

This research work focuses on the question of what are the main objectives and priority avenues for reforming the Russian system for provision of state-funded legal aid in criminal cases and whether the best international experience in this field can be adopted in Russia. With this purpose in mind the researcher provides the analysis of various models of state-funded legal aid existing in the world, the problems they have encountered in the process of their evolution and the strategies they have adopted to address these challenges. The amendments to the Russian criminal legal aid system proposed by the author were developed with regard to the best world's practices in the field and with due consideration of the Russian-specific conditions, including the typical problems of the country's criminal justice system.



Elena Burmitskaya

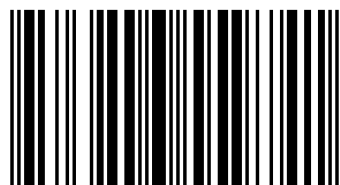
## World's models of legal aid for criminal cases:

What can Russia borrow?



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## Introduction

When it comes to discussion on the possibility of ‘borrowing’ from foreign practices, approbated tools and mechanisms, the Russian state authorities are often doubtful and argue that the country has to go its own way, because of the Russia's ‘specialisness’ (‘samobythost’).<sup>3</sup> As the search of special and unique ways is so time-consuming, resolving of many vital problems is postponed for decades.

The reform of state-funded legal aid for criminal cases is an example of such long-discussed issues: these were late 90s, when the issue had been raised within a wider criminal justice reform debate.<sup>4</sup> In early 2000s the RF Government made attempts to get familiar with the foreign experience in the area, however, no changes followed.<sup>5</sup>

Today, 10 years later, the Russian model for legal aid in criminal cases is still bearing many features of the one that existed in Soviet era: run by the prosecuting authorities and courts, limited to the mandatory defence scheme and ex-officio appointments, badly regulated and organised, corrupted and affording no protection from rights abuse, this model may serve anything, but the genuine advocacy of indigent defendants.

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<sup>3</sup> Thus, in 2007 Message of the President of Russia to the Federal Assembly then President Vladimir Putin claimed that “Failure to adhere to our own cultural orientation, blind copying of the foreign clichés ... inevitably leads to loss of the nation’s identity.” Consultant Plus Electronic Legal Database, "Послание Президента Российской Федерации Федеральному Собранию Российской Федерации"; available in Russian from Consultant Plus database; <http://www.consultant.ru/online/base/?req=doc;base=LAW;n=67870>; Internet; accessed 25 November 2009, p. 1 para2.

<sup>4</sup> For the analysis of the long-lasting criminal justice reforms see, for example, I. Petruhin, "Реформа Уголовного Правосудия В России Не Завершилась" / "The Reform of the Criminal Justice System Is Not Finished Yet," *Zakonodatelstvo* 3, no. (2006), 69 – 77.

<sup>5</sup> See, for example, Marina Venäläinen, "Russia Adopts the Model of the Finnish Legal Aid System, Review of Central and East European Law " 33 (2008 ), 138.

It has to be admitted that recently the efforts of the Russian Government as regards the reform of legal aid in *civil cases* were quite remarkable. Several years of experimenting in this field recently lead to the adoption of the Federal Law of 21 November 2011 N 324-FZ ‘On free legal aid in the Russian Federation’, which entered into force on 15<sup>th</sup> January 2012. The law introduces the ‘state legal aid bureaus’ («государственные юридические бюро») – a system similar to the US staff attorneys scheme and other ‘salaried practitioners’ models, envisaging that lawyers are directly employed for public legal services delivery.

The law mentions participation of the civil society organisations in the system of state-funded legal aid as well, however, it gives no details as to the practical implementation of this. Although the act is named ‘On free legal aid in the Russian Federation’ it leaves aside legal aid for criminal cases, which was widely criticized by the experts in the field. Hopefully, the implementation of the law will help to gain some useful experience, which may become the basis for the subsequent reform of legal aid for criminal cases.

This research is aimed at proving that the best of the international experience of legal aid provision can and should be adopted in Russia. There is an urgent need for the legal aid reform in the country. The unavailability of legal aid combined with other deep-rooted problems in the Russian criminal justice system are jeopardizing such values as human dignity, equality and justice, and cause systematic human rights abuse. As long as Russia postpones the launch of reform, it will fail to comply with its international human rights obligations.

The research of the situation of legal aid in criminal cases in the post-soviet countries is quite limited and mostly carried out by the civil society experts;<sup>6</sup> as regards the situation of Russia, the scientific data is even less available, then in some other former communist states. The domestic research generally focuses on

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<sup>6</sup> See, for example, Vessela Terzieva, *Access to Justice in Central and Eastern Europe: Comparative Report* (Public Interest Law Initiative, 2003).

the violations of defendant's rights in criminal cases, the limited scope and quality of legal aid; however, few research works contain proposals regarding possible reforms, including the reform of legal aid system as an important safeguard of defendant's rights.

[...]

## CHAPTER 2

### **THE INTERNATIONAL HUMAN RIGHTS STANDARDS ON STATE-FUNDED LEGAL AID FOR CRIMINAL CASES**

The *right to free legal assistance* is recognised in almost all the leading international human rights documents. Thus, Article 14 (3) of the International Covenant on Civil and Political Rights<sup>46</sup> postulates:

*In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*

*(d) To be tried in his presence and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.*

Unlike many other rights covered in the Art. 14 ICCPR, the right to legal aid was not well-developed in the jurisprudence of the UN Human Rights Committee. In number of cases, for example, *Touron v Uruguay*,<sup>47</sup> the Committee declared that in certain cases availability of legal aid is crucial for a defendant's ability to defend himself/ herself. As was noted by some commentators, nevertheless, "The Committee has displayed a reluctance to examine the manner in which a member

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<sup>46</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html> [accessed 10 November 2009].

<sup>47</sup> *Tourón v. Uruguay* (R.7/32), ICCPR, A/36/40 (31 March 1981) 120 at paras. 8 and 12.

party administers the provision of legal aid within its territory.”<sup>48</sup> Thus, in *Ricketts v. Jamaica*<sup>49</sup> the Committee did not find a violation of the applicant’s rights and held that it is up for a member party to decide how to arrange the provision of legal aid until a manifest miscarriage of justice occurs. Nevertheless, in *Reid v Jamaica*<sup>50</sup> the Committee expressed its concerns about the overall operation of the system of legal aid in Jamaica, moreover, the Committee stressed that “[...] in cases involving capital punishment, in particular, legal aid should enable counsel to prepare his client’s defence in circumstances that can ensure justice. This does include provision for adequate remuneration for legal aid...”<sup>51</sup> In another case where a death penalty was at stake, *Collins v. Jamaica*<sup>52</sup> the Committee reiterated that “[...] legal aid should not only be made available; it should also enable counsel to prepare his client’s defence in circumstances that can ensure justice.” In para. 11 of the General Comment N13 “Article 14 ICCPR” Human Rights Committee referred to the right to free legal aid envisaged in the Art.14 (3) (d) ICCPR pointing that the States parties should undertake the necessary arrangements to ensure that legal assistance is available to those who is not able to pay for it.

In *Reece v. Jamaica*<sup>53</sup> the Committee was dealing with issues related to quality of legal aid and state responsibility for the shortcomings of state-appointed defence. The Committee recalled its standard developed in earlier cases pointing that “a State party cannot be held responsible for the conduct of a defence lawyer, unless

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<sup>48</sup> Alex Conte, Scott Davidson, and Richard Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (Aldershot: Ashgate Publishing Limited, 2004), 129.

<sup>49</sup> *Ricketts v. Jamaica* (667/1995), ICCPR, A/57/40 vol. II (4 April 2002) 29 (CCPR/C/74/D/667/1995) at paras. 3.2 and 7.3.

<sup>50</sup> *Reid v. Jamaica* (250/1987), ICCPR, A/45/40 vol. II (20 July 1990) 85 at paras. 11.4 and 13.

<sup>51</sup> *Reid v Jamaica*, para. 13.

<sup>52</sup> *Collins v. Jamaica* (240/1987), ICCPR, A/47/40 (1 November 1991) 219 (CCPR/C/43/D/240/1987) at para. 7.6.

