

SEE | EU Cluster of Excellence  
in European and International Law (Ed.)

**South Eastern Europe and  
the European Union –  
Legal Implications**

SEE | EU Cluster of Excellence  
in European and International Law (Ed.)

**SERIES OF PAPERS**

**Volume 2**

Verlag Alma Mater, Saarbrücken

rights. Finally, the experience of the developed countries and the guidelines provided by international organisations, such as UNCITRAL,<sup>59</sup> should be taken into account. This is especially so due to the fact that the usage and association of this "international" mechanism has produced remarkable results and enhancement of value worldwide, proven through the high percentage of participation of industrial property rights as the object of securities, in the total world trade and economy. It is also possible to absorb more stakeholders into the establishment procedure of local administrative regulations and to let all commercial institutions, and especially SMEs, participate in the consultation process to ensure the effectiveness, comprehensiveness, timeliness and pertinence of the policy.

<sup>59</sup> UNCITRAL, (fn. 43), pp. 35-124.

## Discouraging Unnecessary Litigation through the New Croatian Legal Aid System and Law Clinics

Barbara Preložnjak and Juraj Brozović\*

### Abstract

*Access to justice is a core fundamental right and a central concept in the broader field of justice. Exercising this right efficiently through the legal aid system is one of the most important tasks of modern societies. While access to justice typically means having a case heard in a court of law, it can more broadly be achieved or supported through primary legal aid. In the last few years the issue of gaining the right to primary legal aid has become widely discussed and criticized in Croatia. In this paper, we express the view that primary legal aid can encourage early resolution and discourage unnecessary litigation while at the same time enabling effective protection of citizens' civil rights.*

### A. Introduction

Unnecessary litigation is a serious threat to the legal system. It harms both the litigants and society in general. By engaging in such proceedings, litigants lose precious time and money. On the other hand, others are unable to exercise their right of access to justice within a reasonable time, as the courts become overburdened. In such form, unnecessary litigation<sup>1</sup> represents a direct negation of the concept of access to justice. It is thus no surprise that legislators put a

\* Barbara Preložnjak, PhD, Assistant Professor, Department for Legal Theory, Faculty of Law, University of Zagreb. Juraj Brozović, Research Assistant and PhD candidate, Department for Civil Procedure, Faculty of Law, University of Zagreb. This paper was supported in part by Croatian Science Foundation in Project No. 6988.

<sup>1</sup> There is no universal definition of unnecessary litigation. For the purposes of this paper, the term "unnecessary litigation" shall refer to any litigation, which could have been "prevented by the exercise of reasonable care" - *Berheimer et al.*, Rules for the Prevention of Unnecessary Litigation, American Bar Association Journal 3 (1917), p. 36 et seqq.). It should thus be understood in a much broader sense than the term "vexatious litigation".

lot of effort into removing its dreadful consequences, by reforming their civil justice legislation.<sup>2</sup> Although such reforms are to be welcomed, it seems that a mere change in legislation cannot effectively influence the habits of the people. It is not a surprise. If one does not have a detailed and precise insight into his or her legal rights and duties, as well as possibilities, how can one be expected to see any other solution apart from litigation? It is only natural that people seek the court's assistance in protecting their interests. The problem arises when people do not evaluate their situation correctly and try to protect interests, which are not in accordance with the legal order. The situation is similar when there is an alternative to going to court and people are unaware of it.

Those problems could be solved with the help of prior legal advice. When such advice is received early enough it is said to be a useful tool for overcoming socially undesirable behaviour.<sup>3</sup> Not only do people with access to advice reach socially desirable decisions, but they also reach the ones, which are most favourable to them.<sup>4</sup> If unnecessary litigation is viewed as socially undesirable behaviour, which is not favourable to anyone's interest, one could argue that expanding access to legal advice could be a way out of unnecessary judicial proceedings. Such encouragement would certainly be in accordance with the well-established case law of ECtHR, according to which legal advice constitutes a part of the right to a fair trial.<sup>5</sup>

So where could clients get the necessary legal advice? The cost of such advice seems like an insurmountable obstacle in cases where people do not have sufficient funds and where the legal aid system is

<sup>2</sup> For example, a lot of effort was put in recent years to promote alternative dispute resolution methods. For the review of recent reforms in that field within Europe, see European Commission for the Efficiency of Justice (CEPEJ), *European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice*, 2014, pp. 147-155.

