁷ Available in Ukrainian at <http://zakon2.rada.gov.ua/laws/show/5076-17> and in English at <http://en.unba.org.ua/assets/uploads/legislations/pologennya/law-of-ukraine-on-the-bar-and-practice-of-law-new.pdf>.

⁸ Article 2 of the Law on the Bar.

⁹ Article 45 of the Law on the Bar.

¹ Available at <http://zakon0.rada.gov.ua/laws/show/3460-17/print1426243728721122>.

² Article 7 of the Law on Legal Aid.

³ Article 8 and 9 of the Law on Legal Aid.

⁴ Article 13 of the Law on Legal Aid.



(and the Bar itself) in Ukraine, and questions about the costs and maintenance of the system. In view of these issues, it is necessary to make relevant amendments to the Law on Legal Aid, and fundamentally change the system.

Violation of basic human right

One of the major drawbacks of the Law on Legal Aid is that it fails to enshrine the principle of free choice of legal counsel, which is not consistent with Article 59 of the Constitution of Ukraine and paragraph «c» of paragraph 3 of Article 6 of ECHR. In accordance with Article 19 of the Law, it is the legal aid centre that decides on such a defense, and appoints a defense lawyer to a person. Accordingly, a person against whom criminal charges were brought and to whom legal aid is being granted is effectively denied the right to free choice of a defender, in violation of Ukraine's Constitution and ECHR.

In addition, the Law also contributes directly to discrimination based on economic and property status, a violation of Article 14 of ECHR (prohibition of discrimination) when viewed in respect to the guarantees of choice in Article 6 § 3 (c) ECHR. Persons having financial resources are free to choose an attorney of their choice (i.e., to conclude with him a legal assistance contract), while those having no such resources are without choice and bound to the defense attorney appointed by the legal aid centre, at its discretion.

At the same time, the Law on Legal Aid has not yet set the specific criteria for granting legal aid to low-income persons, nor the time-frame in which to verify the financial status of a person against whom criminal charges have been brought. As the result, such legal aid is currently provided (with the use of the state funds) to anyone without regard to his or her financial status.¹⁰

The UNBA also draws attention to the fact that the existing criminal procedural legislation of Ukraine allows for the court to compel the defendant to use a legal aid attorney in certain conditions, regardless of his financial status. Even if a person has all financial capacity to pay for the defense and has hired several attorneys whom he trusts, the investigative bodies or the court may (and has) in certain cases appoint a legal aid attorney to expedite proceedings and in some cases to influence the outcome (for example, in a pre-trial hearing to remand a defendant).¹¹

Another problem is the inability to replace a legal aid attorney in certain cases and the subsequent protraction of hearings. For example, if a legal aid attorney is not able to come to court (for example, if he or she is on leave, or in another locality), the legal aid centre cannot replace him or her with another attorney, as it typically would happen with the attorneys acting under agreement with a client. According to Article 24 of the Law on Legal Aid, a legal aid attorney can be replaced in the case of illness, improper performance of his duties under the contract, failure to comply with the procedure

for providing legal aid, or his exclusion from the register of legal aid attorneys. In all other cases, such as when the attorney is business travel, on leave, etc., a person actually finds himself in a situation without counsel until the appointed attorney is able to return to his or her duties, which in turn leads to an unjustified protraction of criminal proceedings.¹² Such a delay can effectively deny a defendant's right to a hearing within a reasonable time frame, violating a basic principle of Article 6 of ECHR.

Finally, there are numerous reports from the individuals who have suffered from corrupt practices within or caused by the current legal aid system. Examples of this corruption include legal aid attorneys demanding private side agreements to more effectively represent the client (as the state legal aid provided fee is not enough), selective assignment of attorneys to the more winnable or profitable cases, courts assigning legal aid counsel needlessly and without consent, delays in arrivals of legal aid attorneys and so on.¹³

Violation of rights and guarantees of attorneys and the freedom to practice

A number of provisions of the Law on the Bar repeatedly stress that practice of law is an independent professional activity¹⁴, including independence from the state. This independence is violated however in the need for legal aid attorneys to disclose confidential client or case information when they submit certain documents to officials within the legal aid system. For example, legal aid centres require attorneys to provide supporting documents necessary for receiving remuneration for legal aid services that may contain privileged information from the case file. As a result, a number of individuals within the legal aid system (e.g., managers and officials of the legal aid centres, among whom are many lustrated prosecutors, former police officers and other individuals) have access to documentation subject to attorney-client privilege. This is in violation of Ukrainian law and international standards.¹⁵

The administration of the legal aid system by the state through the Ministry of Justice has also contributed to an improper influence in the distribution of cases among legal aid attorneys. Attorneys belonging to the system receive vastly different access to cases assigned by their respective legal aid centres, as revealed both through complaints received by the UNBA and publicly available statistics on case assignment. For example, yearly assignments is through a legal aid centre have an approximate average of ten cases. However, in just three months (from 01.01.2013 to 03.31.2014) in the Chernivtsi region, attorney L. received 73 assignments, while attorney N. only one; in the Dnipropetrovsk region attorney S. received

¹² See, for example, Contradictions in the legal aid system – examples by Judge A. Ivanov (in Ukrainian; at <http://unba.org.ua/assets/uploads/news/publikacii/ivanov-bpd-protyrichya.pdf>, c. 1).

¹³ Information about persons who suffered from legal aid keeps on coming – Ganna Kolesnyk (in Ukrainian; at <http://unba.org.ua/news/655-news.html>); The coup in the legal aid system in Ukraine (in Ukrainian; at <http://unba.org.ua/news/711-news.html>); Negligent legal aid system - the story of attorney Taras Lamakh (in Ukrainian; at <http://unba.org.ua/news/721-news.html>); Chernigiv regional QDCB continues receiving complaints against the legal aid attorneys (in Ukrainian; at <http://unba.org.ua/news/712-news.html>); The independence of the legal profession is a requirement of the European Community - Acting Chairman of the Bar Council of Chernigiv region Volodymyr Tasun (in Ukrainian; at <http://unba.org.ua/news/710-news.html>); The number of victims of the State legal aid increases (in Ukrainian; at <http://unba.org.ua/news/650-news.html>); A teenager has suffered from the activities of a legal aid centre (in Ukrainian; at <http://unba.org.ua/news/681-news.html>); A visually impaired person was denied legal aid by the Coordination Centre (in Ukrainian; at <http://unba.org.ua/news/680-news.html>); Volunteer Oleg: New History from a person who has suffered from the current legal aid system (in Ukrainian; at <http://unba.org.ua/news/663-news.html>).

¹⁴ Para. 2 of part 1 of Article 1, part 1 of Article 4, part 1 of Article 5, part 1 of Article 11 and para. 1 of part 1 of Article 44 of the Law on the Bar.