<sup>53</sup> *Reece v. Jamaica* (796/1998), ICCPR, A/58/40 vol. II (14 July 2003) 61 (CCPR/C/78/D/796/1998) at paras. 2.1, 2.2, 3.1, 3.2, 7.2 and 7.4.

it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice.”<sup>54</sup> However, in many cases invoking similar complaints the Committee have quite often found violations of Art. 14 (3) (b) of the ICCPR – the right to have adequate time and facilities for the preparation of a defence and to communicate with counsel of ones own choosing. In these cases the applicants argued that legal aid was either unavailable to them until the day of a trial or they had an opportunity to consult a lawyer only shortly before the trial, which made adequate preparation of the defence impossible. Even in those cases where such situation resulted from improper professional conduct of state-assigned legal aid lawyer, the Committee repeatedly admitted that there was a violation on part of the member state to respect the right to adequate time and facilities to prepare one’s defence, being reluctant, at the same time to find that there was a violation of right to legal assistance as such under Art. 14 (3) (d).<sup>55</sup>

One of the frequent issues raised in the complaints to the Committee is unavailability of state-funded legal aid on the stage of appeal. In this type of cases the Committee usually first expresses its general position regarding the right to appeal: Art. 14 (5) of the ICCPR guarantees the right of convicts to have their case reviewed ‘by a higher tribunal according to law’ and thus it does not require States parties to provide for more than one instance of appeal.<sup>56</sup> However, the Commission further concludes that it follows from the wording of Art. 14 (5) that in case if national legislation envisages further instances of appeal they must be accessible to the convicted. Next, the Committee assesses whether in the circumstances of concrete case unavailability of the instance to a complainant was contrary to the interests of justice. Accordingly, the Committee has adopted

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<sup>54</sup> *Reece v. Jamaica* at 7.2.

<sup>55</sup> See, for example, *Teesdale v. Trinidad and Tobago* (677/1996) ICCPR, A/57/40 vol. II (1 April 2002) 36 (CCPR/C/74/D/677/1996) at paras. 2.1, 3.6, 3.7, 9.5-9.7, 10 and 11.

<sup>56</sup> See Views on Communication No. 230/1987 (*Raphael Henry v. Jamaica*), adopted 1 November 1991, paragraph 8.3.



opposite views in two similar cases against Jamaica: in *Gentles v. Jamaica*<sup>57</sup> the Committee did not find a violation, because it considered that the Constitutional Court was not *per se* an instance of appeal within the criminal appeal process; in *Currie v. Jamaica* the Committee on the contrary found that “[...] where a convicted person seeking Constitutional review of irregularities in a criminal trial has not sufficient means to meet the costs of legal assistance in order to pursue his Constitutional remedy and where the interests of justice so require, legal assistance should be provided by the State.”<sup>58</sup>

As regards the *right to counsel of one's choice* in relation to the legal aid, in number of its decisions the Committee held that Art. 14 (3) (d) does not afford such guarantee. However, the Committee has also pointed that, though the accused has no right to choose counsel within legal aid scheme, the State has to take measures to ensure that an assigned lawyer performs effective representation of a defendant in conformity with the interest of justice criterion.<sup>59</sup>

Another mechanism of human rights protection of great importance for Russia is European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>60</sup> which refers to the issue of legal aid in Article 6(3) (c):

*Everyone charged with a criminal offence has the following minimum rights (...):*

*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.*

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<sup>57</sup> *Gentles v. Jamaica* (352/1989), ICCPR, A/49/40 vol. II (19 October 1993) 42 (CCPR/C/49/D/352/1989) at paras. 11.1 and 11.2.

<sup>58</sup> *Currie v. Jamaica* (377/1989), ICCPR, A/49/40 vol. II (29 March 1994) 73 (CCPR/C/50/D/377/1989) at para. 13.4.

<sup>59</sup> *Grant v. Jamaica* (353/1988), ICCPR, A/49/40 vol. II (31 March 1994) 50 (CCPR/C/50/D/353/1988) at para. 8.6.

<sup>60</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5, available at: <http://www.unhcr.org/refworld/docid/3ae6b3b04.html> [accessed 10 November 2009]

According to the ECHR legal aid should be available for the defendants in all the types of the *criminal* procedure. Terms ‘criminal offence’ and ‘criminal procedure’ in the European Court of Human Rights case law have an autonomous meaning: the notions of ‘criminal offence’ and ‘criminal procedure’ as they are perceived by the European Court of Human Rights are not identical to the ones, which are applied in member-states domestic laws, although such classification may be relevant.<sup>61</sup>

In the Court’s case-law we can find references essentially to three criteria, which are decisive when the Court is considering whether an individual was ‘charged of a criminal offence’ for the purposes of Art. 6: apart from the *classification of the proceedings under the national law* these are *the character of the penalty* and *the nature of the proceedings*. According to Leach, when deciding whether procedure has to be regarded as criminal under the Convention the Court is taking into consideration the severity of the possible punishment.<sup>62</sup> Finally, when assessing the nature of proceedings, the Court accepts that proceedings that originate in the alleged breach of a rule ‘of general application to all citizens’ ‘brought by public authorities under statutory powers of enforcement’ and ‘had some punitive elements’ are to be regarded as criminal for the purposes of Convention.<sup>63</sup>

As regards an obligation of member-states to provide free legal aid in criminal cases both wording of Art. 6 (3) (c) of the ECHR and the European Court’s jurisprudence invokes two criteria, which have to be met to make a successful claim under the article. Firstly, state-funded legal aid has to be provided for free when a defendant ‘*lacks sufficient means*’ to pay for it and, secondly, when legal

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<sup>61</sup> Philip Leach, *Taking a Case to the European Court of Human Rights*, ed. John Wadham, 2nd ed. (New York: Oxford University Press, 2005), 242.

<sup>62</sup> See, for example, case of Engel and others v the Netherlands, Application no. 5100-5102/71, paras. 82-83, 8 June 1976; case of *Ozturk v Germany*, Application no. 8544/79, paras. 50, 56, 21 February 1984, ECHR.

<sup>63</sup> Benham v the UK, Application no. 19380/9, para. 56, 10 June 1996.

assistance is essential in the ‘*interests of justice*’.<sup>64</sup> The last criterion is being considered in view of such circumstances as severity of the penalty and complexity of the case in question; another important issue to be accessed by the Court is whether given to a perceived complexity of a case, an applicant was able to defend himself or herself in person.<sup>65</sup> According to Leach, cases where possible penalty was imprisonment were unchangeably regarded by the Court as ones requiring participation of a defence lawyer in the interests of justice.<sup>66</sup>

The following standards were developed in the Court’s jurisprudence regarding the right to free legal aid in criminal cases. In *Benham v UK*<sup>67</sup> the Court found the violation of Art. 6 (3) (c) because unlike the UK Government the Court found that ‘interests of justice’ required that the applicant who appeared before the magistrates’ being accused of non-payment of the community charge was represented by the legal counsel. The Court pointed out that, firstly, maximum penalty for an offence incriminated to the applicant was three months imprisonment, which was ‘quite severe’ punishment in the opinion of the Court; secondly, the case invoked legal issues that were, according to the Court, quite difficult for understanding of a non-lawyer.

In *R.D. v Poland*<sup>68</sup> the Court held that in the circumstances of the case, when according to the Polish law the applicant could submit a cassation appeal only through a lawyer but was refused free legal aid there was a violation of Art. 6 (3) (c) of the ECHR.

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<sup>64</sup> Pham Hoang v France, Application no. 13191/87 paras. 43-4925 September 1992; Twalib v. Greece, Application no. 42/1997/826/1032, paras. 52-53, 9 June 1998.

<sup>65</sup> Leach, 273.

<sup>66</sup> Ibid., 274.

<sup>67</sup> Application no. 19380/9, paras. 60 – 63, 10 June 1996.

<sup>68</sup> Applications nos. 29692/96 and 34612/97, paras. 48-50, 18 December 2001.

In *Kamasinski v. Austria*,<sup>69</sup> *Imbrioscia v. Switzerland*,<sup>70</sup> *Daud v. Portugal*,<sup>71</sup> *Czekalla v. Portugal*<sup>72</sup> and a number of other cases the Court was dealing with an issue of failure by the state assigned defence lawyers to properly represent the interests of applicants, which seriously affected their trial rights. The Court pointed out that the states may not be held responsible for every shortcoming of an assigned counsel. Lawyers enjoy professional independence from a state even when they are performing their work under the publicly funded legal aid schemes because this is a fundamental principle of legal profession. However, the Court observed that the very fact that free assistance was available to the applicant does not in itself guarantee that his or her rights under Art. 6 (3) (c) were respected. Article 6 § 3 (c) requires that the competent state authorities intervene “[...] if a failure by legal-aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way”.<sup>73</sup>

Right to free legal aid is enshrined in the number of other human rights instruments, such as UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Articles 6.1 and 6.3.),<sup>74</sup> the Convention on the Rights of a Child (Articles 37 (d), 40.1 and 40.2(b)(ii) of CRC),<sup>75</sup> and International Convention on the Protection of the Rights of All Migrant Workers

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<sup>69</sup> Application no. 9783/82, paras. 33, 64. 19 December 1989.

<sup>70</sup> Application no. 13972/88, para. 38, 24 November 1993.

<sup>71</sup> Application no. 11/1997/795/997, para. 38, 21 April 1998.