<sup>3</sup> *Kaplow/Shavell*, *Legal Advice about Information to Present in Litigation: Its Effects and Social Desirability*, *Harvard Law Review* 102 (1989), p. 567 et seqq. There are, however, other authors who criticize their approach and methodology, see e.g. *Nesson/Kaplow/Shavell*, *On Legal Advice in Litigation*, *Harvard Law Review* 103 (1990), p. 2082 et seqq.

<sup>4</sup> *Ibid.*

<sup>5</sup> According to the ECtHR, entitlement to a fair trial "also comprehended a right to make an informed decision as to whether to sue or not." ECtHR, no. 4451/70, *Golder v. UK*, judgment of 21/2/1975.

not efficient.<sup>6</sup> The other possibility is to enhance support for the non-governmental organisations providing legal aid, as well as for law clinics. The former have become especially popular,<sup>7</sup> as they contribute to society while simultaneously improving the quality of legal education.

Can the law clinics lead the way for such an important social task? In order to answer that question one must first examine the role of the law clinics in the legal aid system and their capacity to contribute to the reduction of unnecessary litigation, on both a macro and micro level. In doing so, we will use the Croatian example.

## B. Advisory Framework for Implementation of Modern Primary Legal Aid Systems

The issue of ensuring efficient protection of human rights through the system of legal aid is one of the most important tasks of modern societies and it has been a powerful and key concept on the political agenda of the judicial systems in Europe.<sup>8</sup> The idea of the necessary and active role of societies in providing protection for equal human rights by enabling access to justice stems from the beginning of the 20th century and the first international conventions on human rights. Despite the initial positive aim of protecting important human rights, legal practices indicated that, in global and regional terms, approaches to providing equal access to justice differed. That necessarily led to the need to establish standards of criteria as a framework within which modern societies would build their systems of protecting equal access to justice. The European Convention of Human Rights (ECHR) undoubtedly influenced the creation of such a system, defining the minimum legal standards that a legal system has to meet in order to create an

<sup>6</sup> The efficiency of legal aid systems was analysed by CEPEJ, (fn. 2), pp. 69-88, but also by some private initiatives, see *Barendrecht et al.*, *Legal Aid in Europe: Nine Different Ways to Guarantee Access to Justice?*, *HiiL Innovating Justice*, 2014.

<sup>7</sup> For the brief overview of the development of clinical legal education, see *Romano*, *The history of legal clinics in the US, Europe and around the world*, in: Bartoli (ed.), *Legal clinics in Europe: for a commitment of higher education in social justice*, 2016, p. 27 et seqq.

<sup>8</sup> *Hess*, *EU Trends in Access to Justice*, in: *Van Rhee/Uzelac*, *Civil Justice between Efficiency and Quality: From Ius Commune to CEPEJ*, 2008, p. 189 et seqq.

adequate legal basis for the creation of a modern and efficient system of legal aid. With the help of the European Court of Human Rights (ECtHR), the ECHR was used to develop the legal doctrine of enabling access to justice through the system of legal aid, which was presented within the right to a fair trial.<sup>9</sup> This is most evident in the ECtHR case *Airey v. Ireland*, which implied the obligation of the state to provide legal aid in order to access justice not only in criminal cases but also in civil.<sup>10</sup> The *Airey* case gave the countries clear guidelines for interpreting the mandatory provision of legal aid in circumstances such as: the importance of the matter for the individual, the complexity of the matter, the ability of the individual to represent themselves legally and to cover the expenses of the procedure on their own.<sup>11</sup> Therefore, effective legal aid systems are part of the core areas of the right of access to justice. With the ECtHR guidelines that keep reminding the countries of the importance of normative and practical establishment of the efficient protection of citizens' rights to access to justice, the countries are obligated to recognize the needs of their citizens and enable all citizens to exercise their equal rights to protection of subjective rights to the greatest extent possible.

<sup>9</sup> See Article 6(1) Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocols No. 11 and No. 14 (opened for signature 4/11/1950, entered into force 3/9/1953).