¹⁵ For example, UN Basic Principles on the Role of Lawyers, Turin Principles of Professional Conduct of Legal Professionals in the 21st Century, among others.

¹⁰ Legal aid centres refuse to cooperate with the bar – an example of the Zaporizhzhya region (in Ukrainian; at <http://unba.org.ua/news/726-news.html>).

¹¹ In one illustrative case, a wealthy individual was arrested and appeared before a judge for arraignment. The individual hired several attorneys to defend him. The hearing proceeded for many hours before a break was granted. During this break the judge contacted legal aid office, which provided an attorney who immediately conceded all points and the individual was remanded in the absence of his legal team. Very recent and high profile examples of this practice include the arrests of the oligarch Gennady Korban, whose attorneys were denied access and his defense in the arraignment was conducted by legal aid attorneys, and former Ministry of Justice Olena Lukash, who was detained and sentenced to two months pre-trial detention after legal aid attorneys were appointed to represent her in the initial proceedings.



170 assignments, while attorney T. only one; in the Odessa region attorney P. received 237 assignments, while attorney Ch. only one; and in the Poltava region attorney M.Y. received 451 assignments, while attorney M.D. only one.¹⁶ Attorneys confirm that assignments are made subjectively by the centres, with some attorneys having access to profitable and interesting assignments, while others, more difficult and not very profitable cases.¹⁷ It is not hard to imagine a scenario in Ukraine where how an attorney behaves or acts during these state-granted cases will directly affect his opportunity for future assignments. Thus, this assignment process has allowed for state influence and control of legal aid attorneys, and a kind of “appropriation” of the criminal proceedings is taking place, in which the state is now represented by the prosecution (public prosecutor), and by the defense (legal aid attorney controlled by the state), which goes against the most basic international norms and cannot be accepted in any state governed by the rule of law.

For those attorneys within the system of legal aid, there is also a potential threat to the independence of attorneys arising from their remuneration. The remuneration of such attorneys has currently decreased compared to what it was in the beginning, and in general is very small (currently, 1.2 USD

¹⁶ Public control over budgetary funds to legal aid: where does the money really go? (in Ukrainian; at <http://unba.org.ua/assets/uploads/news/post-revis/2015.09.15-presentation.pdf>, p. 14). See also: Legal aid centres refuse to cooperate with the bar - an example of the Zaporizhzhya region (supra).

¹⁷ A coup in the legal aid system in Ukraine (supra).

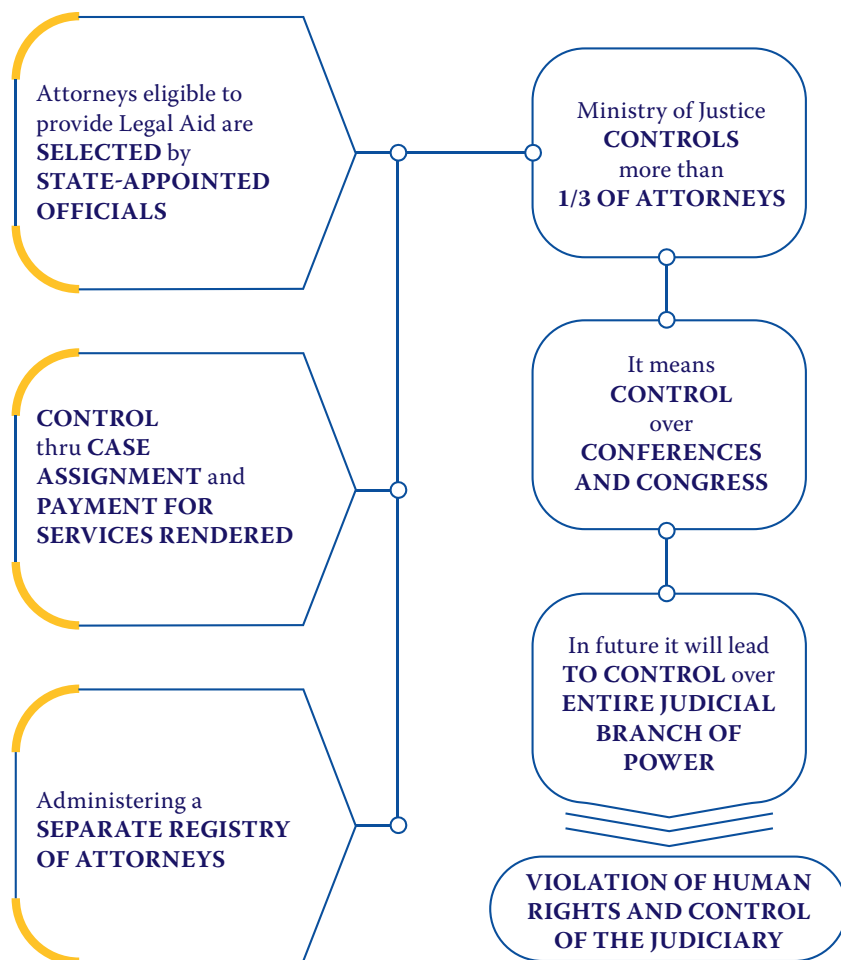
per hour), especially after the deduction of taxes (exh. 6 p. 17). It has also been reported that there are delays in the transfer of funds from the state treasury to attorneys for services rendered. Insufficient or delayed remuneration contributes to, at best, greater dependence of attorneys on the state, at worst, corrupt practices.

Finally, the existing reporting requirements for attorneys rendering legal aid are onerous and overly bureaucratic, and require revision and simplification. In order to obtain remuneration for their work, legal aid attorneys must submit to the legal aid centres a significant number of supporting documents, as well as perform a number of complex calculations. Such requirements for legal aid attorneys are excessive, and prevent them from doing their work and performing their duties, (i.e. ensuring the right to defense), and potentially creates an opportunity for more control by state officials administering the system. In fact, legal aid fees often go unclaimed, which also supports the corruption hypothesis that side agreements are being made between the person receiving legal aid and the attorney.

