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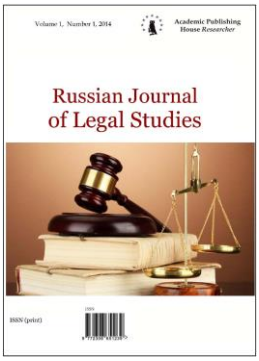

Free Legal Aid System and Its Changes *vis a vis* Law School Legal Clinics – A Missed Opportunity for Much Needed Synergy?

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Abstract

The steady growth of the body of legal provisions and law's significance in our modern, highly juridified and often over-regulated societies, renders the issues of free legal aid and legal awareness vital and always up-to-date. These issues then capture the attention of political factors and result in legislative action. An example of a regulation of free legal aid is the polish act on free legal aid, free civic counselling and legal education. The system of free legal aid created by this act is currently in its sixth year of operation, this itself a success worthy of appraisal. However, the system is burdened with certain flaws as to its operation and the status of persons active within it. The gravest inadequacy of the system, however, is that it failed to, even partly, include within it the pre-existing system of existing law school clinics in Poland, which have for years succeeded in coupling legal education (both of the participating students as well as of the public) with free legal aid offered to those who cannot bear the costs of professional legal services. This missed opportunity for synergistic operation of both systems has no good justification. The text employs the following legal research methods to critically analyse the shape of the free legal aid regulation currently in force in Poland, as well as how the regulation completely omitted the existing system of clinical legal education programs at Polish law schools: formal-dogmatic method, comparative method, historical method, sociological methods.

Keywords: legal aid, clinical legal education, lawyers, legal profession, law reform.

1. Introduction

The issue of access to legal services has for many years occupied a prominent place in legal and political discourse. It is raised both by reformers interested in improving the access to legal services and already existing institutions, and populists desiring to score easy popularity gains alike.

The costs of professional legal services are an ever-present barrier, difficult to overcome for a significant part of the society. At the same time, it is increasingly hard to navigate ones legal affairs without a lawyer's (or even lawyers') assistance. The reasons for this state of affairs are multifold: the dense network of regulations, the power of regulations covering more and more areas of life, the decodification of law and the sectoral nature of detailed, excessively detailed regulations with the decreasing quality of legislation make it extremely difficult for a layman to operate in this system independently. The growing number of lawyers only partially mitigates this effect, although it should, as a supply factor, increase access to professional legal advice.

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The social, and therefore political, consequences of excluding entire groups from access to professional legal assistance are negative. Political authorities and the legal community, acting either synergistically or independently of each other, are making efforts to facilitate access to professional legal assistance. The aim here is in particular to overcome the financial barrier.

Indirect impact of legal and civic counselling is also not to be underestimated. Legal awareness (public legal education) can be considered a very peculiar activity that benefits not only its main intended beneficiaries, but also those that provide such education (in that they may better study and better understand the issues they are to explain). Another indirect impact of legal and civic counselling is to sensitize the practitioners to human rights violations (Chavkin, 2002: 2). It should be noted that within the dynamic, modern interpretation of the concept of "social security" free legal advice is sometimes understood as its element, a fragment of state social policy (Lach, 2016: 32).

2. Material and methods

The body of European literature concerning legal aid is growing, yet not vast – most of it, in Poland's case, concerns legal clinics ran by law schools. The notion free legal aid is often analyzed in the context of European law and civil rights' guarantees proffered by it (both EU law and international European law i.e. the ECHR). American scholars often analyze the very minutiae of legal clinics' work and practice. The Polish legislation on free legal aid financed by the state, though it is in force since 2016, has not yet been broadly analyzed by academics and practitioners of law alike.

Among the sources examined by the author, the chief role is played by the relevant provisions of the law – European conventions and treaties, Polish statutes regulating the free legal aid, Polish procedural acts and regulations concerning the position of attorneys in Polish court practice. Also analyzed is the body of scholarship work – modern legal literature concerning free legal aid. Research conducted has also touched upon statistical data concerning the

Formal dogmatic method will be employed to analyze the relevant law – statutory material and treaties. Fruitful to that extent will be the use of the comparative legal analysis, with its potential to seek and find the peculiarities of a decisive magnitude, defining specifically the researched processes. Historical analysis will be utilized analyze the relevant historical legal sources against the historical context and contemporary academic and practical legal responses thereto, as well as to depict a broader historical course of processes that led to the developments researched in the text.

3. Discussion

3.1. Free legal aid. University clinics

Legal aid as a notion, broadly speaking, encompasses all forms of assistance to certain categories of persons in the form of State funded legal advice and/or representation (CEPEJ, 2020: 34). The CJEU has remarked that the notion of "legal aid" encompasses both the assistance by a lawyer and dispensation from advance payment of the costs of proceedings (Case C-279/09).