<sup>10</sup> *Uzelac/van Rhee*, Introduction, in: Van Rhee/Uzelac (eds.), *Access to Justice and the Judiciary: Towards New European Standards of Affordability, Quality and Efficiency of Civil Adjudication*, 2009, p. 2.

<sup>11</sup> Apart from the previously mentioned ruling of the ECtHR, the following court rulings are applied as a special source of law regarding the right to legal aid: ECtHR, no. 6694/74, *Artico v. Italy*, judgment of 13/5/1980 (member states are generally obligated to ensure the right to equality before the law); ECtHR, no. 8398/78, *Pakelli v. FRG*, judgment of 25/4/1983 (the petitioner seeking legal aid has the right to use the lack of material means without having to prove it beyond reasonable doubt); ECtHR, no. 8966/80, *Goddi v. Italy*, judgment of 9/4/1983 (the right to legal aid is violated if the official solicitor is not granted sufficient time to prepare); ECtHR, no. 12744/87, *Quaranta v. Switzerland*, judgment of 23/4/1991; ECtHR, no. 19380/92, *Benham v. U.K.*, judgment of 10/6/1996; ECtHR, no. 25280/94, *Perks et al. v. UK*, judgment of 12/10/1999 (the existence of the interest of justice); ECtHR, no. 11932/86, *Granger v. UK*, judgment of 28/3/1990; ECtHR, no. 18711/91, *Boner v. UK*, judgment of 28/10/1994 (member states are obligated to ensure legal aid in all stages of the procedure); and ECtHR, no. 13611/88, *Croissant v. Germany*, judgment of 25/9/1992 (if the state asks for reimbursement of authorized funds spent on the official solicitor, the right to legal aid is not violated).

Therefore, it is of utmost importance for each country to establish an efficient system of primary legal aid, which will enable an equal and free right to legal information and advice to the greatest extent possible by focusing on the actual needs of the citizens.<sup>12</sup> Specifically, this means that the countries constantly monitor the needs of their citizens, which includes regular empirical research to identify changes in the citizens' needs and to adjust the system of primary legal aid accordingly, especially considering the circle of subjects aid is given to, the scope of legal advice, the type of legal aid services available and the appropriate funding of primary legal aid services.<sup>13</sup> Following previously mentioned guidelines for establishing the modern primary legal aid system, legal aid schemes are supposed to be generous in defining their target population with the aim being to provide practical and effective access to legal information and advice by eliminating economic obstacles, especially for those in an economically weak position.<sup>14</sup> Providing practical and effective access to primary legal aid means taking into account an individual's capacity to understand their legal problem and also their capacity to undertake legal measures for efficient protection of rights in various legal problems by accessing not only the court but to other legal services as well.<sup>15</sup>

### C. Croatia on the Path to a Modern Legal Aid System – A Background Picture of Croatian Primary Legal Aid

Modern legal aid should be liberal when it comes to the provision of brief legal advice and it should cover all types of legal problems in society.<sup>16</sup> International research show that legal literacy is limited and that ordinary and poor people face huge amounts of simple legal

<sup>12</sup> *Johnsen/Stawa/Uzelac*, *Evaluation of the Croatian Legal Aid Act and its Implementation (International Expertise)*, 2010, p. 11.

<sup>13</sup> *Ibid.*, p. 10; *Flood/Whyte*, *What's Wrong With Legal Aid? Lessons From Outside the UK*, *Civil Justice Quarterly* 25 (2006), p. 85.

<sup>14</sup> *Johnsen/Stawa/Uzelac*, (fn. 12), p. 29; *Manning*, *Development of a Civil Legal Aid System*, in: *Sachs/Rekosh* (eds.), *Issues for Consideration, Making Legal Aid a Reality A Resource Book for Policy Makers and Civil Society*, 2009, p. 65.

<sup>15</sup> *Johnsen/Stawa/Uzelac*, (fn. 12), p. 7 et seq.