State pressure on the Bar and jeopardizing the independence of the legal profession

A challenge for the continued independence of the legal profession is the system of admission of attorneys to the legal aid system, through the creation of additional, non-

THREATS POSED BY LEGAL AID BEING UNDER CONTROL OF MINISTRY OF JUSTICE



INCOMPARABLE EXPENSES OF LEGAL AID SYSTEM

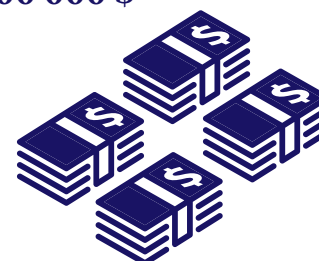
Hourly rate for attorney involved in Legal Aid



1.20 \$

Expense of Ministry of Justice on renovation of one Legal Aid center premises

1 000 000 \$





transparent testing and selection of attorneys. This practice is not only duplicitous, but is in fact a form of state regulation and even selective control over which attorneys are permitted to practice law in legal aid cases. This is unacceptable, since all attorneys have already undergone training and qualification during the administration of the qualification exam to the Bar. Moreover, the quality of their work is to be evaluated by the qualification and disciplinary commission of the Bar, and not by state officials within the Ministry of Justice. This system is clearly in contradiction with the principle of self-regulation of the legal profession and Bar, its independence from the state apparatus and nondiscrimination in the right to practice law.¹⁸

The state's intention to expand their licensing of legal aid attorneys also poses a genuine threat to the future independence of the legal profession, and the opportunity for state dominance over the profession. The state has announced its intention to increase the number of legal aid attorneys to 15,000 persons, which will then behalf of all attorneys registered in Ukraine. In Ukraine, the Congress of Attorneys – the highest body to regulate attorneys and the Bar – is comprised of attorneys elected by their peers on the regional level. This Congress also appoints three members of the High Council of Justice¹⁹, one member of the disciplinary chamber and one member of the qualification chamber of the Higher Qualification and Disciplinary Commission of Judges of Ukraine²⁰ and one member of the Qualification Commission of Prosecutors.²¹ Through its influence over significant portion of all attorneys through the legal aid system, the state has an influence or even control on the appointment of these institutions which are critical to the existence of the rule of law and judicial independence in Ukraine. Even now, prior to this planned expansion, attorneys taking part in the legal aid system report to the UNBA that they have been called be the head of the regional legal aid centre and asked to vote a certain way in Congress elections, or simply not to attend these elections.

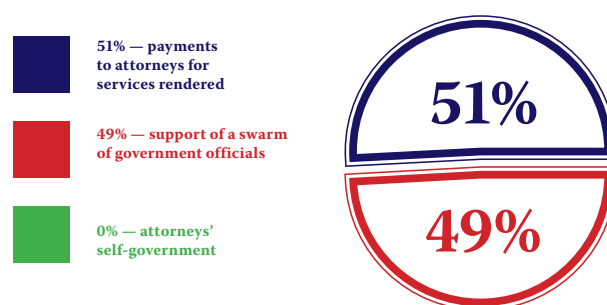
There is also a threat to the existence of the Bar arising from the distinction between attorneys who are part of the legal aid system and those who are not. This development has led to the actual split of the Bar into two parts: independent attorneys, and legal aid attorneys. This division damages the UNBA as a professional organization that unites all of the attorneys of Ukraine – the creation of which, in pursuance of the state's obligations vis-à-vis the Council of Europe, the legal community of Ukraine has had to wait nearly 20 years.

Inefficient and non-transparent use of funds

The administration of the legal aid system has demonstrated that the funds from the state budget of Ukraine and other sources (including international donors) are used inefficiently and irrationally, to the detriment of the citizens of Ukraine, and to citizens globally, who pay taxes to fund Ukraine's state budget and the budgets of international donors, respectively. (exh. 4 p. 16). Using publicly available data, the UNBA has recently reviewed the operational spending of the Coordination Centre and regional legal aid centres.²² The UNBA found alarming and questionable a number of statistics and examples of expenditures (exh. 7 p. 17).

For example, the number of officials and employees engaged in the administration of the legal aid centres increases each year. For example, while in 2013 the legal aid centres employed 125 persons, in 2015 this figure has already reached 581 persons, and is currently planned to increase to 3,500.²³ The same can be said about the cost of this labor, which in 2015 reached 17,725,215 UAH (about 832,560 USD at the rate of the National Bank of Ukraine), compared to 4,773,007 UAH (about 224,190 USD) in 2013. Viewed another way, in 2014 almost half of the legal aid budget was spent on the maintenance of legal aid centres and officials²⁴ (exh. 5 p. 16). In addition, the Cabinet of Ministers of Ukraine has just recently reduced the remuneration designated for legal aid attorneys, while increasing the financing of the bureaucratic apparatus of this system.²⁵ These amounts should also be viewed in light of the recent tender to refurbish the MOJ premises designated for the Coordination Centre, which is estimated to cost 25,057,638 UAH (about 1,176,967 USD)²⁶.

LA STATE BUDGET FINANCING IN 2012-2015



Improving the legal aid system in Ukraine

In view of the above-mentioned problems which in the legal aid system of Ukraine there is an urgent need for reform. Such reform will be to the benefit of human rights, professional rights and guarantees of attorneys, and, ultimately, of taxpayers and international donors whose contributions to legal aid will be spent more efficiently, transparently and accountably.

Some of the basic problems which involve violations of defendants rights, remuneration of attorneys, and spending of public funds could potentially be resolved by a reform within the existing system. However, the fundamental issue of the subjugation of the legal profession, and potential threat to the independence of the judiciary and rule of law in Ukraine, can only be resolved by removing the state control over providing legal assistance. In the UNBA opinion therefore, it is necessary to radically change the current legal aid system and to create a new model for the provision of legal aid and its administration.

In response to the numerous issues described in this Report, the UNBA Committee for Legislative Initiatives for the Bar has recently initiated a collection of proposals from the legal community in order to amend the Law on Legal Aid²⁷. These proposals are organized into categories, such as proposals that address reporting procedures, monitoring the quality of legal aid provided, equal access to legal aid work, as well as

18 Ibid, see also Council of Europe Recommendation Rec(2000) 21 of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer

19 Article 54 of the Law of Ukraine on the Bar.

20 Article 102 of the Law of Ukraine «On the judiciary and status of judges».

21 Article 74 of the Law of Ukraine «On prosecutor's offices».

22 Public control over budgetary funds to legal aid: where does the money really go?(supra).

23 Ibid, pp. 4 i 5.

24 A coup in the legal aid system in Ukraine (supra).

25 Decree of the Cabinet of Ministers of Ukraine of 13 October 2015 No. 1070-p «On reallocation of certain expenditures from the State budget envisaged for the Ministry of Justice for 2015 (in Ukrainian); at <http://www.kmu.gov.ua/control/uk/cardnp?docid=248556490>.

26 Public control over budgetary funds to legal aid: where does the money really go?(supra,p.1).

27 The UNBA initiated collection of proposals for amendments to the Law on Legal Aid (in Ukrainian); at <http://unba.org.ua/news/668-news.html>.



issues pertaining to the administration and maintenance of the legal aid system. Following the completion of this process the UNBA will propose an improved draft law on legal aid, which will then be submitted to the Parliament for consideration.