In Poland it is assumed that legal aid in general terms (not limited to its university face i.e. legal clinics) is a form of social activity, most often remaining within the institutional framework characteristic of the third sector – non-governmental organizations (NGOs) (Dudkiewicz, Schimanek, 2013: 25). In practice, it is the provision of free information and legal advice aimed at solving a specific problem (a specific case), for the benefit of an individual (or, more rarely, for the benefit of NGOs, especially non-profit organizations) and is provided by lawyers or persons without formal education, but equipped with relevant competences. In the case of law school clinics these are university students of law, working under the supervision of experienced lawyer-academics. Civic advisors (introduced by the amendment to the FLAA) are an important addition to this sentence in the current Polish legal order.

Article 47(3) of the Charter of Fundamental Rights of the European Union states that Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice. It is worth noting that this provision repeats the wording of the 1973 *Airey* judgment of the European Court of Human Rights (Airey v. Ireland). However, Member States may place conditions on the granting of legal aid, provided they are compliant with Article 52(1) of the Charter of Fundamental Rights (Kellerbauer et al., 2019: 2226).

And the several Member States, just as other countries all over the globe, do just so. Just as is the case with numerous – arguably all – forms of welfare, serious challenges for legal aid efforts result from the very phenomenon of scarcity (. Ever-insufficient resources demand that hard choices be made as to how to help and whom to help; this, coupled with cuts to funding, requires an approach both flexible and goal-oriented: it usually demands that clear priorities are set, more and more often just to address the most urgent issues.

For many years, an important element of the free legal aid system in Poland were students' legal clinics, affiliated with law faculties of various Polish universities. Certainly, such legal clinics were not – nor is it the ambition of this text to prove the contrary – a way to provide legal services to the poorest on a mass scale. However, law school clinics were present in the system, they served numerous clients, they were effective, and some of their specific features, such as: independence from the pressures of operational economic calculation, detachment from political factors (both local and central), reliance on the university apparatus, i.e. both the work of student volunteers and tutors-academic lawyers, ensuring a high level of substantive and ethical operation of the clinics, can be considered large and difficult to replace advantages.

However, these clinics, along with other elements of the scattered, grassroots legal advice system, were not effective or efficient enough to be deserving of political factors' satisfaction. Therefore, the Journal of Laws of the Republic of Poland of 2016, item as amended, hereinafter referred to as: FLAA – the Free Legal Aid Act. This law was subsequently substantially amended in 2019. It introduced several new institutions and developed some solutions. Several new institutions were introduced, some solutions were developed. However, no reference was made to a certain omission (intentional or not), which undoubtedly constitutes a defect of the Act in its original wording. It concerns the lack of inclusion of law school clinics in the system created by the Act. This is particularly so in the context of the fact that the dispensaries could have been used.

The remainder of the text will discuss the 2015 FLAA and its amendments. Before that, the text will briefly recapitulate the nature of law school clinics and a certain barrier to their development. Against this backdrop, the shortcomings of the FLAA will be pointed out, especially what could have been done to make more effective use of the existing infrastructure and human resources – both in law school clinics' disposition – and harness it to work towards a guidance system that would better facilitate the common good.

3.2. University legal clinics in Poland

In Poland, legal education has a traditionally academic character. While it is obvious that the role of the university is not to provide exclusively professional education in a strict, sense, i.e. purely practical, vocative-like legal education, but to confer a body theoretical knowledge, the idea that certain elements of practical professional education should be reflected in the law schools' curricula is uncontroversial. Such a claim has been increasingly reflected in syllabi in recent years: in particular, it is strongly visible in the context of an increasing number of workshop classes.

It seems that the emergence and spread of student (university) legal clinics is a manifestation of efforts to achieve such a compromise. The so-called clinical program, carried out within the framework of student legal clinics, is usually an optional subject in the course of study. It supplements the model of education with highly practical classes. Their practicality is practically complete. The model of operation of student legal clinics does not differ much from the work of a lawyer on the market of services provided by attorneys. The biggest difference is the nature of operation not determined by economic realities. What can be emphasized here is the lack of payment as a scheme of relations with the client and the lack of necessity for the lawyer to cover the costs of operation and his own existence – this as a specific scheme of relations with oneself (no pressure, no economic background for the selection of cases and setting priorities). The only apparent difference is the fact of working under the supervision of another, more experienced lawyer – such a fate is, also outside the clinics, very often shared by young and middle-aged lawyers, and certainly during the apprenticeship period.

The parallel existence of two goals of clinical law teaching is emphasized – the first one includes providing students with practical knowledge (Klauze, 2014: 100), showing the realities of practicing legal professions, and finally: enabling these young people, most often at the beginning of their life path, to verify whether the practice of law, in its broad sense, is their life calling.

The second purpose, which is probably more important from the social point of view (although it is impossible to deny the social importance of the first purpose), is providing pro bono legal aid to persons who are not able to bear the costs of a professional lawyer (Szewczyk, 1999: 15).

In the Polish system, all students working in the clinics provide legal advice to the poor (those who cannot afford a professional lawyer). The assistance is provided in accordance with the rules set forth by the foundation that oversees all the clinics, which has drawn up a document of standards binding for the clinics. According to these standards, law clinics should strive to provide the highest quality assistance and be supervised by qualified lawyers. The assistance provided by the clinics is free of charge. One of the main values in the work of law clinics should be far-reaching confidentiality. The client of the clinic and the student dealing with his/her case should be connected by a deep relationship of trust (FUPP, 2014).