<sup>16</sup> *Johnsen/Regan*, *How to Use an International "Best Policy" Model in the Analysis and Improvement of Finnish Legal Aid*, in: *Van Rhee/Uzelac*, (fn. 8), p. 155.

problems that they are unable to handle effectively by themselves but that can be solved quickly by a competent adviser.<sup>17</sup> Such legal aid services should be informal, efficient and accessible.<sup>18</sup> They should include services such as: legal advice and information in face-to-face interviews or over the telephone; minor assistance including explanation of documents, drafting simple wills or other simple legal documents; public education and training about legal rights and obligations; publications about relevant, recurring and simple legal issues, etc.<sup>19</sup> In addition, the court is not the best solution for most problems that people are nowadays facing. Some of the problems could be better handled through negotiations or alternative dispute resolution (ADR).<sup>20</sup> Administrative procedures might be a better alternative for others.<sup>21</sup> Further, primary legal aid should be open for all serious problems outside the courts with criteria similar to those outlined in *Airey*.<sup>22</sup>

Croatia also subscribed to the obligation of guaranteeing equality to all citizens in terms of access to justice, by becoming a signatory of the ECHR. Despite the fact that Croatia intends to follow contemporary societies in terms of the implementation of political and legal ideals of realisation of access by judicial and other state authorities, which decide on matters of implementation and protection of citizens' substantive rights, it was falling behind.<sup>23</sup> The reasons behind this were political and legal barriers, which prevent primary legal aid from being established to offer the opportunity for all citizens to have an equal right to obtain access to justice. In the attempt to establish an efficient legal aid system, the existing one has become a matter of frequent discussions and critique by representatives of the legislative branch, the civil sector and academia.<sup>24</sup> Before 2013, the Croatian legislator did not recognise the importance of an efficient legal advice

<sup>17</sup> *Johnsen/Stawa/Uzelac*, (fn. 12), p. 22.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Johnsen/Regan*, (fn. 16), p. 155.

<sup>20</sup> *Johnsen/Stawa/Uzelac*, (fn. 12), p. 23.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*; *Manning*, (fn. 14), p. 62 et seq.

<sup>23</sup> *Aras/Preložnjak*, *Intentional Killing of Efficiency by Overzealousness in the Pursuit for Truth, The Example of Croatian Legal Aid System*, *Stvarni pravni život* 3 (2012), p. 293.

<sup>24</sup> *Ibid.*, p. 294.

system for everyday legal problems. The need for a citizen to comply with the legally prescribed preconditions in order to realise the right to legal aid and the bureaucratic nature of the procedure dealing with such compliance have often deprived the applicant of timely legal protection which was in direct collision with the very purpose of legal aid.<sup>25</sup> The granting of primary legal aid also depended on the type of legal problem.<sup>26</sup> So, for example, beneficiaries could obtain primary legal aid only regarding status matters; rights from pension and invalidity insurance, rights from the social welfare system and employment rights.<sup>27</sup> This represented a serious limitation on the efficient implementation of citizens' right of access to justice since it results in a great number of citizens not complying with the formal conditions.<sup>28</sup> The legal problem criteria was too narrowly shaped to secure everyone proper access to legal advice outside of the court so the scheme needed to be changed.

The new Croatian Legal Aid Act relaxed the merit criteria for primary legal aid, the application of which no longer depends on the type of legal problems but rather covers all types of legal problems.<sup>29</sup> Primary legal aid is comprised of general legal information, legal advice, the preparation of submissions to government agencies, ECtHR, international organisations, representation in proceedings before government agencies and legal assistance in the peaceful resolution of the dispute out of court.<sup>30</sup> This represents a big step toward the modern legal aid system for the Croatian legal aid system. The participants emphasise that primary legal aid, and in particular legal information and advice before and outside of formal court, administrative and other legal proceedings, has a special importance

<sup>25</sup> *Johnsen/Stawa/Uzelac*, (fn. 12), p. 48; *Aras/Preložnjak*, (fn. 23), p. 294.

<sup>26</sup> Article 5(2)(a)-(c) and (e) Legal Aid Act, Official Gazette of the Republic of Croatia No. 62/08, 44/11, 81/11 of 30/5/2008 (hereinafter: CLAA'08).

<sup>27</sup> *Ibid.*

<sup>28</sup> *Aras/Preložnjak*, (fn. 23), p. 294.