While the details are dependent upon the collection and systemization of proposals from the legal community, it is currently envisioned that such a model would feature the creation of legal entity of public law (e.g., a Legal Aid Foundation), which will be established by the state but managed independently by the legal profession, and will be financed by the state and outside donors and sponsors, including from the private sector. This foundation will develop clear criteria under which a person will be eligible for legal aid, ensuring that this aid is not given to each and everyone, as is currently happening, but only to the socially vulnerable categories of persons who actually require it.

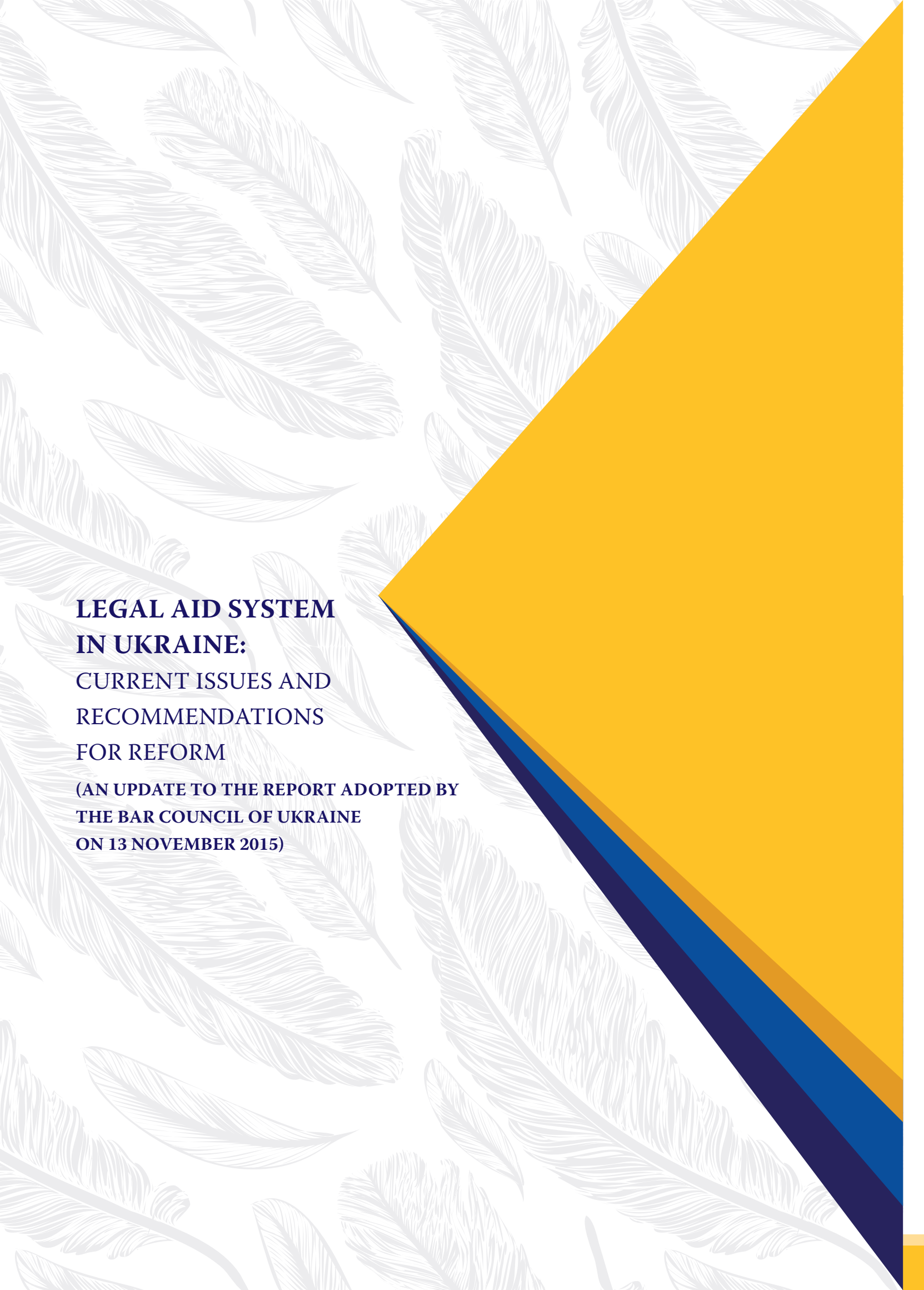
The Legal Aid Foundation would be controlled by a board, which must be headed by an independent attorney, elected through free and open elections for a set term. The board will be comprised of a majority representation of the Bar, as well as a minority representation of the Ukrainian Parliamentary Commissioner for Human Rights (Ombudsperson) and a representative of the Ministry of Finance. The board will have a secretariat with a small number of employees who will be responsible for its operation. Such a composition of the board, modeled from other successful examples in the region, will be able to ensure both respect for human rights and the independence of the Bar, and legal aid attorneys, from the state.

It is envisioned that every attorney will have the right, without any additional testing or qualification, to voluntarily provide legal aid. It is after all the legal profession in Ukraine which is called to defend human rights, including defense from the state, and the Bar which maintains the Unified Register of Attorneys of Ukraine.²⁸ To be eligible to participate in legal aid cases, an attorney would simply need to submit in advance information to the Register that he wishes to provide legal aid, what types of cases he can assume, and in what time periods. Such an approach would thus help ensure the implementation of a free choice of defense on competitive principles, as a person could choose from among a list of attorneys generated by a law enforcement officer from the Register. Attorneys who wish to provide legal aid would also have the opportunity to regularly improve their professional skills through participation in various events (e.g., seminars, workshops, conferences, forums, etc.) that will be organized by the higher and regional bodies of the Bar self-government.

Concluding remarks

The legal aid system which currently exists in Ukraine is insufficient and does not guarantee certain basic human rights to persons in need. Shortcomings in the legislation and practice of legal aid have given opportunity for improper state pressure and control of attorneys, have contributed to corruption and threaten the independence of the legal profession. It is therefore proposed to change the existing system of legal aid to one managed by the legal profession itself and not the state.

²⁸ Article 17 of the Law on the Bar.



**LEGAL AID SYSTEM
IN UKRAINE:
CURRENT ISSUES AND
RECOMMENDATIONS
FOR REFORM**

**(AN UPDATE TO THE REPORT ADOPTED BY
THE BAR COUNCIL OF UKRAINE
ON 13 NOVEMBER 2015)**



INTRODUCTION

On its meeting of 13 November 2015, the Bar Council of Ukraine adopted the Report “Legal Aid System in Ukraine: Current Issues and Recommendations for Reform”, earlier prepared by the Ukrainian National Bar Association (UNBA). The purpose of the Report was to draw the immediate attention of the Government of Ukraine, civil society and the international community to critical issues within the system of legal aid in Ukraine, and the need for reform.