<sup>72</sup> Application no. 38830/97, paras. 59-71, 10 January 2003.

<sup>73</sup> see *Daud*, cited above, para. 38.

<sup>74</sup> UN General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment : resolution / adopted by the General Assembly.*, 10 December 1984, A/RES/39/46, available at: <http://www.unhcr.org/refworld/docid/3b00f2224.html> [accessed 10 November 2009].

<sup>75</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.unhcr.org/refworld/docid/3ae6b38f0.html> [accessed 10 November 2009].

and Members of Their Families (Articles 18.3(b) and 18.3(d) of CMW),<sup>76</sup> as well as some regional human rights instruments, such as Council of Europe ones: European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment<sup>77</sup> and the CPT's documents, Council of Europe Convention on Action Against Trafficking in Human Beings (Article 15.2),<sup>78</sup> Convention on preventing and combating violence against women and domestic violence (Article 57)<sup>79</sup> and other. These instruments view the issue of legal aid in the context of specific human rights problems they are dealing with.

Thus, the Committee for the Prevention of Torture (CPT), which is functioning on the basis of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, views legal aid as one of the crucial means of torture prevention. With this regards the CPT promotes, *inter alia*, an *early access* to legal assistance, which means that legal counsel should be available to persons suspected of committing a crime as soon as possible and no later than from the moment of arrest and before the first police interrogation. Most of the individuals facing criminal charges do not have a lawyer they could contact in such situation immediately; moreover, it is well known that in principle most of the criminal suspects everywhere in the world are indigent. Therefore, the police detention and interrogation are situations when free legal aid is most needed.

The Committee for the Prevention of Torture observed: “The CPT wishes to stress that, in its experience, the period immediately following deprivation of liberty is

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<sup>76</sup> UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158, available at: <http://www.unhcr.org/refworld/docid/3ae6b3980.html> [accessed 10 November 2009].

<sup>77</sup> Council of Europe, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 November 1987, ETS 126.

<sup>78</sup> Council of Europe, Council of Europe Convention on Action Against Trafficking in Human Beings, 16 May 2005, CETS 197.

<sup>79</sup> Council of Europe, Council of Europe Convention on preventing and combating violence against women and domestic violence, 11 May 2011.

when the risk of intimidation and physical ill-treatment is greatest. Consequently, the possibility for persons taken into police custody to have access to a lawyer during that period is a fundamental safeguard against ill-treatment. The existence of that possibility will have a dissuasive effect upon those minded to ill treat detained persons; further, a lawyer is well placed to take appropriate action if ill-treatment actually occurs.”<sup>80</sup>

The format of this research paper does not allow for a more in-depth study of the international human rights instruments envisaging the provisions related to the right to legal aid and the relevant jurisprudence. For the purposes of this research it was enough to identify the key international human rights law standards and approaches related to the right to state-funded legal aid in criminal cases.

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<sup>80</sup> Council of Europe: Committee for the Prevention of Torture, *The CPT Standards. "Substantive" Sections of the CPT's General Reports*, 1 January 2004, CPT/Inf/E (2002) 1, available at: <http://www.unhcr.org/refworld/docid/4252a2e04.html> [accessed 25 November 2009].

## CHAPTER 3

### **THE WORLD'S MODELS OF LEGAL AID FOR CRIMINAL CASES**

In many countries the system of delivery of state-funded legal aid has been developing for decades. The main incentives for the introducing of more sophisticated systems of legal aid provision and their increasing funding were the growing public concern about the compatibility of the existing criminal justice systems with the highest social values, and the influence of the relevant developments in international law. As a result, it can be claimed that after the decades of experiments in the field several advanced models of legal aid provision emerged in the world.

Of course, there is no model of legal aid provision, which can be defined as 'perfect' or 'the best in the world', moreover, system which proved to be a success in one country, may turn out a complete failure in another due to many reasons such as legal and political environment, resources available, etc. According to Smith, "The organisation of publicly funded legal services in different countries is affected by local culture and history. These differ enormously. [...] I am conscious that, within central and Eastern Europe, there will be different traditions that dictate different levels of available resources, different priorities in provision and different preferences in the type of provision. [...] The lesson is that there is no right answer only optimum provision for individual circumstances".<sup>81</sup>

However, such parameters as availability of legal aid (the range of cases and the

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<sup>81</sup> Smith, 3.

amount of legal aid delivered), the quality of services, the cost-effectiveness and some other can objectively characterise the model as successful. In the following chapter I would like to define the mechanisms and solutions utilised by the advanced world's models of state-funded legal aid provision. This is important in view of the aim to further suggest which of them (or combination of) may be adopted in Russian conditions.

### **3.1 The scope of the right to state-funded legal aid for criminal cases**

Every system of publicly funded legal aid envisages some classification of cases when legal assistance is being delivered free of charge. These cases for the purposes of the present discussion may be divided into those when provision of state-funded legal aid is 'mandatory' (*i.e.* there is an obligation on the part of a state to provide free legal aid)<sup>82</sup> and 'discretionary' (it is up to a decision-maker to grant free legal aid or not)<sup>83</sup>.

Rules governing 'mandatory' and 'discretionary' cases can be derived either from international obligations binding a state or its domestic law. Ideally, the last should be in conformity with the first however this is not always the case. As regards the international system, in Chapter 2 I already made an attempt to identify some basic standards with regard to the appearance of the right to state-funded legal aid. Basically, they relate to the following preconditions: the criminal character of proceedings (which is to be interpreted broadly), inability of the defendant to pay for legal assistance and the 'interests of justice' making legal representation necessary.

Domestic laws and practices may vary significantly while generally being in conformity with the international human rights standards due to the 'margin of

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<sup>82</sup> Depending on certain types of offences or at some stages of criminal procedure; on individual features/ situation of a defendant, e.g. minor status, mental disability; procedural limitations of individual's freedom, such as apprehension, arrest, questioning by police, placement in custody.

<sup>83</sup> Usually based on 'merits' test.



appreciation' doctrine, which presumes that it is in the competence of national governments to decide how to arrange legal aid provision in respective jurisdictions.

The issue of scope of the right to state-funded legal aid has to be analysed also from the point of view of types of services available, the procedural stages, when the aid is provided and the availability of legal aid to specific groups of service recipients, which as it will be demonstrated later may significantly differ.

As to the types of services available, depending on situation, these may be limited services (legal advice, preparation of relevant documents, etc.), and full representation, including participation of the lawyer in trial proceedings. The type of services provided may vary on different stages of criminal procedure dependent on the gravity of charges and individual characteristics of the recipient. Thus, in many systems, like, for instance, the ones that are operating in Canada, the UK and the Netherlands, legal advice may be received relatively easily, including on-line and telephone counselling services, whereas retaining a lawyer for the representation of an applicant in court requires going through application procedure and testing.<sup>84</sup>

### *3.1.1 The types of proceedings where state-funded legal aid is granted*

In the USA, the UK, Canada and some other countries the state-funded legal aid is available not only in criminal cases, but also in administrative and other types of proceedings. This conforms to the internationally recognised standards set out by the ICCPR and ECHR instruments, according to which term 'criminal charges' used in Article 14 of the ICCPR and 6 of the ECHR must be interpreted broadly.<sup>85</sup> Thus, state-funded legal aid according to the international standards and best

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<sup>84</sup> See, for example, Legal Aid Ontario, "Criminal Cases"; available from [http://www.legalaid.on.ca/en/getting/type\\_criminal.asp](http://www.legalaid.on.ca/en/getting/type_criminal.asp); Internet; accessed 14 November 2009.

<sup>85</sup> See Chapter 2 of the paper for the relevant analysis.

practices has to be awarded to the individuals who meet the requirements of means and/or merits test and the ‘interests of justice’ test, independent of the fact that he/she is not a person charged with criminal offence according to the national criminal law.

### ***3.1.2. The availability of legal aid at different stages of criminal procedure***

One of the important issues regarding the scope of a right to legal aid is a moment when it becomes available to an indigent defendant. It is clear, that human rights approach dictates that in criminal cases it has to be available as soon as possible. Admittedly, the problem of *early access* to legal counsel becomes even more complicated when it comes to the situation of indigent suspects: comparing to those individuals who can retain the lawyer of their choice, those, who cannot afford to pay for legal services, have to wait for the aid to be granted to them, which jeopardises their right to early access.

Many European and non-European jurisdictions are reporting that legal aid is available for suspects *in custody* before charges are laid.<sup>86</sup> This is in particular organized through various ‘emergency’ schemes which are available to suspects at the police station or the investigator’s office. For instance, as of 2004 in seven Canadian provinces, including Ontario, Quebec and Manitoba early access to legal aid was provided to suspects in custody through the toll-free 24-hour call service assisted by the duty counsel lawyers<sup>87</sup>; in UK – through the ‘Defence Solicitor Call Centre.’<sup>88</sup>

However, in practice placing a suspect into police custody is not the only situation

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<sup>86</sup> See, for ex., Peter Soar, ed. *The New International Directory of Legal Aid*, vol. 51 (The Hague London New York: Kluwer Law International, 2002), 54, 87, 126.