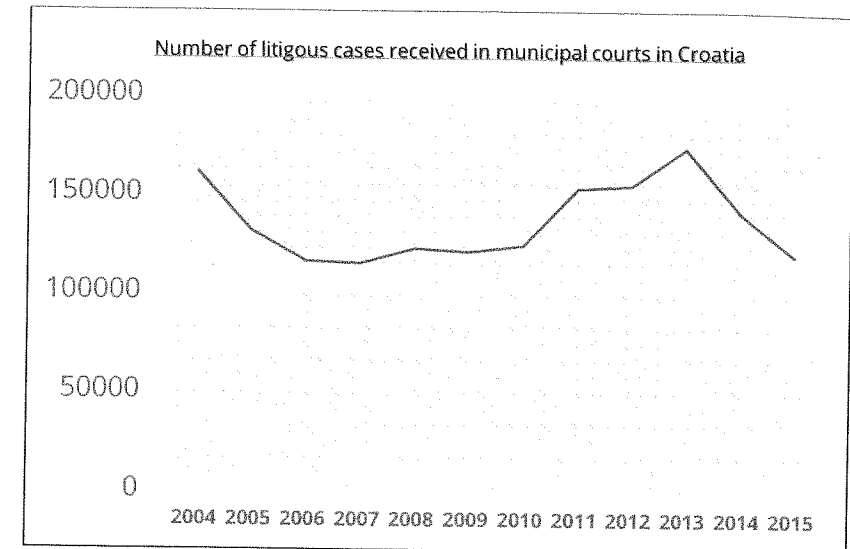
<sup>29</sup> Article 10 Legal Aid Act, Official Gazette of the Republic of Croatia No. 143/13 of 2/12/2013 (hereinafter: CLAA'13).

<sup>30</sup> Article 9 CLAA'13.

for an effective legal system that equally protects the rights of all citizens.<sup>31</sup>

#### D. Current State of Litigation in Croatia and Possible Outcomes of Increasing Funds for Primary Legal Aid

As is the case with many South-East European countries, Croatia is characterised by a large number of cases.<sup>32</sup> The reasons for this can be traced to the socialist legal tradition, which still hugely influences Croatian law and judicial system,<sup>33</sup> but also to the general lack of political willingness to analyse a problem deeply and to solve it.<sup>34</sup> Bearing in mind that Croatia only has approximately 4.2 million inhabitants, the statistics clearly show that the judicial system is overburdened.<sup>35</sup> Table 1 shows the number of litigious cases in municipal courts in Croatia over the years:



It seems that the great economic crisis of 2008 strongly affected the number of cases received by Croatian courts. It was not until 2015 that the number of cases fell below the previous number (app. 120.000 per year). Although it can hardly be argued that the decrease can be attributed to the increase in financing of the legal aid system, it can certainly be an important factor in the future.

If the system of primary legal aid functions properly, it can influence the habits of the citizen with respect to the initiation of civil proceedings. For example Zagreb Law Clinic now solves more than 2.500 cases per year,<sup>36</sup> which means that 2.500 citizen get the necessary information which they can use to choose whether to engage the court system or not. Moreover, those who decide to do it are also informed about the alternatives to the court proceedings, which could increase the popularity of mediation and other ADR methods. If organised carefully, the law clinics themselves could engage in mediation proceedings as mediators, as has already been done in some clinics.<sup>37</sup> This would

<sup>31</sup> Conclusions of the Round-table "Reform of legal aid system – the future of legal advice?" organised by the Zagreb Law Clinic in co-operation with the UK Embassy, the Ombudsman Office and Centre for Human Rights on 14/11/2011 (unpublished), p. 2; *Uzelac/Preložnjak*, The Development of Legal Aid Systems in the Western Balkans, A Study of Controversial Reforms in Croatia and Serbia, *Kritisk Juss* 20 (2012), p. 271.

<sup>32</sup> For the Croatian perspective, see *Uzelac*, Delays and Backlogs in Civil Procedure, A (South) East European Perspective, *Revista de Processo (RePro, Sao Paulo)* 238 (2014), pp. 42-47.

<sup>33</sup> *Uzelac*, Survival of the Third Legal Tradition?, *Supreme Court Law Review* 49 (2010), p. 377 et seqq.