The main conclusions of the Report were as follows. The legal aid system which currently exists in Ukraine is insufficient and does not guarantee certain basic human rights to persons in need. Shortcomings in the legislation and practice of legal aid have given opportunity for improper state pressure and control of attorneys, have contributed to corruption and threaten the independence of the legal profession. It was therefore proposed to change the existing system of legal aid to one managed by the legal profession itself and not the state.

Since the adoption of the Report in November 2015, some further unfortunate developments in the legal aid system have taken place, showing continued inefficiency of the system and irrational decision-making within it, despite the reforms announced by the state (perhaps as a reaction to this Report). That situation called for making an update to the Report.

Disappointing reforms, irrational use of funds and reduced legal aid

In addition to information about the inefficient and non-transparent use of funds in the Ukrainian legal aid system as administered by the state, which was at length described in the Report of November 2015, it should be noted that in December 2015 the Coordination Centre for Legal Aid announced some “reforms” in the legal aid system. This included, in particular, launching, on 1 July 2016, of 400 new district legal aid bureaus as separate units of the regional legal aid centres. Apart from provision of legal aid, those bureaus are also to provide electronic services of the Ministry of Justice of Ukraine – services totally uncommon for provision of legal aid¹.

In other words, the system continues spending legal aid budget on enlargement and maintenance of the bureaucratic apparatus, which in addition will provide services unconnected to legal aid, instead of increasing the remuneration (per hour rate) of legal aid attorneys, which is already quite insignificant compared to market prices on legal services and which has recently been even decreased by the Cabinet of Ministers of Ukraine.

Besides, the reforms of legal aid system announced by the Ministry of Justice have in practice turned out to be an intentional activity for significant reduction of citizens’ guaranteed right to legal aid.

As an example, the Ministry of Justice of Ukraine recently decided to liquidate regional secondary legal aid centers in the Lugansk and Kharkiv regions, having instead created one single regional legal aid centre. As a result, citizens of Lugansk, who have already found themselves in quite a difficult situation,

and citizens of Kharkiv, who live close to the zone of anti-terrorist operation, have been limited in legal assistance. No other region of Ukraine was affected by this “reform”.

The initiator of this decision was the Coordination Center for Legal Aid, which inadequately responded to a fair criticism of inefficient budget expenditures and, under the pretext of optimization and cost savings, secured adoption by the Ministry of Justice of the regulations which stripped citizens of their constitutional right to legal aid. The process of liquidation of two legal aid centers has blocked their work, i.e. provision of legal services to citizens at the expense of the budget. People have been left alone with their everyday problems.

It is to be noted that the head of the liquidation commission has no right to conclude new contracts between the centers and attorneys. As the result, no new competitions to attract attorneys to the legal aid system are held. Due to the lack of budgetary funds, it is not possible to pay for services already provided by legal aid attorneys. Due to this scenario, attorneys may become totally demotivated in cooperation with the most vulnerable groups of population in the future.

As far as the local legal aid centers of the above regions are concerned, their structure was also completely redesigned: in the Kharkiv region, seven local legal aid centers were liquidated and only three local secondary legal aid centres were created in their stead. On the other hand, in the Lugansk region, one more centre was added. If the Ministry of Justice is to be fully consistent with its discriminatory approach towards the Kharkiv region, the legal aid system here will be represented only by the local centers, which will be coordinated by the head office in the neighboring region.

The logic which dictated such a solution is not clear and obviously raises concerns not only about inequalities in treatment by the Ministry of local managers of legal aid centers and about a great role of personal factors, but also about the inequality of the Ukrainian citizens created by such a decision, since the opportunities to have citizen’s rights protected are dependent on geography.

Having realized the uncontrollability of consequences of this decision, acting Director of the Coordination Center signed an order authorizing further work of the Kharkiv regional legal aid center in a usual operating mode until its liquidation. This attempt to play back the situation once again demonstrates the illiterate decisions and no forecasting of the consequences of the authorities’ own actions, which are the basis of the so-called “reforms” of the Ministry. All the above is just an inefficient imitation of reforms or a plain unprofessionalism, which in reality has nothing to do with reforms².

It should also be noted that the creation of hybrid offices of centres of secondary legal aid and legal aid bureaus in the place of the territorial bodies of the Ministry of Justice will not solve any of the real problems existing in the legal aid system. Further delays in a thoughtful and comprehensive reform of the legal aid system will lead only to a repetition of incidents similar to those having taken place in the Lugansk and Kharkiv regions and which destroy the confidence of citizens in the state and legal profession, and deprive socially vulnerable groups of legal assistance.

¹ Ministry of Justice will open more than 400 legal aid bureaus and will liquidate local departments of justice of a Soviet type throughout Ukraine (available in Ukrainian at: <http://legalaid.gov.ua/ua/holovna/liutyi-2016/ministerstvo-iustytisii-vidkryie-bilshe-400-biuro-pravovoi-dopomohy-ta-likviduie-miski-upravlinnia-iustytisii-radianskoho-zrazka-po-vsii-ukraini>).

² Price of reform: residents of Lugansk and Kharkiv regions have been deprived of access to legal aid (available in Ukrainian at: <http://unba.org.ua/news/1162-cina-reformi-luganchan-i-harkiv-yan-pozbavleno-dostupu-do-bezoplatnoi-pravovoi-dopomogi.html>); Liquidation of legal aid centres in the Kharkiv region went out of control of the Ministry of Justice (available in Ukrainian at: <http://unba.org.ua/news/1165-likvidaciya-centriv-bpd-na-harkivshini-vijshla-z-pid-kontrolyu-minyustu.html>).



Unsatisfactory working and payment conditions for legal aid attorneys

The legal aid centers not only untimely and poorly react to citizens' applications, but also create unsatisfactory conditions for the work of legal aid attorneys. As an example, the UNBA received a letter from attorney Andriy Chebanenko (Odessa), in which he informed it about the poor conditions for provision by attorneys of free primary legal aid to citizens. The attorney informed that on 28 December 2015 he had received a proposal from the Second Odessa city legal aid centre to be on duty in this centre during the month of January 2016 and to provide free primary legal aid to citizens (verbal or written counseling of clients visiting the centre).

Being well aware of the location of working premises of the Second Odessa city legal aid centre, Mr Chebanenko noted that there is still no equipped premise for the work of an advocate with a client in conditions of confidentiality, as a result of which the duty and the written or oral counseling of clients take place in one of the working premises, in which employees of the centre, who are not attorneys, also work.