The clinics received their highest ever number of cases in the 2011/12 academic year, when the clinics accepted a record 13,379 cases. Since then they have recorded a noticeable decline in those interested. In 2014/15, the figure was 10,693 cases, giving an average per student of around 5 clients accepted. In the 2019/2020 academic year, the university-ran legal clinics handled 2,547 cases. There were 1,219 students and 318 teaching staff active in the clinics. This is tantamount to two cases per student and eight cases per academic supervisor. The number of cases in the academic year in which the FLAA came into effect was 8424. This represents a decrease of almost 70 %.

Between 2003 and 2020, the number of university clinics increased from 17 clinics in 14 cities to 27 clinics in 17 cities. It is noticeable that the growth rate has slowed down since the FLAA came into force. Indeed, from 2016 to date, only one new dispensary has emerged (which corresponds to the emergence of one new dispensary in a 5-year period, with the previous dynamic of 9 new dispensaries in 13 years). It is not possible to clearly link this issue with the omission of legal aid offices in the FLAA or, what seems most logical, with the emergence of a broad system of state legal aid competing with student legal aid offices. The correlation is interesting, however.

All the above is happening while the number of court cases, especially the rate of civil litigation, has been rising – steadily. In Poland only, during the period from 2010 to 2016, the so-called *disposition time index* had increased by a little over 62 % (Klimczak, 2020: 7-9). In the period between ending in 2020 and starting in 2015, the average time of court proceedings increased from 4.2 to 7 months (the increase of 2.8 months is tantamount to a 67 % increase rate). Polish courts are overburdened, even though the number of judges in relation to the population is relatively high (Siemaszko, 2016: 14, Kociołowicz-Wiśniewska, Pilitowski, 2017: 23). This data indicates that the rate of Poles' activity in legal and court matters is quite high and rising.

3.3. Audition rights as a barrier for law school clinics

Legal barriers facing university clinics can be divided into procedural and institutional (Hadel, Jarosz, 2017: 82). The former are related to the way court proceedings are structured. The latter: with the functioning of the entire system of free legal advice on the one hand, and the system of student legal clinics on the other, with the way the position of university clinics is shaped in the system of law and law protection bodies, as well as, in a broader sense, with the regulations governing the undertaking and conduct of activities consisting in the provision of legal assistance (Pisulinski, 2005: 38). Issues of substantive law (other than those regulating the existence and life of law school clinics themselves, that is, broadly speaking, issues of civil or criminal law) can be treated here as existing and, as being the core subject of the activity of legal advice, not directly affecting the way such clinics operate. They affect the whole society in the same way, its defects are not defects specifically affecting clinics.

Unfortunately, none of these barriers were addressed in the FLAA. Some even believe that the Act has worsened the position of university clinics.

The first and most serious and procedural barrier unaddressed thus far is the inability of a student participating in a law school clinical program to appear in court proceedings, either as an attorney *ad* litem or as a representative for certain actions (especially to act, argue and represent the client in a hearing).

The possibility to act as a defense attorney in criminal proceedings is limited to advocates and, starting from 1 July, 2015, also to legal advisers i.e. the other profession grouping attorneys in Poland (see: Article 82 of the Polish Code of Criminal Procedure, Articles 65-69 of the Polish Advocates' Profession Act and Article 24 of the Legal Advisers' Profession Act). The rule applies also to attorneys representing other parties in criminal procedure (e.g. acting as the so-called

auxiliary prosecutor for the harmed person) (see: Article 87 of the Polish Code of Criminal Procedure). The regulation is analogous in misdemeanor proceedings (see: Article 24 of the Polish Code of Procedure in Misdemeanor Cases). However, it must be underlined here that the previous Code of Procedure in Misdemeanor Cases provided, in its Article 30, that a defense representative, apart from a person entitled to act as such pursuant to the provisions of the then-biding act regulating the legal profession, could also be any other trustworthy person admitted by the chairperson of the adjudicating council or the chairperson of the panel of judges – seemingly, therefore, this provision could have been interpreted as to encompass a possibility for a law student to be admitted to defense *ad litem*, notwithstanding the fact that no legal clinics existed then.

In civil trials, the catalogue of persons entitled to act as parties' representatives is exhaustively regulated by Article 87 of the Polish Code of Civil Procedure. In principle, the position of an *ad litem* representative is restricted to the benefit advocates and legal advisers, with a few exceptions: a broader one for family members of a party (Article 87(1) of the Polish Code of Civil Procedure) and a narrower ones for 1) specialized legal professions (a patent attorneys or a restructuring adviser) in cases within the scope of their area of expertise, 2) persons managing a party's property or interests, 3) persons maintaining a permanent contract of mandate with a party, covering the subject matter of a given case, and 4) co-participants in the dispute.