<sup>34</sup> *Uzelac*, Croatia: Omnipotent Judges as the Cause of Procedural Inefficiency and Impotence, in; *Van Rhee/Yulin*, Civil Litigation in China and Europe, 2014, p. 198 et seq.

<sup>35</sup> In 2012, Croatia had total of 1.097.909 civil cases ("other than criminal cases"), which is only two times less than the situation in France and three times less than the situation in Germany. CEPEJ, (fn. 2), p. 195. In comparison, according to the individual country reports ([www.coe.int/t/dghl/cooperation/cepej/profiles](http://www.coe.int/t/dghl/cooperation/cepej/profiles) (1/12/2016)), Croatia has 4.262.140 inhabitants, France 65.585.857 inhabitants and Germany 80.233.100 inhabitants. When one adds the number of judges into the picture, the situation becomes even more clear because Croatia has four times more judges than France and two times more judges than Germany. CEPEJ, (fn. 2), p. 155.

<sup>36</sup> Full statistics are available on the official web site of Zagreb Law Clinic, <http://klinika.pravo.unizg.hr/broj-i-vrsta-predmeta> (1/12/2016).

<sup>37</sup> See e.g. the Mediation Clinic of Columbia Law School, <http://web.law.columbia.edu/clinics/mediation-clinic> (1/12/2016).

allow the law clinics to go beyond a purely educational context and to impact the society as a whole.<sup>38</sup>

Unfortunately, so far Croatian governments have not recognised the full potential of the law clinics and NGOs. The clear majority of funds available to the free legal aid providers have been distributed to the providers of secondary legal aid, i.e. lawyers. Before CLAA'13, funds available to the primary legal aid providers were up to ten times smaller than the funds available to the secondary legal aid providers. Although the situation has changed in favour of primary legal aid, since in 2014 and 2015 the available funds were even greater than the funds for secondary legal aid, in 2016 the Croatian legal aid system returned to the situation that existed before CLAA'13.<sup>39</sup> It can be expected that such lack of financing will affect the habits of people and enhance the problem of overburdened courts in Croatia even further.

## E. How can law clinics discourage unnecessary litigation?

### I. Client-centred approach

Respecting the autonomy of the client is the cornerstone of the modern attorney-client relationship.<sup>40</sup> Although a client-centred approach can represent the ethical ideal for the lawyers as well, such an approach is not generally accepted in the legal community.<sup>41</sup>

<sup>38</sup> Some argue that the social significance of law clinics should prevail over its educational purposes. *Nicholson*, Legal Education Or Community Service? The Extra-Curricular Student Law Clinic, Web Journal of Current Legal Issues, No. 3, 2006, p. 17, noted: "[...] if every law school had a properly funded clinic, the problem of unmet legal need would virtually disappear."

<sup>39</sup> Only 25 % of the funds is available to the primary legal aid providers. Detailed statistics are available on the official website of Croatian Ministry of Justice, <https://pravosudje.gov.hr/pristup-informacijama-6341/strategije-planovi-i-izvjesca/izvjesce-o-ostvarivanju-prava-na-besplatnu-pravnu-pomoc-i-utrosku-sredstava/6723> (1/12/2016).

<sup>40</sup> *Mendez*, Deflating Autonomy, American Inns of Court, 2014, p. 1 et seqq.

<sup>41</sup> *Lawton*, Who Is My Client? Client-Centered Lawyering with Multiple Clients, *Clinical Law Review* 22 (2015), pp. 147-155. On the contrary, it was widely criticised when it was introduced back in 1970's, see *Burtch*, The Lawyer As Counselor, *Virginia Lawyer* 58 (2010), p. 28.

While it might work in real *pro bono* cases, it could hardly function in systems such as that in Croatia, where lawyers engaged in free legal aid get a reduced fee for their services.<sup>42</sup> This means that the lawyer will charge for his or her services, regardless of the success of his or her client. Therefore, lawyers cannot be expected to be neutral advisors informing the client about all the legal possibilities, even when the best one excludes their further engagement. This is the reason why only law clinics and NGOs can achieve the objective of decreasing unnecessary litigation.