As a matter of logic, the main objective of the centre is to ensure "equal opportunities for access to justice by providing free legal aid". In other words, the priority is cooperation with citizens: legal counseling, interviewing, informing. Therefore, providing for, and equipping of a workspace for a legal aid attorney must be a priority. Nonetheless, according to the Director of the Centre, provision of a separate room for attorney's confidential work with clients is impossible due to the lack of funds.

It becomes quite clear that under such conditions, a duty attorney of the centre is unable to ensure compliance with Article 10 of the Rules of Advocates' Professional Conduct, namely, to ensure confidentiality of relations with a client, since his conversation with a client, advice and other information is heard by other persons, who may potentially use the information received this way for the detriment of both the client and the advocate. In this respect, quite a logical question arises about the real destination of budgetary funds allocated for the administration of legal aid centres in Ukraine³.

It should further be noted that the system of reporting by legal aid attorneys has continued showing a number of flaws due to its complexity. Besides, delays in payments of fees to legal aid attorneys also continue taking place. As a result, many legal aid attorneys simply refuse to submit reporting documents and to receive their remuneration or simply terminate their contracts with the state.

Finally, the irrational methodology of remuneration by the state for the work of legal aid attorneys have been such that many actions or tactical options of such attorneys, which are prima facie beneficial to defendants from the point of view of their rights, will simply not be paid by the state, the legal aid attorneys thus being fully discouraged from taking them.

³ Legal aid centres: millions spent on repairs of premises, rather than on legal aid attorneys (available in Ukrainian at <http://unba.org.ua/news/1000-centr-z-nadannya-bpd-mil-joni-na-remont-primishen-ale-ne-dlya-advokativ.html>).

For example, if a prosecutor drops certain charges against a defendant, this will not be considered as an achievement of the latter's legal aid attorney and thus will not be paid by the state, unless the attorney insists that the court in its conviction acquits the accused in this part of the prosecutor's charges. In other words, the legal aid attorneys are discouraged from persuading the prosecutors to drop the charges in whole or in part, because in case this happens they will not be paid for this (apparently, the state considers that this is only the prosecutor's merit to which the attorney has not contributed).

If a prosecutor seeks extension of detention of a person, a legal aid attorney is not encouraged to be very active in objecting to this, because if the prosecutor's request is rejected by a trial court and the person is released from detention, this will not be considered as attorney's achievement, and the attorney will not be paid for that. On the contrary, if the legal aid attorney lodges an appeal after the court allows the prosecutor's request, this scenario will allow the attorney to count on receiving a "coefficient" to his fees for legal aid provided to a client in continued detention.

If a client complains to his attorney that he was ill-treated in detention, the attorney should request the investigator to enter the statement about the crime into the Unified Register of Pre-trial Investigations. If the legal aid attorney's request is well-written and grounded, the investigator will normally enter the statement in the URPD. However, in this scenario no fees are envisaged for this apparently good job by legal aid attorney. On the contrary, if the attorney submits an ill-drafted request, and the investigator refuses to enter the statement about the crime in the URPD, the attorney can then challenge the investigator's action in the court, which will have to examine it. The result of the court proceedings is not important; what is important is that the state additionally pays the attorney for "separate set of court proceedings". In other words, there is an evident ethical dilemma for a legal aid attorney: to make a well-founded request (and to get no money that) or to make an ill-drafted request and to further challenge the investigator's refusal to allow it in courts (and to get money for that).

These and other paradoxes and irrationalities in remuneration for work of legal aid attorneys have been confirmed by the legal aid attorneys themselves⁴.

Continued violations of the right to defense

As before, the right to defense, albeit guaranteed by the Constitution, continues to be breached. A detained person does not have a possibility of a free choice of a defense counsel, because the legal aid attorneys are "imposed" on them by the State and the detainees are refused to call their own attorney. Attorneys acting under the legal aid contract signed with a detainee or his relatives are not admitted to procedural actions, in which legal aid attorneys already participate. Legal aid centers do not provide information to contracted attorneys about the time, date and whereabouts of a procedural action in cases where legal aid attorney was already assigned, and so on.

⁴ Olena Demyanova, Legal Aid System Ignores the Attorneys' Interests (available in Ukrainian at: <https://lawyerkhmelnytsky.wordpress.com/2016/03/10/система-бесплатной-правовой-помощи-и/more-95>).



CONCLUSIONS

Despite the “reforms” in the legal aid system announced by the Ministry of Justice of Ukraine under the noble slogan of optimization of expenses and cost savings, it is quite evident that the awkward and hasty decisions or steps taken by the Ministry only lead to further limitation of citizens’ right to legal assistance. This in particular concerns the right of socially vulnerable groups of population.

Same as before, the system continues spending budgetary money in an inefficient and non-transparent way, which eventually affects both the legal aid attorneys who cannot ensure proper provision of legal services to clients and the attorney-client privilege due to unsatisfactory conditions existing in some legal aid centres, and the eventual recipients of legal aid – citizens of Ukraine.

Despite the constitutional guarantees, the right to legal assistance is not ensured in practice due to an apparent unequal treatment by the law enforcement authorities or the state of contracted attorneys vis-à-vis legal aid attorneys.

The system of remuneration by the state for the work of legal aid attorneys is such that in practice legal aid attorneys are often confronted with an ethical or professional dilemma: to act in the best interests of their clients and to get no remuneration for that or to “adjust” their actions to scenarios (beneficial for them but not for their clients), in which such a remuneration will be made.

A REPORT ON EXPENDITURE IN THE LEGAL AID SYSTEM IN UKRAINE

Ukrainian Legal Aid System Expenditure
2012 - 2016

General expenses

Spending on Staff Salaries
for State Officials

Spending on Remuneration for Attorneys
that Provide Legal Aid

Global trends in Legal Aid system
administration costs





Exhibit 1. Ukrainian Legal Aid System Expenditure 2012 - 2016 (in thousands UAH)

Year:	2012	2013	2014	2015	2016
Formation and operation of the Legal Aid System	1 078.50	13 065.30	12 870.90	91 937.70	35 862.20
Staff salaries (state officials)	2 007.50	9 119.50	15 201.60	58 557.70	84 767.30
Remuneration for attorneys that provide Legal Aid	0.00	28 891.80	65 981.10	122 390.00	97 671.20
Total:	3 086.00	51 076.60	94 053.60	272 885.40	218 300.70



Exhibit 2. Ukrainian Legal Aid System Expenditure 2012 - 2016 (in thousands USD)

Year:	2012	2013	2014	2015	2016
Formation and operation of the Legal Aid System	134.81	1 613.00	1 514.22	5 408.10	1 488.06
Staff salaries (state officials)	250.94	1 125.86	1 788.42	3 444.57	3 517.32
Remuneration for attorneys that provide Legal Aid	0.00	3 566.89	7 762.48	7 199.41	4 052.75
Total:	385.75	6 305.75	11 065.13	16 052.08	9 058.12