A similarly narrow, as in civil proceedings, catalogue of possible legal representatives is provided for in the court-administrative procedure, in which a party's representative may be an advocate or a legal adviser, and also another plaintiff or a participant in the proceedings, as well as a spouse, siblings, ascendants or descendants of a party and persons in an adoption relationship with a party, and other persons, if specific provisions so provide.

An example of Polish regulation starting from a different premise is the administrative procedure. The Administrative Procedure Act allows for the appointment of a representative of any person having legal capacity (Article 33(1) of the Polish Code of Administrative Procedure). There is also an additional exception, rarely used in practice, existing within the framework of criminal executive procedure: this act creates the institution of a convicted person's representative (Article 42 of the Polish Code of Criminal Enforcement), who enjoys limited powers to submit, on behalf of and solely in the interest of the convicted person, motions, complaints or requests to the competent authorities and institutions, associations, foundations, organizations, churches and other religious associations, but otherwise may be allowed to participate in proceedings before the court – although, as explained in the case law, within a scope narrowed in principle to attendance at a session.

The inability to act for a party as his/her representative implies the impossibility of filing letters for him/her and of participating in procedural acts, in particular in hearings and meetings. It is also associated with minor impediments, such as lack of access to case files and access to information (by telephone or computer) about the status of the case. The lack of regulation of professional secrecy is also a significant issue.

The catalogue of entities entitled to access to the records of proceedings is specified in procedural laws. In civil proceedings, pursuant to Article 9 § 1 sentence 2 of the Code of Civil Procedure, only the parties and participants to the proceedings have the right to inspect the case file and obtain copies, copies or excerpts thereof. These issues are overlapped with the provisions of the Rules of Procedure of common courts of law, which provide that access to files and the documents contained therein for the purpose of inspection or independent recording of their image to a party or a participant in a non-trial proceeding may take place upon proof of their identity, and with respect to other persons – upon proof of the existence of a right arising from the provisions of law. It is clear from the wording of this standard that students of university clinics do not have such a right and – without the status of an attorney – cannot have it. The practice shows that court employees even exclude the possibility of a party reviewing files in person, albeit in the company of an assisting person. Such a solution results in significant logistical and practical difficulties for clinics.

Not only can the student not review the case file himself, but he cannot even view it with his client. On the part of the clients, this results in the necessity to incur unnecessary costs of making photocopies of the files and printing them out for the Clinic, or even ordering photocopies from the court, as due to age or resourcefulness of persons assisted by the Clinic, it is often impossible to make photographs of the files on their own). It is also a hindrance from the point of view of the clinic's obligation to verify the client's statements and limited trust in him – the ethical rules obliging the participant's in university-ran legal clinics, modelled strongly on the lawyer's ethics,

requires such an approach. Meanwhile, because of restrictions on access to the case file, the student conducting the case must rely only on material received from the client, about which there is a risk of (not necessarily deliberate) selection.

The same applies to obtaining information about the status of a case by phone or e-mail. It should be added here that the Rules of the Common Courts of Justice in theory severely limit the catalogue of matters that can be determined over the phone (to information such as appearing on the agenda and information about the date and manner of resolving the case). In practice, however, telephone information provided to attorneys also includes information about service of documents and their dates. In the Polish system, such information is of key importance, as it determines whether a hearing will be held at all (e.g. the issue of failure to serve a summons on a witness).

An important unfortunate problem with the informal status of law school clinical program participants is the lack of regulation of professional secrecy (or similar). This exposes both students and the clients they serve to the risk of being required to testify about facts learned in connection with a case. Even a cursory recapitulation of the arguments in favor of professional secrecy of lawyers is beyond the scope of this text. Rooted in European legal culture and anchored in the conditions of international and European mechanisms for the protection of human rights, the Polish legal system protects advocacy secrecy on several levels, as expected. However, it has not been able to find a solution that would protect students taking part in clinical programs and the citizens they serve.

3.4. Proposals to regulate limited audition rights for students in clinical programs

A peculiarity of university clinics, especially in the context of other institutions operating in the system of legal aid and civic counseling (which often prefer not to venture beyond the public legal education), is that they rarely avoid accepting cases that need ultimately to go to a civil trial. As a result of this, and the limitations described above, students of university clinics assist clients in cases where their services are limited to drafting briefs (including appeals). As for other aspects and phases of a trial, the client is left to his or hers own devices; especially argue during hearings on his or her own. The student responsible for the case may only be present at the hearing – practically forced to stay in the seats reserved for the public. It should be emphasized that this issue is regulated in a similar way in the currently binding FLAA as regards the scope of free legal aid, with the difference that the activity of the advisors is limited to drafting a brief (possibly with an application for a public attorney). On the one hand, perhaps the legislator's intention was not to create room for market competition with advocates and legal advisers. On the other hand, there are, in the author's opinion, strong arguments for broadening the scope of activities that are permissible for students participating in law school clinical programs.