<sup>87</sup> Ab Currie, "The Nature and Extent of Unmet Need for Criminal Legal Aid in Canada," *International Journal Of The Legal Profession* 11, no. 3 (2004), 196.

<sup>88</sup> Legal Services Commission, "Defence Solicitors Call Centre"; available from [http://www.legalservices.gov.uk/criminal/defence\\_solicitor\\_call\\_centre.asp](http://www.legalservices.gov.uk/criminal/defence_solicitor_call_centre.asp); Internet; accessed 26 November, 2009.

of liberty limitation possible within criminal procedure. Thus, police search, questioning, and any other physical or psychological restraints, which make an individual subjected to them think that he/she cannot leave freely, may be regarded as limitation of liberty from the point of view of the international standards.<sup>89</sup> In addition, it has to be noted, that application for and granting of legal aid takes some time, which also may place the indigent suspect/ defendant into vulnerable situation.

Scholars and human rights activists are alarmed with the situation of legal assistance at early stages of criminal procedure in many jurisdictions that are believed to have relatively well-developed legal aid systems: there are no mechanisms securing that suspects are always informed of their right to legal aid; police is often manipulating with rules of criminal procedure so that not to be obliged to ensure the presence of legal counsel (e.g., ‘informal talks’ instead of official interrogation); the ‘police station’ legal aid schemes, where exist, often utilise paralegal’s services and simplified schemes like ‘telephone consultation’, which reduces quality and undermines the value of lawyer’s assistance as a safeguard against the police abuse.<sup>90</sup>

International human rights standards require that legal aid is available at least for one *appellate stage*, but if the national legal system envisages several appellate instances, it has to be available for each of them.<sup>91</sup> The research shows that practices differ from jurisdiction to jurisdiction; thus, in Canadian Manitoba legal aid on the appellate stage may be granted on discretionary basis, based on merits of a complaint, whereas in another Canadian province - Ontario it is available to everyone who was granted legal aid at first instance. Legal aid for the appellate

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<sup>89</sup> David Harris and others, eds., *Law of the European Convention on Human Rights*, 2nd ed. (New York: Oxford University Press, 2009), 125.

<sup>90</sup> Ed Cape, Roger Smith, and Taru Spronken, "Effective Rights for Suspects and Defendants: Nature and Scope," in *Towards Effective Criminal Defence Rights: An Opening Debate* (Maastricht, the Netherlands: 2009), 14.

<sup>91</sup> See Chapter 2 of the paper for the relevant analysis.

stage is also granted automatically to those, who have received it for the first instance proceedings, in England and Wales, Finland, Denmark, Germany, and the Netherlands.<sup>92</sup>

In principle, both attitudes comply with the international standards: according to them, legal aid is provided ‘when the interests of justice so require’. For this reason, the practice of applying the relevant test when deciding whether to grant legal aid or not is not incompatible. However, it seems that if the defendant was granted legal aid for the duration of the case, the best practice is to envisage that it extends to the appellate stage.

The requirement to separately apply for legal aid for the appellate proceedings seems to be problematic at least because of two reasons: first, the application for legal aid and the procedure of its granting are time-consuming, whereas there is the time-limit for submission of the appellate complaint: it either creates a danger of the lapse of the time limit set by law, or requires that the court suspends the periods of limitation. In any case the defendant will probably have to wait for the decision regarding legal aid in custody, uncertain of his/her destiny. Second, and more important, it is hard to imagine how often it may be the case that the situation of defendant may change to better after he/she is convicted - both from the point of view of his/her financial eligibility and in terms of ‘interests of justice’ criterion.

### **3.2 The eligibility rules**

As it was already discussed every legal aid model foresees certain criteria determining the eligibility of prospective legal aid recipients for state-funded legal assistance. This is generally done by the way of using *means* test and *merits* test. In some situations only one test or neither of them may apply.

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<sup>92</sup> Soar, ed.

In UK merits test is named ‘Interests of Justice test’ or the ‘Widgery Criteria’.<sup>93</sup> To pass this test the situation of an applicant should conform with the following criteria: the likelihood of losing liberty; being previously released on parole; possibility of losing a livelihood; serious reputation damage; complexity of an applicant’s case (serious question of law involved, need to locate and interview witnesses on an applicant’s behalf or carry out other defence activities that require special knowledge). The list of conditions is open: any other circumstances may be considered.<sup>94</sup>

In New South Wales, Australia, there are two types of merit test: test A (applies to the state of South Wales matters) and test B (applies to the Commonwealth matters).<sup>95</sup> Test A basically consists of answering two questions: a) what is a benefit that the applicant may win by receiving legal aid, or a disadvantage (harm) that may be caused by rejecting legal aid and b) are there reasonable prospects of the applicant’s case success. Test B requires an assessment of the following questions: a) the reasonable prospects of success of the case; b) would a cautious litigant risk his own funds in an analogous case and c) whether it is ‘appropriate’ to spend limited public funds on it (considering an overall benefit to the applicant and sometimes – the community).<sup>96</sup>

Independently of merits of a case, a prospective recipient of legal aid should, as a rule, qualify for legal aid in terms of his/her financial situation. The means test, according to Legal Aid Ontario (LAO) consists of two parts: estimation of assets

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<sup>93</sup> Legal Services Commission, "Interests of Justice Test"; available from [http://www.legalservices.gov.uk/criminal/getting\\_legal\\_aid/interests\\_of\\_justice\\_test.asp](http://www.legalservices.gov.uk/criminal/getting_legal_aid/interests_of_justice_test.asp); Internet; accessed 26 November, 2009.

<sup>94</sup> Ibid.

<sup>95</sup> Legal Aid New South Wales, “Merit Test A: State Affairs”; available from [http://www.legalaid.nsw.gov.au/asp/index.asp?pgid=758&cid=993&policyid=1&chapterid=26&sectionid=5973#paragraph\\_19044](http://www.legalaid.nsw.gov.au/asp/index.asp?pgid=758&cid=993&policyid=1&chapterid=26&sectionid=5973#paragraph_19044); Internet; accessed 26 November, 2009.

<sup>96</sup> Legal Aid New South Wales, “Merit Test B – Commonwealth matters”; available from <http://www.legalaid.nsw.gov.au/asp/index.asp?pgid=758&cid=993&policyid=1&chapterid=26&sectionid=597>; Internet; accessed 26 November, 2009.

and income.<sup>97</sup> When LAO is checking an applicant's assets, they not only consider cash, bank accounts, etc., but any other assets that may be relatively easily sold by an applicant. Moreover, if an applicant owns a house, he is expected to cover his/her legal fees by the way of getting a loan against it. A lien against the property can be signed in the office of Legal Aid. When evaluating an income, LAO is taking into account all sources of applicant's income, including salaries, self-employed earnings and social benefits payments, and makes cost of leaving deductions that depend on size of an applicant's family, etc. When assessing an applicant's family situation, LAO is considering not only dependent children and spouse, but common law partner and same-sex partner. Accordingly, LAO will consider an applicant's income that is left after deduction of amounts for rent (mortgage), groceries, and cost of day care, clothes as well as other essential life expenses. An applicant may be asked to partly cover the costs of his/her case.

At present in UK an applicant who is seeking to be legally represented in the criminal case apart from the Interests of Justice (merits) test has to pass financial eligibility test. It only considers income and expenses, not capital assets of an applicant, as it is in Canada. The test is construed of two stages: the 'initial means test' represents an assessment of the applicant's income divided between the applicant's family members; a 'full means test' is applied if in the result of the initial means test, the applicant's income is within £12,475 and £22,325. From the applicant's annual income the taxes, essential life expenses and some other costs are being deducted so that to figure out the applicant's 'disposable income'. In UK the means test also exists in several variants, for instance, 'complex means test' is applied when the applicant has 'complex financial circumstances' and 'Hardship Reviews' – "[...] if an applicant can show they are genuinely unable to fund their

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<sup>97</sup> Legal Aid Ontario, "Getting Legal Aid"; available from <http://legalaid.on.ca/en/getting/eligibility.asp>; Internet; accessed 14 November 2009.

own representation.”<sup>98</sup>

In most advanced legal aid systems there are categories of individuals who are treated under separate eligibility rules overall or in connection to some specific issues; the relevant schemes can form a part of wider anti-discrimination policies<sup>99</sup>, policies directed at the prevention of juvenile crime, etc.