Exhibit 3. USD/UAH Exchange rate, as used to calculate the State Budget of Ukraine

Year:	2012	2013	2014	2015	2016
USD/UAH Exchange rate	8.00	8.10	8.50	17.00	24.10



Exhibit 4. Overall expenditure throughout the years (in thousands USD)

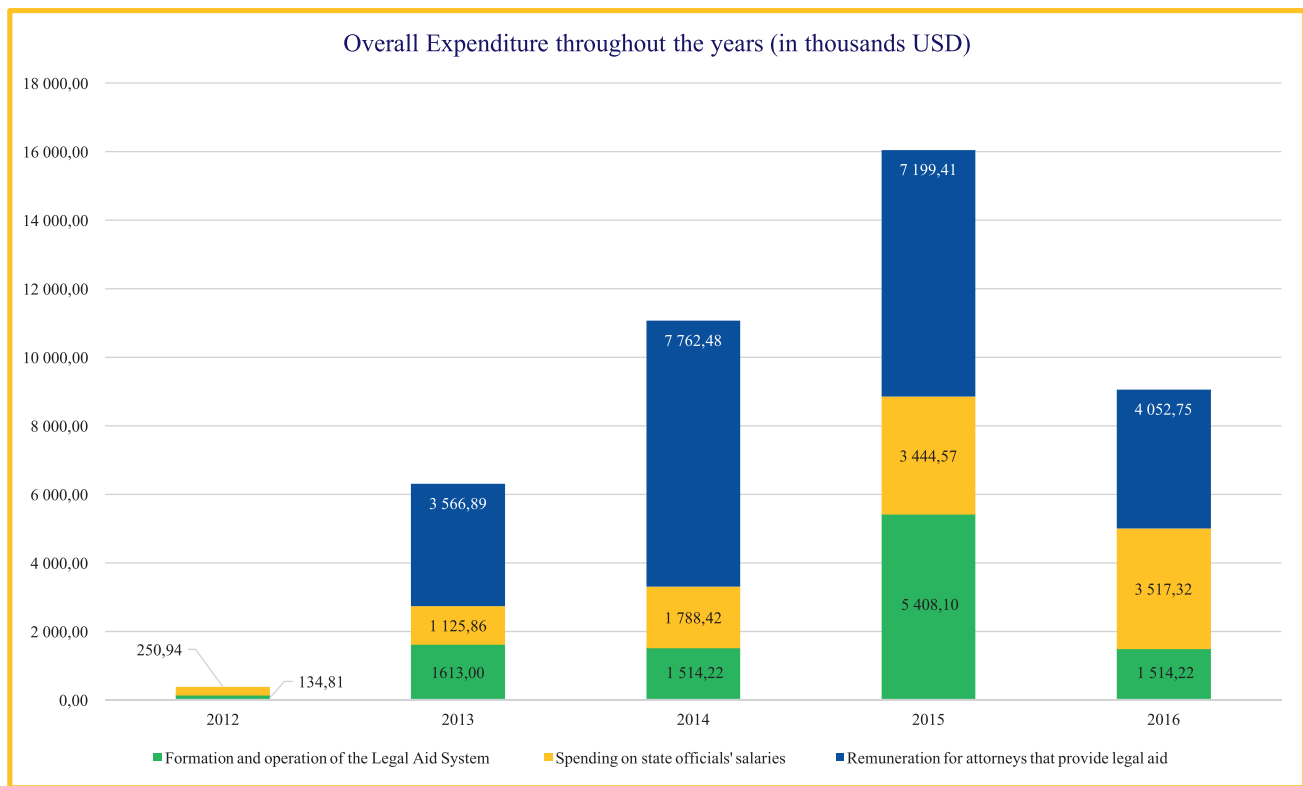


Exhibit 5. Spending on Staff Salaries for State Officials (in thousands USD)

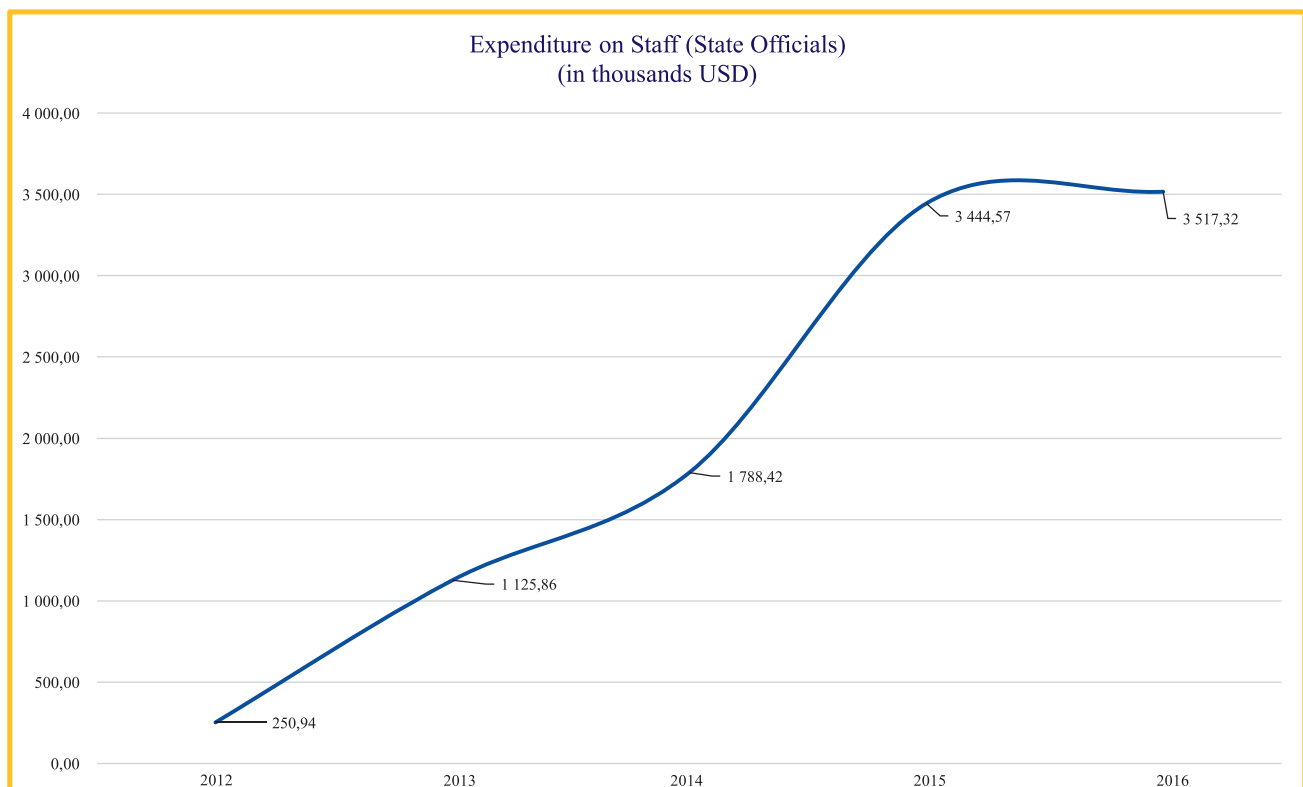




Exhibit 6. Spending on Remuneration for Attorneys that Provide Legal Aid (in thousands USD)