The possibility of at least a limited appearance alongside and on behalf of clients would seem to be of considerable importance for the practice of law clinics, expressed in at least two aspects. Firstly, it is necessary to point out the particular characteristics of the clientele of university clinics. For reasons that probably don't need explaining, they are mostly elderly, ill people, often inadequate in life, lacking court experience and familiarity with presenting their arguments. One should also take into account the factor of being under stress: clients are very often extremely nervous about the situation, intimidated by the seriousness of the court and worried about the consequences. Clients ask for help in often complicated cases, in which professional attorneys are not willing to provide legal assistance for economic or practical reasons.

It is common for clients of clinics, when brought to court alone and without assistance, to make statements and express positions that are not accurate or harmful to themselves. It is less of a problem if clients' statements are made off-topic, "beside" the point. It is more difficult when clients themselves contradict key elements of their own position, whether in terms of legal argument or those relating to the facts of the case. This strongly suggests that clinic clients would benefit from having students present their position and speak on their behalf in court – it would relieve them of a burden that they are often unable to carry. The psychological significance of the presence of a student, acting in a role similar to that of an advocate, as a support and assistance to the client cannot be overestimated either.

It should also be noted that the student legal clinics make intensive use of the procedural opportunities offered to them by the Code of Administrative Procedure and the Criminal Executive Code. In addition to acting as attorneys in administrative proceedings and as representatives of the convicted person in criminal executive proceedings, students of the student legal clinics actively

undertake activities in the role of guardians ad litem appointed by the courts in various types of proceedings. Student legal clinic volunteers often also take part in university disciplinary cases as defense counsel.

The functioning of the university legal clinics, including constant, regular and thorough monitoring of student activities by senior staff, allows for the maintenance of standards of maximum diligence expected of a professional lawyer acting in a trial on behalf of his or her client. A possible risk of making mistakes exists as always, however, the above-mentioned way of shaping the work of the clinic and, achieved thanks to the reliably conducted sifting of students during recruitment, the high substantive level of students donating their time to the clinic allows for a significant minimization of this risk – in principle, to the level uncontroversial in the Polish legal system in the case of trainees conducting various acts in litigation independently (though under supervision). In the event of erroneous practice, there also remains the issue of the university's liability insurance, certainly higher than that of law firms.

Interestingly, there exist in the broadly understood Western legal order certain states whose procedural laws provide for certain audition rights for students working in legal clinics there. This is the case within virtually every American state (Joy, 1999: 267; Chavkin, 1998: 1546-1554). In addition, the United States Judicial Conference adopted a model student practice rule and most federal courts permit student practitioners (Walker, 1980: 1101).

The flagship example of a state regulation granting students a limited capacity to act in court is the one from Louisiana. Rule XX of the Rules of the Supreme Court of Louisiana, enacted in 1999, provides for the possibility for students working in university-run legal clinics to appear before all courts and tribunals (the equivalent of specialized administrative courts, etc.), subject to several requirements. The case must be conducted within the framework of a clinical program that takes into account the supervision of its conduct by the university, it must be individually selected through a recruitment process controlled and conducted by the university's law faculty, and the student's appearance in a given case before a court must be supported by the prior written consent of the principal-client and the written consent of the person supervising the conduct of the case. The student must have completed at least four semesters of legal education (tantamount to two thirds of the education period in a three year American law school program), and a required law school coursework in legal ethics.

It bears underlining that American courts treat the requirements that are to be fulfilled by student-practitioners very seriously (especially on grounds of US Constitution's Sixth Amendment's right to the assistance of counsel, which is construed as to demand the assistance of a professional, as opposed to attorneys-in-fact or laypersons). For instance, the Supreme Court of Illinois held that a law school clinic's volunteer who had failed to comply with the requirements of the that court's "student practice" rule was not "counsel" for purposes of a defendant's constitutional right to counsel (Denzel, 2010: 710).

In light of the above, a proposal has been put forward (Hadel, Jarosz, 2017: 83) to grant university legal clinic students certain limited audition rights, allowing them to appear on behalf of and in the company of their clients at court hearings, to offer factual explanations and to make legal arguments on the clients' behalf. The power to perform dispositive procedural acts (would obviously have to be excluded from the scope of such authorization. The exclusion would also apply to the possibility of students, as sui generis legal representatives, to submit pleadings on behalf of the parties. To that extent, clients would retain exclusivity, maintaining in their hands control over the written positions presented at trial. The concept was that the ability of law clinic students to have audition rights in court procedures would have to be subject to requirements similar to those provided by the Louisiana state legislature.

The prerequisites that the relevant provision would thus have to provide for would be: supervision of the handling of the case by the university (student law clinic), an express written authorization from the client consenting to the student's representation in the scope of the court hearing, and the express written consent of the clinic coordinator, as the person with substantive supervision of the student's practice, to the appearance of that particular student as a litigation representative. It is worth noting that a specific consent to the provision of legal aid by a person of a particular, incomplete professional standing is also present under the FLAA – this Act deals with potential shortages of staff in legal aid facilities by allowing lawyers without professional qualifications to provide advice, provided, however, that the client gives a written consent to such

an arrangement. Even more so, there is currently no systemic reason to exclude the possibility of a client's informed consent to another form of legal risk, such as allowing a narrowly empowered student to act in a case.