Law clinics can achieve such goals by putting the client in the centre.<sup>43</sup> This means that the client is informed in detail how the law regulates his or her position and how he or she can use the law to achieve his or her goals. If the client cannot do this, the reasons are also thoroughly explained.<sup>44</sup> The advisors should always be careful to avoid bias<sup>45</sup> and remain neutral.<sup>46</sup> Of course, the communication methods used by the clinics will play a major role in terms of enabling the client to make his or her own decision.<sup>47</sup> In other words, it is not only important to solve the case, but also to actually communicate the

<sup>42</sup> According to the Regulation on the fees for secondary legal aid in 2015 (Official Gazette of the Republic of Croatia No. 20/15 of 23/2/2015), the lawyers are granted 50 % of the lawyer fees they would charge if the case was not financed within legal aid system. Although the new Regulation was not enacted, it was announced that the fees would not change in 2016.

<sup>43</sup> The best way for law clinics to truly contribute to the ideal of access to justice is to put clinical advice in the centre, as opposed to their educational goals, see *Aiken/Wizner*, Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice, *Fordham Law Review* 73 (2004), p. 1006.

<sup>44</sup> *Kerrigan/Murray*, A Student Guide to Clinical Legal Education and Pro Bono, 2011, p. 115.

<sup>45</sup> *Webb et al.*, *Lawyer's skills*, 18th ed. 2011, p. 142. One of the biggest challenges for the students is "the passionate conviction about the client's experience and their own sense of injustice about it." See *Curran*, University Law Clinics and their value in undertaking client-centred law reform to provide a voice for clients' experiences, *Journal of Clinical Legal Education* 12 (2007), p. 116.

<sup>46</sup> Such an ethical concept can be described as "neutral partisanship", see *Kerrigan/Murray*, (fn. 44), p. 64. The focus on client autonomy however should not be at expense of other people, see *Cohran*, Which Client-Centered Counselors?: A Reply to Professor Freedman, *Hofstra Law Review* 40 (2012), p. 366.

<sup>47</sup> *Lawton*, (fn. 41), p. 149.

advice to the client. Regardless whether the advice is given in written or oral form, it should always be adjusted to the needs of the client.<sup>48</sup>

## II. Challenges in clinical advice

Giving full information to the clients can seem a bit challenging. Informing the clients about too many technical issues can be counterproductive because clients can hardly be expected to understand complex legal procedures. This can, of course, be solved by greater quality of advice, as well as better advising and communication methods,<sup>49</sup> but the clients will always remain lay people whose only concern is to solve the issue before them.<sup>50</sup>

Moreover, can the information really be considered comprehensive if the advisor cannot give an honest opinion and estimation of the expected results of certain action? Although the client is definitely the one who should decide in the end, that does not mean the advisor cannot opt for one of the alternatives, by explaining that it one option has a higher likelihood of success. However, while doing so, the advisor should explain in detail why they think the other options are not likely to be successful, leaving the client to decide if they find those reasons convincing and convenient for his or her situation.<sup>51</sup>

Even when the party is about to render a completely unreasonable decision, it is questionable if the advisor should intervene and advise the client not to do it. It is actually the question of who the advisor should serve – the client or the legal order. It is in the public interest to stop the potentially vexatious litigant from initiating the proceedings, but the advisor cannot make a decision for the client. The advisor should stay within the limits and inform the client about all the negative inferences of any of his or her decisions.<sup>52</sup>

<sup>48</sup> *Kerrigan/Murray*, (fn. 44), p. 116.

<sup>49</sup> According to *Higgins/Tatham*, *Successful Legal Writing*, 1st ed. 2006, p. 1, the ability to communicate is “the most important skill which marks out a good lawyer”.

<sup>50</sup> *Kruse*, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, *Clinical Law Review* 12 (2006), p. 374 cited in *Lawton*, (fn. 41), p. 149.

<sup>51</sup> *Kerrigan/Murray*, (fn. 44), p. 115 et seq.

<sup>52</sup> Of course, this does not apply to situations where such behaviour might harm others, especially vulnerable citizens such as children, see *ibid.*, pp. 64-65 and 116.