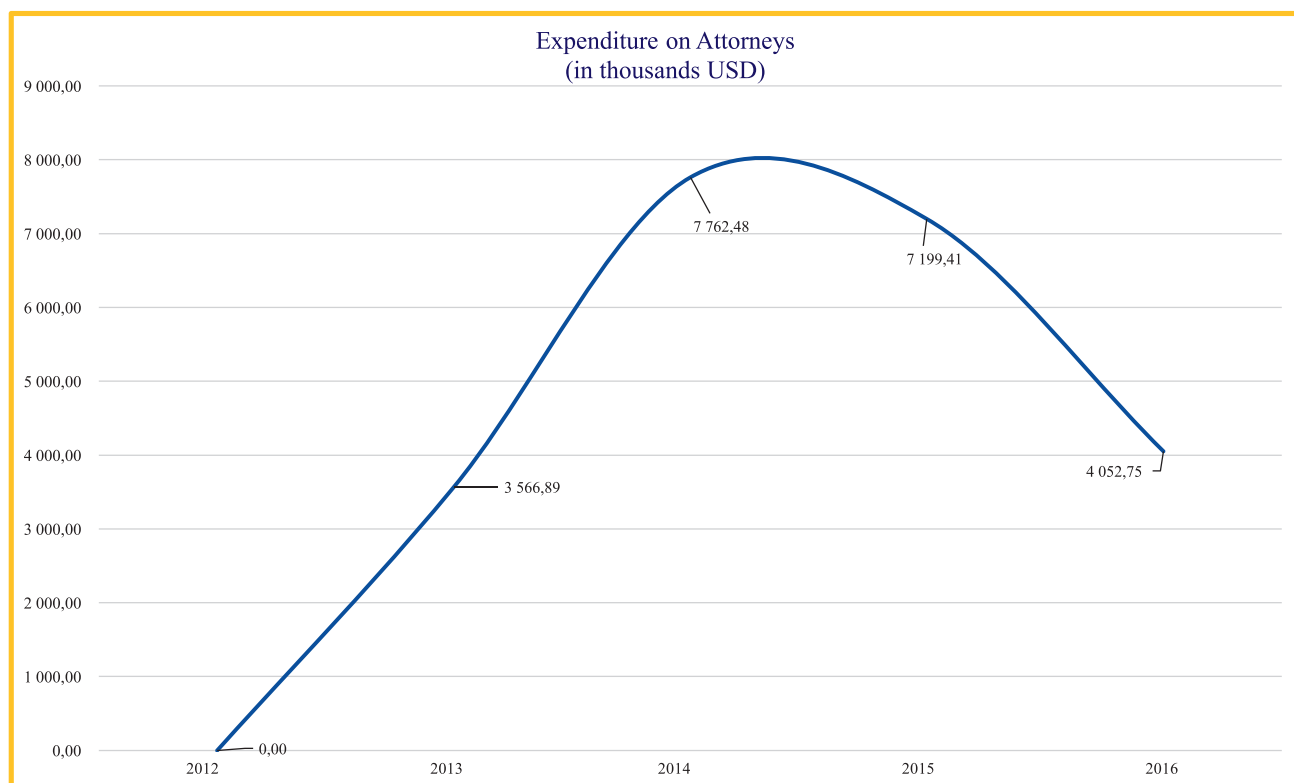
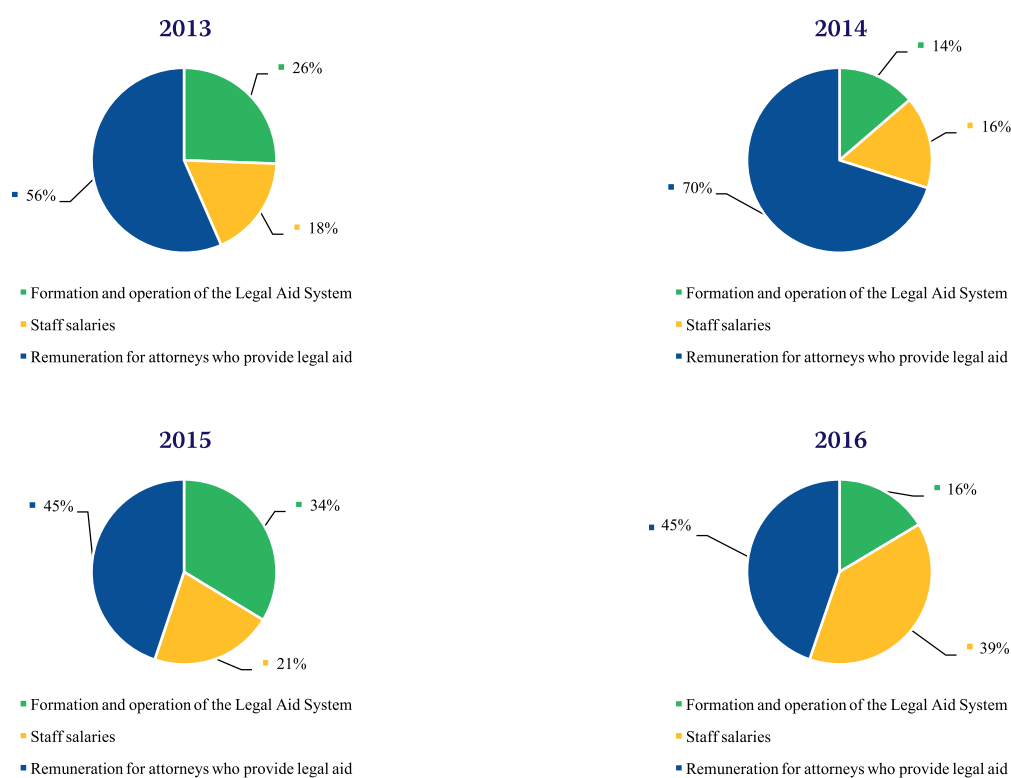


Exhibit 7. Global trends in Legal Aid system administration costs





2016