Thus, in many jurisdictions juveniles constitute a separate category in terms of eligibility for legal aid. In the UK means test does not apply to the minors under 16 and with some small exceptions also to those who are under 18<sup>100</sup>. In Canadian Ontario, on the contrary, legal aid to the juveniles may only be provided if their parents or guardians meet general eligibility requirements.<sup>101</sup>

Examples of another category of individuals who may qualify for legal aid according to special eligibility rules are women subjected to domestic violence or being at risk of ill-treatment, mentally disabled individuals, refugees, migrants and ethnic minorities. For instance, Legal Aid Ontario rules regarding legal aid envisage that individuals of ‘aboriginal ancestry’ do not have to pass general tests, but have to be treated according to separate rules, if their case is related to the specific ‘Aboriginal circumstances or rights’.<sup>102</sup>

Prisoners are another category of individuals that in many jurisdictions qualify for legal aid under special rules. Thus, in UK state-funded legal aid is available for

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<sup>98</sup> Legal Services Commission, "Means testing in the magistrates court"; available from [http://www.legalservices.gov.uk/criminal/getting\\_legal\\_aid/means\\_testing\\_magistrates\\_court.asp](http://www.legalservices.gov.uk/criminal/getting_legal_aid/means_testing_magistrates_court.asp); Internet; accessed 26 November, 2009.

<sup>99</sup> For example, in Ontario, Canada free legal services, available to the persons of aboriginal ancestry is tailored so that to meet their specific needs and issues. Legal Aid Ontario, "Getting Legal Help"; available from <http://www.legalaid.on.ca/en/getting/aboriginal.asp>; Internet; accessed 26 November 2009.

<sup>100</sup> Ibid.

<sup>101</sup> Legal Aid Ontario, "Getting Legal Help"; available from [http://www.legalaid.on.ca/en/getting/type\\_youthcriminal.asp](http://www.legalaid.on.ca/en/getting/type_youthcriminal.asp); Internet; accessed 26 November 2009.

<sup>102</sup> Legal Aid Ontario, "Getting Legal Help"; available from <http://www.legalaid.on.ca/en/getting/aboriginal.asp>; Internet; accessed 26 November 2009.

prisoners in cases relating to ‘progression through the prison system’, disciplinary and parole board hearings.<sup>103</sup> It is worth noting that volume of spending on legal aid to prisoners in UK in 2008/9 was about £22m, whereas in 2001/2 it was over £1m.<sup>104</sup>

In many countries, including the USA, UK, Canada, New Zealand, Philippines, Australia and other, legal aid is also available to *victims* of crime. In some jurisdictions there are special state-run legal aid programmes for separate categories of victims, such as victims of domestic violence, forced labour and other. Victims of crime may have to pass eligibility test.<sup>105</sup>

### 3.3 The methods of legal aid delivery

Commentators usually refer to three main types of actors who directly participate in providing free legal aid in criminal cases. These are: a) privately practicing lawyers appointed on a case by case basis, a system that is usually named ‘*ex-officio*’ in Europe (*‘judicare’* in the US terminology); b) salaried practitioners directly employed for public legal services delivery by the body administering legal aid and c) so-called ‘public defenders’<sup>106</sup> - staff attorneys employed by an independent organization (Public defender office) and undertaking a full representation of defendants.<sup>107</sup> Any of these schemes may be employed within ‘contracted services’ scheme, which envisages that legal aid providers have to compete for a contract granting state funds for delivering public legal services. Each model has its *pros* and *cons*, will be briefly summarized below.

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<sup>103</sup> Vicky Ling and Simon Pugh, *Understanding Legal Aid: A Practical Guide to Legal Aid Funding* (Law Society Publishing, 2003), 191.

<sup>104</sup> Legal Services Commission, "Prison Law Funding"; available from [http://www.legalservices.gov.uk/criminal/prison\\_law\\_funding.asp](http://www.legalservices.gov.uk/criminal/prison_law_funding.asp); Internet; accessed 26 November, 2009.

<sup>105</sup> See, for example, Legal Aid Ontario, "Getting Legal Help: Domestic Violence"; available from [http://www.legalaid.on.ca/en/getting/type\\_domesticviolence.asp](http://www.legalaid.on.ca/en/getting/type_domesticviolence.asp); Internet; accessed 26 November 2009.

<sup>106</sup> The term may have different meaning in some jurisdictions

<sup>107</sup> Smith,6. See also: "Making Legal Aid a Reality: A Resource Book for Policy Makers and Civil Society", 87.



The *ex-officio* model of legal aid delivery makes it possible to more thoroughly decide whether to grant legal aid in each case (this, however, makes sense only when there is a discretion in deciding whether to grant legal aid or not). This model also ensures that private practitioners, lawyers who generally do not depend on the money paid for public legal services, are involved in the kind of work that is closely tied with many human rights issues.<sup>108</sup> This system sometimes is combined with the right of the defendant to enjoy the assistance of a lawyer of their own choice.

Among the disadvantages of this system, admitted by some commentators, are: poor quality control, especially when the quality of services is evaluated by private practitioners themselves, and higher costs.<sup>109</sup> It is worth noting that the number of researches carried out in the field prove that *ex-officio* model of legal aid delivery not always means higher costs.<sup>110</sup>

Salaried practitioners' scheme – employment of lawyers (groups of lawyers) by the agency administering legal aid – is advantageous from the point of view of costs. The problem with salaried practitioners is that they are often underpaid and overloaded, experiencing problems with motivation for work and professional self-esteem, which again brings up quality concerns.<sup>111</sup>

Public defenders' scheme affords similar advantages (possibility to maintain low costs) and, to some extent, raises similar concerns as salaried practitioners' scheme (low esteem in profession due to the routine caseload and traditionally low

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<sup>108</sup> Smith, 6.

<sup>109</sup> Smith, 7. See also: Rekosh and others., p.p. 19 - 20.

<sup>110</sup> Roger Bowles and Amanda Perry, "International Comparison of Publicly Funded Legal Services & Justice Systems," (2009). <http://www.justice.gov.uk/publications/docs/comparison-public-fund-legal-services-justice-systems.pdf>; Internet; Accessed 25.11.2009, 34.

<sup>111</sup> See, for example, "Making Legal Aid a Reality: A Resource Book for Policy Makers and Civil Society.", 12.

salaries).<sup>112</sup> Comparing to the two prior models public defenders are normally working as a team, which makes it possible to build up a high spirit and regular exchange of professional experience. It is easier to realise a quality control mechanism. At the same time, the advantages may well turn into disadvantages, thus low costs are often achieved at the expense of quality; professional control within a team may turn out to deter lawyer's independence and possibility to act freely when defending his/her client.<sup>113</sup>

In practice most of the existing public legal services systems combine two or three of the enumerated models. Employing various aid delivery mechanisms *inter alia* not only gives an opportunity to compare the effectiveness of different models, but to make the cost-effective choices of deliverers in different cases. In the jurisdictions, where the mixed system of legal aid delivery is operating, for example, in the Netherlands, Spain, some provinces of Canada, Finland, Iceland, Hungary indigent defendants have a choice between appointing a private lawyer through legal aid scheme or using public defender assistance, whereas in Poland, Switzerland and Sweden – they do not.<sup>114</sup>

### **3.4 Administration and financing of state-funded legal aid**

#### ***3.4.1 Administration of legal aid delivery***

There are several types of arrangements as regards administration of legal aid. The term 'administration of legal aid' for the purposes of the present research is to be understood as a complex activity generally embracing such issues as distributing public funds allocated for legal aid, deciding on eligibility of the applicants, selection and contracting of legal aid deliverers, exercising quality control and formulating relevant policies.

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<sup>112</sup> Rekosh and others, 28.

<sup>113</sup> "Making Legal Aid a Reality: A Resource Book for Policy Makers and Civil Society", 55.

<sup>114</sup> See, for ex., Soar, ed., p.p. 54, 126, 201, 220, 223, 226.

Based on the analysis of the existing legal aid models, these functions may be divided between several agencies or concentrated within one of them; usually, these are: a governmental body (as a rule, the Ministry of Justice or alike), a legal professionals association, or a specialised legal aid agency, independent both from government and legal profession.