Finally, the advisor has a big responsibility towards the client. It is sometimes his or her own feeling of justice<sup>53</sup> that stops the client from making a rational decision. This is especially true in civil law systems where legislators are the ones deciding what is appropriate and just, while judges have rather modest, almost passive and purely instrumental roles.<sup>54</sup> It is, therefore, the advisor's duty to not only inform the client about the law, but to also explain the reasons behind those rules.<sup>55</sup> Only such information can be considered full and be in the best interest of the client.

## F. Conclusion

Overburdened courts can hardly meet the expectations of citizens to have their cases heard and solved within a reasonable time. It is thus of the utmost importance for the modern legislators to deal with this issue. Law clinics have shown that they can be a useful tool to achieve this purpose. With relatively small funds, law clinics can advise many clients and inform them about their legal rights and duties, while improving legal education at the same time. Unlike common legal professionals, such as lawyers, they can truly act as neutral third-party counsellors and help citizens to make the wisest decision in solving their legal issues; their own decision that will take into account all the advantages and disadvantages of different solutions. Increasing the funds of the law clinics can only increase this potential.

The Croatian legal aid system has started off with quite a number of problems. The lack of sufficient financing of the providers, combined with small number of legal problems, which could have been covered within the legal aid scheme did not allow for the proper functioning of the system. It was not until 2013 that Croatia enacted the new Legal Aid Act, which, to a great extent, reflects the guidelines of the ECtHR as stated in the *Airey Case*. However, a legal aid system cannot itself

<sup>53</sup> Although such interconnection definitely deserves careful study, the role of emotions has been completely ignored in research studies, see *De Cremer/Van den Bos*, *Justice and Feelings: Toward a New Era in Justice Research*, *Social Justice Research* 20 (2007), p. 2.

<sup>54</sup> *Merryman*, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, 2 ed. 1984, pp. 52-55.

<sup>55</sup> *Kerrigan/Murray*, (fn. 44), p. 115.



achieve the goal of increasing access to justice. It is the better functioning of the whole judicial system that is needed to truly make a change. The problem of overburdened courts can be solved only by a combination of organisational, technical and economic reforms, in accordance with best comparative practices.

As for the Croatian legal aid system, discouraging unnecessary litigation could indeed represent its new focus. It seemed that the trend in recent years was moving in this direction, however recent budgetary restrictions do not give cause for belief that many citizens will indeed have the opportunity for their case to be assessed by a neutral counsellor. This will probably affect the number of incoming litigious cases and thus prevent those who really need the court's assistance to get such assistance within a reasonable time frame.

## Shareholders Right to Vote on Directors' Remuneration Policy – Proposed EU Law v. Current Serbian Law

Vuk Radović\*

### Abstract

*A company's general meeting of shareholders should maintain indirect control over directors' remuneration. Among the many modalities of exercising such control, the impact it has on the directors' remuneration policy in a company is particularly significant. This paper provides an analysis of solutions laid down in the Proposal for the amendment of the Shareholders Rights Directive that deal with the shareholders' right to vote on the remuneration policy, and of relevant provisions of Serbian law regulating this field.*

### A. Regulation concerning Directors' Remuneration in EU and Serbian Law

In acknowledgement of the fact that the remuneration of members of the board of directors is one of the most controversial and problematic areas of corporate governance, the European Commission adopted three recommendations concerning remuneration since 2004, two of which were related to the general regime for the remuneration of board members, while the third focused solely on the financial sector.<sup>1</sup> Existing remuneration regulations were concluded with the adoption of a special directive introducing specific rules concerning the remuneration policy in financial institutions, designed to discourage

---

\* Vuk Radović, PhD, Mag. Iur., LL.M. (University of Pittsburgh), Associate Professor, Faculty of Law, University of Belgrade.

<sup>1</sup> Commission Recommendation of 14/12/2004 fostering an appropriate regime for the remuneration of directors of listed companies (2004/913/EC), OJ L 385 of 29/12/2004, p. 55; Commission Recommendation of 30/4/2009 complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies (2009/385/EC), OJ L 120 of 15/5/2009, p. 28; Commission Recommendation of 30/4/2009 on remuneration policies in the financial services sector (2009/384/EC), OJ L 120 of 15/5/2009, p. 22.