3.5. The new Polish regulation on free legal aid and civic counselling.

Placed in Chapter I (General Provisions) – Article 1 FLAA states that: "The Act lays down rules for the provision of free legal aid, as well as rules for the operation of public administration bodies in the field of legal education". This provision should, however, be read in conjunction with Article 3 of the FLAA. From the juxtaposition of these provisions it clearly appears that free legal aid covers only legal services rendered in the the pre-court stage, and only to a limited extent.

According to further provisions of the Act (Article 3 FLAA), free legal aid includes:

1) informing an entitled person of the current legal status, of the rights to which they are entitled or of the obligations incumbent upon them; or

2) indicating to the entitled person the way of solving his/her legal problem or

3) providing assistance in drafting a letter in matters referred to in points 1 and 2, excluding pleadings in pending pre-trial or court proceedings and pleadings in pending court-administrative proceedings or

4) free mediation;

5) drafting an application for exemption from court fees or appointment of a public attorney in court proceedings or appointment of an attorney in administrative court proceedings.

Before amendments, Article 3 s. 2 FLAA in the original version of the Act excluded from the scope of free legal assistance matters: 1) tax matters related to the conduct of economic activity; 2) customs, foreign exchange and commercial law; 3) matters related to the conduct of economic activity, with the exception of preparation for the start of such activity.

However, this provision has been repealed together with a set of new SARS-CoV-2 pandemic and is intentional. This is because it has been combined with the expansion of the catalogue of persons entitled to assistance under the FLAA to include self-employed individuals – but only those who have not employed other persons during the past year.

Initially (the first version of the Act of 2015), the catalogue of persons entitled to receive assistance was casuistically narrowed (and included, for example: beneficiaries of social assistance, pregnant women, seniors, veterans, etc., etc.). Currently, free legal aid and free civic consultancy is available to entitled persons who are unable to bear the costs of paid legal aid. This is how it was regulated by the amendment that came into force in 2019. After the changes introduced during the pandemic: an individual who runs a sole proprietorship not employing other persons during the last year is also entitled to assistance. An important test determining access to forms of assistance is the submission of relevant declarations.

Free legal assistance is provided, in principle, by an advocate or a legal adviser, with the option to have trainees act as substitutes. An advocate or legal advisor provides free legal assistance on the basis of an agreement concluded with the county (*powiat*). This is how, *prima facie*, the Act stipulates. In practice, however, another provision of the FLAA contains a backdoor. Article 11 of the FLAA states that half of the facilities allocated within the county for the purposes of the Act shall be given to legal advisers and advocates for the purpose of providing free legal assistance, and the other half to non-governmental organizations for the purpose of providing free legal assistance or free civic consultancy. In these facilities – as explicitly stated in Article 11 s. 3(2) – free legal aid may also be provided by a person with no criminal record and without civil or public liability, who: a) holds a degree in law from a higher educational institution in Poland or a degree recognized abroad, b) has at least three years' experience in performing activities requiring legal knowledge and directly related to the provision of legal aid, c) enjoys full public rights and has a full capacity to perform legal acts. Such a solution constitutes a huge and important breach in the principle of free legal assistance provided by eligible lawyers, which is present in relation to half of the free legal assistance facilities in Poland. Interestingly, in the case referred to in the above mentioned provision, the client, before obtaining assistance, shall make a written statement that he/she is aware of the fact that he/she is getting legal assistance from a non-professional. An analogous solution has been applied by university law clinics (FUPP, 2014). Definitely important in practice, but also for theoretical considerations about the location in the system of non-professionals providing advice within NGOs, is the issue of silence by the law on the issues of their professional

secrecy (attorney-client privilege) and duties towards the client, including loyalty, avoidance of conflicts of interest and others, which are inherent in the relationship of lawyers with their clients.

The newly added Article 3a of the FLAA in turn defines unpaid citizen counselling. It covers activities tailored to the individual situation of the person entitled, intended to make that person aware of his or her rights or obligations and to help him or her resolve the problem independently, including, where necessary, drawing up an action plan together with the person entitled and assisting in its implementation. Free citizen counselling includes, in particular, advice for people in debt and advice on housing and social security matters. Sponsors of the bill explained it thus: "counseling in general, and civic counseling in particular, undoubtedly makes it easier to navigate the legal system, prevents social marginalization of those who receive counseling, helps solve the problems of those already excluded, and thus facilitates their return to society. It also provides a practical form of legal and civic education" (Reform Bill Explanatory Memorandum, 2018: 3).

Free civic counselling may also be provided by a civic advisor. According to Article 11 s. 3a of the FLAA, a civic advisor is a person who has been trained to provide civic counselling or who has at least three years' experience in providing specialist advice or in social work. The training consists of 70 hours of counselling, of which at least 15 hours are for counselling methodology and at least 20 hours for debt counselling - Article 11a s. 1 FLAA.