Some of the enumerated functions (reviewing applications for legal aid, quality control, and distribution of funds) may be also assigned to Public Defender offices and courts; however, these are used as subsidiary mechanisms. Thus, in Netherlands, Austria and Germany, for instance, the issues related to administration of legal aid are responsibility of Ministry of Justice while decision to grant legal aid in criminal case is made by the court where the case is being heard (or the court situated in the district of an applicant's domicile).<sup>115</sup>

The 'pros' of this way of administering legal aid may be lower costs (there is no need to establish a specialised agency); the decision-making process is not being split between different agencies – it is a court, which decides whether the interests of justice require that legal aid is granted or not and the court provides for the lawyer. However, there are 'cons' as well: the courts are often overloaded and these additional responsibilities will create an additional load; the way an independent agency can deal with the relevant issues is much more flexible and sophisticated in terms of accessing the needs and finding the financial solutions, etc. In some cases defence lawyers may be perceived by the judges as an obstacle to a speedy hearing, especially taking into consideration such factors as the professional burnout and the bureaucratic approaches characteristic of some representatives of the judiciary.<sup>116</sup>

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<sup>115</sup> See, for ex. *ibid.*, 52, 60, 124. For the description of existing mechanism of the administration of legal aid see also: Smith, 4-6;

<sup>116</sup> Moshe Hacohen, "Israel's Office of Public Defender: Lessons from the Past, Plans for the Future," in *Access to Justice in Central and Eastern Europe: A Source Book*(Budapest: PILI 2003), 134.

Many countries with advanced legal aid models, however, opted for an independent body scheme. A body specialised in administering legal aid is organisationally independent from government (although its board may include state officials) and entitled to decide the following issues: making a choice of prospective services providers and contracting; distribution of funds between the service providers; distribution, planning and optimising expenditures; exercising quality control; reviewing individual applications for free legal aid and deciding on eligibility; running professional learning and training programmes etc.<sup>117</sup> Depending on jurisdiction this body may be called ‘commission’, ‘board’ or ‘corporation’. Examples of such bodies are Legal Services Commission (UK), Legal Services Corporation (the USA),<sup>118</sup> Legal Aid Ontario (Canada). In the USA establishing of similar national body responsible for administering legal aid in criminal cases - National Center for Defense Services is being discussed.<sup>119</sup>

Administration of legal aid through a body, which is independent both from state authorities and those who are delivering legal has many benefits. Administration of legal aid located with legal profession – usually in form of creating a board composed of the delegated members of bar associations was abandoned by most of the countries, where it existed previously, although it might be of use in some countries, for instance, where legal aid systems are relevantly new and wider involvement of legal profession could be useful.<sup>120</sup>

An independent body administering legal aid is better solution also in terms of capacity for statistical analysis, transparency and ability to provide professional

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<sup>117</sup> Rekosh and others, 18.

<sup>118</sup> Dealing with civil cases only.

<sup>119</sup> Norman Lefstein, "A Broken Indigent Defense System: Observations and Recommendations of a New National Report," *Human Rights: Journal of the Section of Individual Rights & Responsibilities, American Bar Association* 36, no. 2 (2009). [http://www.abanet.org/irr/hr/spring09/HR\\_spring\\_2009.pdf](http://www.abanet.org/irr/hr/spring09/HR_spring_2009.pdf) (accessed 25 November 2009), 14.

<sup>120</sup> Roger Smith, Peter van den Biggelaar, and David McQuoid-Mason, "Models of Organization of a Legal Aid Delivery System," in *Access to Justice in Central and Eastern Europe: Source Book* (Public Interest Law Initiative, 2003), 64.

training. Finally, an independent body is most suitable for the efficient management of complex legal aid systems integrating different types of service providers and ensures the choice of the most cost effective forms of delivery and ability to meet the varying needs of the applicants for legal aid.<sup>121</sup> The way in which body administering legal aid is formed may differ. In some models it is composed of the representatives of various stakeholders: responsible governmental bodies, such as executive bodies, courts, criminal prosecution authorities, as well as the representatives of legal profession, academics and civil society organisations. Smith describes this type of arrangement as one of the most efficient models of organising of legal aid provision. The type of arrangement which Smith calls a 'commission model' consists in an independent governmental body, which is responsible for selection and provides for the lawyers remuneration. The members of such commissions may be appointed in different way, depending on the jurisdictions.<sup>122</sup>

As regards state agency responsible for developing policies and budgets it may significantly differ in various jurisdictions with relevant functions vested in executive, judicial or legislative bodies. For instance, in England and Wales role of such an agency belongs to the Lord Chancellor's Department; in federal states, such as the USA or Canada the picture is not only different from state to state, but additionally being complicated because of the necessity to split responsibilities following the federal – state issues (funding) dichotomy.<sup>123</sup>

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<sup>121</sup> Ibid., 61.

<sup>122</sup> Smith, "Models of Organisation of the System for Provision of Legal Aid", 4.

<sup>123</sup> Ibid.

### 3.4.2 Financing of legal aid

As regards mechanisms of financing of legal aid, it is considered to be the best practice when public funds are directly allocated by a legislative body to an independent body administering legal aid as a separate item in the budget.<sup>124</sup> Legal aid budgets may be composed of national and local public funds; in federal states - also funds of federal subunits. The way the issue is decided differs, for instance in Canada legal aid is generally financed from provincial governments' funds; in some circumstances, in particular as regards criminal cases, the expenses are divided between provincial and local governments.<sup>125</sup> In the USA as of 2005 the states average share in the legal aid budget was over 50% of overall funding and little less than 50 % was contributed by the counties, which shows that federal funding is either not provided or insignificant.<sup>126</sup>

What expenditures are covered by the legal aid funds? The most 'expensive' legal aid budget item is, of course, lawyers' charges. The mechanism of calculating the legal aid lawyer's charge depends on whether it is a private practitioner, appointed as 'ex-officio' or a staff attorney. 'Salaried' lawyers and so-called 'public defenders' are usually paid stable rates. 'Ex-officio' practitioners may be paid by time spent and/or by the grade of the case or by block contract that envisages a 'package' of cases and services for certain reward.

Until recently in the UK legal aid charges were calculated on the basis of hours spent by a lawyer working on a case; today this is being revised as part of wider legal aid reform in UK, a considerable part of which is aimed at optimizing the

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<sup>124</sup> "Promoting Access to Justice in Central and Eastern Europe: Bulgaria and Poland," in *Access to Justice in Central and Eastern Europe: A Source Book*(Budapest: Public Interest Law Initiative, 2003), 430.

<sup>125</sup> Soar, ed., 48.

<sup>126</sup> American Bar Association. The Spangenberg Group, *State and County Expenditures for Indigent Defense Services in Fiscal Year 2005- 2006*; available from [http://www.abanet.org/legalservices/sclaid/defender/downloads/FINAL\\_REPORT\\_FY\\_2005\\_Expenditure\\_Report.pdf](http://www.abanet.org/legalservices/sclaid/defender/downloads/FINAL_REPORT_FY_2005_Expenditure_Report.pdf); Internet; accessed 12 November, 2009, 37.

expenditures on legal aid: “Moving to a market based system – such as best value tendering - will ensure that we buy criminal legal services at the best price for the taxpayer as well as ensuring quality” – say Legal Services Corporation website. “In the meantime fixed, graduated and standard fees will encourage efficiency and help the market prepare for wider competition”.<sup>127</sup>

Amount of legal aid lawyers’ remuneration is frequently a subject of many clashes between legal profession and governments. When legal aid budget is prepared by the body administering legal aid or the Ministry of Justice it is often done after consultations with legal profession; however, requests of higher rates on part of legal profession are more often left without due attention as recent trends in many parts of the world show that governments are pushing for cutting the legal aid expenses.<sup>128</sup>

It is clear that quality public legal services system requires adequate levels of funding. The problem of willingness to grant the adequate funding for these purposes is to a large extent political and is very much connected to the values dominating in a given society. Legal services are very expensive everywhere in the world. Spending taxpayers’ money ‘on lawyers’ and – as regards criminal cases – on ‘criminals and their advocates’ is not very popular among voters and consequently politically gainful; like any liberal reform in sphere of criminal justice, broadening the access of suspects and those accused of committing crimes to legal aid may be regarded by the population as threatening public safety and likely to increase crime levels.<sup>129</sup> Not surprisingly governments everywhere are pushing for lowering levels of expenditures.

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<sup>127</sup> Legal Services Corporation, “Transforming criminal legal aid”; available from [http://www.legalservices.gov.uk/criminal/transforming\\_criminal\\_legal\\_aid.asp](http://www.legalservices.gov.uk/criminal/transforming_criminal_legal_aid.asp); Internet; accessed 25 November, 2009.

<sup>128</sup> "Making Legal Aid a Reality: A Resource Book for Policy Makers and Civil Society", 54.

<sup>129</sup> Nuno Garoupa and Frank H. Stephen, "Optimal Law Enforcement with Legal Aid " *Economica* 2004, 493.

Unfortunately, the world experience proves that reduced levels of funding inevitably affect quality and scope of legal aid. For instance, the public legal services scheme adopted in Quebec, Canada, was known as one of the most successful systems in the world; in the 1990s its funding had fallen dramatically and consequently the capacity of the system to deliver legal aid became minimal.<sup>130</sup> According to the Legal Services Commission 2001 report English lawyers have warned the government about possibility of full or partial termination of legal aid work on their part: "...up to 50 per cent of firms are seriously considering stopping or significantly reducing publicly funded work."<sup>131</sup>

It is useful to note that legal aid budgets differ enormously from country to country. Thus, total amount spent on legal aid in criminal cases in England and Wales in 2004 was €33.5 per capita that was more than three times higher than in the Netherlands (€8.8) and more than ten times – comparing to France (€2.0).<sup>132</sup> The countries where inquisitorial systems of criminal justice operate are believed to have their legal aid expenditures much lower because this “reduces the need for expensive, adversarial court-based proceedings.”<sup>133</sup>

In terms of decision-making the best world practice consists in elaboration of legal aid budget by an independent body administering legal aid (upon consultations with relevant governmental bodies and legal profession) and the consequent adoption of the final decision by a legislature. It is important that not only adoption of legal aid budget, but budget cuts were exclusively in legislature’s so that to ensure transparency and allow for an open public debate.

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<sup>130</sup> Smith, Biggelaar, and McQuoid-Mason, "Models of Organization of a Legal Aid Delivery System", 4.

<sup>131</sup> Legal Services Commission, “About us”, available from: [http://www.legalservices.gov.uk/archive/archive\\_about.asp](http://www.legalservices.gov.uk/archive/archive_about.asp)*Annual Report 2001/02 HC949*; Internet; accessed 25 November 2009, para 2.7.

<sup>132</sup> Bowles and Perry, 23.

<sup>133</sup> Alastair Hudson, *Towards a Just Society: Law, Labour and Legal Aid* (New York: Continuum International Publishing Group Ltd., 1999), 151.



Finally, it has to be admitted that many states are not only subsidizing state-run systems of legal assistance, but using various other methods so that to increase availability of free legal aid: they support *pro bono* work, activities of legal clinics and the civil society organisations delivering legal assistance to the indigent defendants, etc. in form of tax benefits, providing governmental grants, etc. launching special insurance programmes are good alternatives to traditional schemes.

## CHAPTER 4

### **THE RUSSIAN SYSTEM OF STATE-FUNDED LEGAL AID FOR CRIMINAL CASES: PROBLEMS AND PERSPECTIVES OF REFORMS**

It is almost impossible to describe Russian model of legal aid delivery through a comparison of its elements to the advanced systems of legal aid delivery. The mechanism that is employed in Russia is characteristic of many post-communist states and is quite primitive. There is only one avenue through which the state-funded legal aid may be delivered in criminal case: it is appointing of an *ex-officio* lawyer by the criminal inquirer, an investigator, a prosecutor (further in the text - the ‘prosecuting authorities’)<sup>134</sup> or a judge either upon the indigent defendant’s request or as a mandatory defence (the cases defined in law, when the participation of a lawyer is compulsory). In such cases the absence of defence lawyer is considered to be a serious violation of procedural law which in itself is a sufficient basis for the judgement to be overturned by the higher courts (see the analysis of the case-law in section 4.1.1).

In all the other cases in Russia the competent governmental body has to appoint a lawyer for the defence if *the defendant asks for it* or if he/she at least *did not refuse from it in writing* (Art. 52 (1) of the RF Criminal Procedure Code (CPC)<sup>135</sup>). No financial or merits test apply and, thus, even those defendants who

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<sup>134</sup> The term is used conditionally for the purposes of the instant research.

<sup>135</sup> Уголовно-процессуальный Кодекс Российской Федерации/ Code of Criminal Procedure of the Russian

in principle can afford paying for legal services can be provided with free *ex-officio* counsel. In fact, the competent bodies have no discretion in deciding on whether to appoint a lawyer to an unrepresented defendant or not, apart from the cases when the defendant refuses from the lawyer in writing.<sup>136</sup> According to Articles 11 and 16 of the CPC, the prosecuting authorities and courts are not only obliged to inform the defendant of his/her rights, but must ensure the possibility of their realisation.

This could sound like a most liberal and comprehensive legal aid system in the world if the defence offered by it was not that weak and illusory in reality. The injustices and human rights violations that are hidden in the Russian system of legal aid go far beyond the questions of public spending and the indigent assistance as a prerequisite of legal equality.

All the flaws of Russian criminal justice system: corruption, impunity of the public officers abusing their power, unprofessionalism, disrespect to law and human dignity, systematic ignoring of presumption of innocence and other core principles of fair trial are inevitably affecting the legal aid practices and – in turn – these evils are flourishing in particular due to the corrupted state-funded legal aid system.

#### **4.1. The scope of the right to state-funded legal aid in criminal cases under the Russian law**

First of all, I would like to define a theoretical scope of the right to free legal aid in Russia and to briefly characterise the legal norms that regulate the mechanism of the delivery of state-funded legal aid in criminal cases. For Russia as a country with a civil law system and strong normativistic tradition a question of the precise content of the provisions governing a given sphere is often decisive. That is why legal controversies, including human rights disputes, are being resolved by courts

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Federation, adopted by Federal Law No. 174-FZ, Rossiiskaia Gazeta [official publication] No. 249, Dec. 22, 2001.

<sup>136</sup> Article 52 of the RF Criminal Procedure Code.

mainly on the basis of the texts of the domestic normative acts. As it will be demonstrated below, a number of the minimum standards in regard to the right to free legal assistance set forth in the international treaties, to which Russia is a party, as well as in the RF Constitution<sup>137</sup> are not implemented in Russia either because of the absence of the relevant recognition in law or the deficiencies of practical implementation. The provisions of the RF Criminal Procedure Code and the RF Law “On Advocate Activities and Advocate Profession in the Russian Federation”<sup>138</sup> are often too general or lack clarity; the absence of the adequate mechanism of enforcement and serious problems with funding considerably circumscribe the access to state-funded legal aid.

#### ***4.1.1 The constitutional scope of the right to free legal aid***

Article 48 (1) of the Constitution of the Russian Federation guarantees the right of everyone to qualified legal assistance, free *in cases envisaged by law*. The meaning and the scope of the constitutional right to free legal aid as well as its implementation in law and practice must be assessed in the light of the following provisions of the RF Constitution: Article 15 (4) of the RF Constitution stipulates that the international treaties to which Russia became a party, constitute an element of Russia’s legal system and that laws of Russian Federation shall conform to the international treaties; Article 17 (1) of the RF Constitution establishes an obligation on part of the Russian Federation to guarantee rights and freedoms in accordance with the ‘internationally recognized principles and norms of international law’, Article 18 of the RF Constitution sets forth that rights and freedoms of man and citizen shall be directly applicable and determine the meaning of laws and policies.

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<sup>137</sup> Конституция Российской Федерации/ The Constitution of the Russian Federation, Adopted at National Voting on December 12, 1993. Came into force on 25 December, 1993.

<sup>138</sup> Закон Российской Федерации «Об адвокатуре и адвокатской деятельности в Российской Федерации/ The RF Law “On Advocate Activities and Advocate Profession in the Russian Federation”, adopted by State Duma of the RF Federal Assembly 26.04.2002 No. 63-FZ, Rossiiskaia Gazeta [official publication] No. 100, Jun. 5, 2002.

The cited constitutional provisions mean that the scope of the right to state-funded legal aid as defined in the RF domestic law may not be narrower than the minimum standards established in the international human rights law; the latter are directly applicable to domestic legal disputes; these are not the domestic laws that determine the basic rights, but the basic rights that should determine the content of laws and policies.

Russia is a party to the International Covenant on Civil and Political Rights,<sup>139</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Articles 6.1 and 6.3.),<sup>140</sup> the Convention on the Rights of a Child (Articles 37 (d), 40.1 and 40.2(b)(ii) of CRC),<sup>141</sup> and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6(3) (c))<sup>142</sup> and, therefore, the relevant instruments may theoretically be invoked in legal disputes in any court of the Russian Federation based on the incompatibility between the domestic and international law. This is not only the international instruments but the relevant jurisprudence which is recognised in the Russian Federation as legally binding.<sup>143</sup>

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<sup>139</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html> [accessed 10 November 2009].

<sup>140</sup> UN General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment : resolution / adopted by the General Assembly.*, 10 December 1984, A/RES/39/46, available at: <http://www.unhcr.org/refworld/docid/3b00f2224.html> [accessed 10 November 2009].

<sup>141</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.unhcr.org/refworld/docid/3ae6b38f0.html> [accessed 10 November 2009].

<sup>142</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5, available at: <http://www.unhcr.org/refworld/docid/3ae6b3b04.html> [accessed 10 November 2009].