3.6. Critical remarks on FLAA and it omitting the law school clinics.

It is noteworthy, as already described above, that the FLAA – both in its original version (FLAA 2015) and in the substantially amended text adopted in 2018 (binding since 01.01.2019), and finally: after the changes introduced during the SARS-CoV-2 pandemic – entirely omits, as if completely disinterested, the already existing alternative system of legal aid that university legal clinics are. The law was constructed as if it was to be enacted in a state with no forms of free legal counsel, as if free legal aid was to be a completely new and previously inaccessible phenomenon.

Such a solution deserves multifold criticism. Firstly, such a decision resulted in the newly-built free legal aid system failing to utilize the existing apparatus of the legal clinics; though the number of students' legal clinics has been meek compared to the number of facilities now run under FLAA, it is hard to fathom why had the law chosen not to employ also those existing venues – from a purely logistics-oriented perspective. Similar remarks apply to the people active in the university legal aid system. Especially in the early months of FLAA's operation, it is puzzling why had the lawmaker not taken an "all-hands-on-deck" approach toward the issue of whom and to what extent is available to partake in the free legal aid system. It is an omission both reprehensible and unjustified, not to take advantage of available human resources that are highly qualified, motivated (as many volunteers are) yet at the same time: operate under professional academic supervisions in terms of both substantive quality of the advice proffered as well as the ethical aspects of activity. Another mistake was the failure to take advantage of the existing reputation of the university's clinics, coupled with the reputation of the university.

The above is incomprehensible, all the more so given that FLAA provides for a considerable place for third sector entities. Interestingly, it should be emphasized that the possibility of running free legal aid facilities by non-governmental organizations was not obvious from the very beginning. The first version of the bill did not provide for this at all. It was only the resistance and protests of many non-governmental entities providing free-of-charge civic counselling services that inspired the Ministry of Justice to amend the draft law. Similar pressure from university clinics, however, was not given consideration.

At the same time, it is impossible not to see that the entry into force of the FLAA, a law shaping a system in which the bulk of the work (at least half of it, given the inflexible division of facilities between NGOs and attorney's professional societies) is carried out by advocates and legal advisers, must have affected the popularity of law school legal clinics, whose public perception cannot by any means overcome the awareness that advice is nevertheless given by students (Lach, 2016: 21). Though a clear link between the emergence of FLAA and the continuously diminishing popularity of students' legal clinics is hard to prove in causal terms, it is, *ceteris paribus*, tough to establish any other reasons that could have led to such a downfall in terms of case and client number (over 70 % within 4 years). That FLAA would have such an effect had not maybe been directly intended, but must have been foreseeable. This must lead to an alternative: either the sponsors of the FLAA bill did not care at all about university legal clinics and their operation, or they decided to deliberately sacrifice the law school aid programs in the name of a greater good.

Whichever is the case, the bill and its explanatory memorandum does not offer a slightest rationale to this end.

Furthermore, FLAAs failure to employ law school clinics in the system and the resulting decline in client and case numbers on their part is a blow to the law school programs as a form of legal education. The less cases there are, the less students may partake in the program – and, to that extent, partake actively. That a student may deal with, on average, two cases a year, is not enough to make the clinical program intensive enough for educative purposes nor does it allow it to be a fair simulation of a professional lawyer's work. This is a significant weakening of the university clinics' attractiveness from the perspective of interested candidates. It has been argued that involvement in clinical programs is a net educative benefit especially for the students. That benefit has been visibly diminished. Moreover, FLAA offers nothing in return. It does not provide for any forms of students' commitment in the legal aid system (unless they choose to become civic advisors).

It also bears noting that the FLAA has been criticized because of the significant imbalance between the number of facilities allocated to professional attorneys and those allocated to non-governmental organizations. On the one hand, this was admonished by the professionals and their association. For one, the Polish Supreme Bar Council presented an opinion on the bill, deploring the solutions adopted therein, pointing to the discrimination of professional attorneys: advocates and legal advisers on grounds of costs (fees) and number limits (NRA, 2014: 11). On the other hand, this solution has been criticized on the grounds that it allocates facilities in equal parts between professional attorneys – of whom there are, together with trainees in pupillage, more than 80,000 persons – and non-governmental entities, which are not equipped with such numerous human resources. Commentators have pointed out that the legislators unreasonably placed such a large obligation on NGOs (Paxford et al., 2016: 264).

At the same time, the legislator encumbered NGOs with the obligation to present, to a competent supervising public body, agreements entered into with professional attorneys (apparently for the purpose of giving advice in the facilities ran by NGOs). It is not clear what the legislators' intention was here, especially given the prescriptive, not enabling wording of the provision at hand; whether the rule was to serve as a form of broadening the human resources pool available for non-governmental entities (in such case, however, it would be sufficient to simply allow them to conclude agreements with professional lawyers, clarifying any possible doubts in this regard – i.e. employ an enabling mood in the wording of the rule), or whether this provision is aimed at fulfilling a guarantee role (a minimum level of services provided). In the first case: why, then, were as many as half of the facilities given to non-governmental organizations?

Alternatively, if we accept the second option: why, then, were two further-reaching exceptions allowed, with: 1) lawyers without qualifications, and 2) civic advisors being admitted to offer legal and civic aid? Regardless of the above: in the context of the need to "save" the system with professional attorneys, it seems even more erroneous that the legislator gave up on the idea to utilize the pre-existing clinical system operating in connections with Poland's top law schools.

Another omission of the commented law, which is the result of it being constructed as if law school clinics had not existed, is the failure to not only make the university clinics a part of the free legal advice system but also to regulate the status of their volunteers or employees. In the context of the enactment of the Act and its shape at that time, this was probably a consequence of the overall omission of the phenomenon of clinics in the regulation.

A certain logical opportunity to partially regulate the status of students from university clinics was the amendment of 2018. At that time, it was possible, with the invention of citizen counsellors into the system, to give their status automatically, or to introduce a similar special status. Nor was the FLAA's systemic change to allow unqualified lawyers to provide legal advice – with the client's written consent – employed similarly in the case of law school. Such a breakthrough could have provided a primer on how, in similar conditions, clients are allowed to make dispositive choices as to whom they agree to offer them legal aid.

Finally, the FLAA omitted the issue of attorney-client privilege. A global overview of the regulation of attorney-client privilege reveals that the specific regulations vary considerably from one jurisdiction to another. Among the common features, however, it covers knowledge of facts obtained from the client in the course of providing legal assistance by an advocate. This broad definition includes, inter alia, giving oral advice, conducting all matters for a client, including the

so-called ongoing legal services, as well as representing the client in specific, individual proceedings, including in particular criminal defense proceedings.

However, it is important to note that the concept of attorney-client privilege has inherently two aspects: it encompasses both the obligation to maintain confidentiality with respect to information learned in the course of, or in connection with, the professional activity of an advocate (the internal aspect of attorney-client privilege – the legal, ethical and moral obligation incumbent on the advocate), but also the sets of specific legal instruments available for the attorney to protect the confidentiality of information covered by the privilege (the external aspect – the attorneys' rights utilized as to protect secrecy).

In particular, in the case of professional service of activities of such social importance as legal advice, the enactment of rules protecting professional confidentiality is a necessity. Each legal system constructs certain principles for maintaining and protecting attorney-client privilege. This makes it all the more surprising that in the case of the FLAA, it is really only a narrow regulation of the internal aspect of secrecy (in case of the NGOs; the law is tacit about professional attorneys active in the system, possibly due to them being already covered by their respective professions' rules on confidentiality), obliging the entities who provide advice to further oblige the persons active with them to maintain confidentiality. The question is whether it would not have been more appropriate to impose a statutory duty of confidentiality on those persons, while still respecting the internal aspect of confidentiality.

And above all, what was above called the external aspect of attorney-client privilege was not addressed at all in FLAA. The least the law could have done was to allow persons providing advice under the free legal aid system to benefit from the advantages accorded to advocates and legal advisers – such as the right to refuse to give testimony, the right to refuse to answer questions, the protection of documents made in the course of giving advice to clients, and other.

4. Results

Free legal assistance offered to persons who cannot otherwise afford to cover the costs of legal services themselves has been, since many decades, a vital and evergreen problem for modern states. Especially Western societies with the ever-increasing number of elderly citizens may find themselves in a condition where the shape of the free legal aid system will shape how the courts and the law as an entire apparatus of the social machinery operates. Unsurprisingly, the Polish legislators have at last turned their attention toward the problems of flee legal aid. However, the system of free legal aid they have thus created is not free from flaws. Clinical legal education programs at the best Polish laws schools have, since well over two decades, formed an important piece of the puzzle that Polish legal aid system was, prior to it being encompassed by one encroaching regulation. Obviously, how university clinics operated was stained with difficulties and barriers, some of them purely legal.

Having outlined such barriers, we have seen how FLAA has failed include the law school clinics in the system and, moreover, failed to address the barriers laid before such clinics in a systemic way. Both these failures show that the legislators responsible for certain solutions of FLAA have not had a proper chance to participate in the free legal aid system prior to choosing to regulate it. The new free legal aid system and law school clinics could have benefited from mutual interactions: the former could use the clinics' experience and standards of operation, as well as students' volunteer work, their vitality and free time, especially given certain manpower hardships in the case of free legal aid facilities run by NGOs; the latter, in turn, could use the infrastructural and financial support that the state-financed system may offer. Unfortunately, how FLAA was shaped, even after amendments, constitutes merely a missed opportunity for much needed synergy in the area of free legal aid.

5. Conclusion

The analysis conducted leads to a conclusion that the method of constructing the free legal aid system in Poland has certain shortcomings. While the fact alone that the lawmaker considered it reasonable to address the issue of free legal assistance, it is impossible not to notice the inadequacies of the adopted solutions. To begin with, the failure to engage with law school clinics and render them a part of the free legal aid system is a missed chance for synergistic operation and an improvident approach to existing human and infrastructural resources. Secondly, the publicly

backed free legal aid system failed to address certain procedural, systemic and ethical problems related to the activity of persons active in the system that had already been pointed out with respect to law school clinics.

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