<sup>143</sup> See, for example, Федеральный закон "О ратификации Конвенции о защите прав человека и основных свобод и Протоколов к ней"/ the Federal Law "On the Ratification of the Convention on Protection of Human Rights and Basic Freedoms" of 30.03.1998 N 54-ФЗ, came into force on 20.02.1998. Available from Consultant Pus legal database, Article 1, para. 5.

Article 19 (1), (2) of the RF Constitution guarantees equality before the law and court and obligation of the state to guarantee equality of rights and freedoms independent of differences, including such as property status. Article 123 (3) and (4) of the Constitution of Russian Federation requires that judicial proceedings are held with regard to the principles of adversarialism and equality of the parties. Right to free legal aid envisaged in the Article 48 of the Constitution together with the provisions of articles 19 (1), (2) and 123 (3) and (4) of the RF Constitution must be construed so that to guarantee that the defendants who cannot afford to pay for legal assistance enjoy their rights and freedoms without unjustified discrimination and that state-funded legal aid provided to the indigent defendants ensures that their fair trial rights are fully respected. The scope of the right to legal aid in criminal cases is further defined in the decisions of the RF Constitutional Court.

Thus, in two decisions - the Ruling of the Constitutional Court of 27<sup>th</sup> March 1996 N 8-П re the complaint of Mr. Gurdzhijants and others<sup>144</sup> and the Ruling of 25 October 2001 г. N 14-п re the complaint of Mr. Golomidov and others,<sup>145</sup> the Court held that the principle of adversarialism envisaged in Article 123 (3) of the RF Constitution excludes the possibility of making the realization of the constitutional right to legal counsel by defendants conditional upon the discretion of the prosecuting authorities or courts. The Ruling of 25 October 2001 also addressed the problem of the permission, which had to be obtained by an advocate

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<sup>144</sup> Постановление Конституционного Суда РФ от 27.03.1996 N 8-П "По делу о проверке конституционности статей 1 и 21 Закона Российской Федерации от 21 июля 1993 года "О государственной тайне" в связи с жалобами граждан В.М. Гурджиянца, В.Н. Синцова, В.Н. Бугрова и А.К. Никитина" / The Constitutional Court of the Russian Federation, Decision of 27<sup>th</sup> March 1996 N 8-П re the complaint of Mr. Gurdzhijants and others. Para. 5 of the reasoning part. Available at Consultant Plus legal database.

<sup>145</sup> Постановление Конституционного Суда РФ от 25.10.2001 N 14-П "По делу о проверке конституционности положений, содержащихся в статьях 47 и 51 Уголовно - процессуального кодекса РСФСР и пункте 15 части второй статьи 16 Федерального закона "О содержании под стражей подозреваемых и обвиняемых в совершении преступлений", в связи с жалобами граждан А.П. Голомидова, В.Г. Кислицина и И.В. Москвичева" / The Constitutional Court of the Russian Federation, Decision of 25 October 2001 г. N 14-п re the complaint of Mr. Golomidov and others. Para. 5 of the reasoning part. Available at Consultant Plus legal database.

from the prosecuting authorities or court to have a meeting with a client in pre-trial detention. The Court held that this practice was unconstitutional for it can create the impediments to the realization of defendant's right to timely access legal counsel.<sup>146</sup>

In the Rulings of 26 December 2003 re the complaint of Mr. Shengelaya and others<sup>147</sup> and of 08.02.2007 re the complaint of Mr. Efimenko<sup>148</sup> the Constitutional Court held that since the Constitution only determines the starting moment when an individual becomes entitled to legal aid, but not the moment when such right is no longer available, legal aid should be also available to convicts (acquitted) and prisoners. The state-funded legal assistance should be available for all types of the appellate proceedings. As regards the convicts, who were imprisoned, this also should include the activities directed at the protection of rights of prisoners from the violations by the administration of a prison.

The RF Constitutional Court Ruling of 08.02.2007 N 257-O-II re the complaint of Ms Murtazina<sup>149</sup> was related to the specific issue of availability of state-funded legal aid for the appeal proceedings. In this ruling the Court reiterated its previous positions delivered in regard to the right to legal counsel as such and

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<sup>146</sup> Ibid., para.4.

<sup>147</sup> Постановление Конституционного Суда РФ от 26.12.2003 N 20-П "По делу о проверке конституционности отдельных положений частей первой и второй статьи 118 Уголовно-исполнительного кодекса Российской Федерации в связи с жалобой Шенгелая Зазы Ревазовича"/ The Constitutional Court of the Russian Federation, Decision of 26 December 2003 No. 20 – п re the complaint of Mr Shengelaya and others, para.2. of the reasoning part. Available at Consultant Plus legal database.

<sup>148</sup> Определение Конституционного Суда РФ от 08.02.2007 N 252-О-П "По жалобе гражданина Ефименко Сергея Александровича на нарушение его конституционных прав положениями пунктов 1 и 5 части первой и части третьей статьи 51, части второй статьи 376 Уголовно-процессуального кодекса Российской Федерации"/ The Constitutional Court of the Russian Federation, Ruling of 08.02.2007 N 252-О-П re the complaint of Mr Efimenko, para.2. of the reasoning part. Available at Consultant Plus legal database.

<sup>149</sup> Определение Конституционного Суда РФ от 08.02.2007 N 257-О-П "По жалобе гражданки Муртазиной Лилии Дмитриевны на нарушение ее конституционных прав положениями частей второй и пятой статьи 50 Уголовно-процессуального кодекса Российской Федерации"/ The Constitutional Court of the Russian Federation, Ruling of 08.02.2007 N 257-О-П re the complaint of Mrs Murtazina. Available at Consultant Plus legal database.

stated that they are also applicable to the right to *state-funded legal aid*.<sup>150</sup> The Court held that in the RF the right to free legal aid is not limited to some separate procedural stages and cannot depend on the discretionary decision of the competent authorities; in each case when a defendant applies for legal assistance the lawyer should be appointed by the prosecuting authorities or the court.<sup>151</sup> The principle of equality of arms, in view of the Court, requires that on all the stages of criminal procedure the defendant and the prosecution were in equal positions: for the indigent defendant this means, *inter alia* access to free legal aid.<sup>152</sup>

In the Ruling of the Constitutional Court of 6<sup>th</sup> February 2004 re the complaint of Mr. Demianenko<sup>153</sup> the Court found unconstitutional the practice when the testimonies and the confessions made by defendants in absence of a lawyer, and later withdrawn, although formally regarded by the courts as inadmissible evidence, were routinely put in the foundation of the guilty verdicts by the way of re-stating of the data obtained from defendant into the testimony given to a court by witness, inquirer or investigator. The significance of this ruling was enormous and the prosecuting authorities had to take seriously the legal requirement of the participation of the defence lawyer on the early stages of criminal procedure.

#### ***4.1.2 The right to free legal assistance according to the RF Code of Criminal Procedure***

According to the RF Criminal Procedure Code (Article 49 (3)) the counsel of the defence is to be admitted to participation in the criminal case from the moment

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<sup>150</sup> Ibid, para. 3 of the reasoning part.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid., para. 5 of the reasoning part.

<sup>153</sup> Определение Конституционного Суда РФ от 06.02.2004 N 44-О "По жалобе гражданина Демьяненко Владимира Николаевича на нарушение его конституционных прав положениями статей 56, 246, 278 и 355 Уголовно-процессуального кодекса Российской Федерации"/ The Constitutional Court of the Russian Federation, Ruling of 6<sup>th</sup> February 2004 N 44- O re the complaint of Mr Demianenko, para. 2 of the reasoning part. Available at Consultant Plus legal database.



when a person is being accused of committing a crime; if a case was open in respect of identified person – immediately when such file is open (para. (3) (2)); the defence lawyer has to be admitted when a person is detained in connection to suspicion in committing a crime (para. 3 (3)) or subjected to any other measures of the procedural coercion (any other procedural actions that may limit the rights and freedoms of the suspect) (para. 3 (5)). The indigent defence, according to the Article 50 of the Code, should be appointed by the inquirer, the investigator, the prosecutor, or by the court at the request of the suspect (accused) depending on the stage of criminal procedure, when such need occurs.<sup>154</sup> The provisions of the Code, therefore, in principle envisage a possibility of ‘early access’ to legal counsel, however, in practice, there is no comprehensive and meaningful mechanism, which ensures that every person detained by police or facing the criminal charges has an access to a lawyer or even is informed of such a right.

Moreover, in cases when the lawyer *is* appointed by the police inquirer (investigator) his/her presence often turns out to be either mere formality or put the defendant even in worse position than before because of the collusion between the advocate and the prosecution.

Apart from the cases of the appointment of a lawyer *upon the defendant’s request*, the prosecution is *obliged to appoint* a lawyer in every case when a suspect (accused) who is apprehended or taken into custody did not employ his/ her own counsel or the lawyer is not able to attend him/her within 24 hours unless the defendant refuses from an appointed lawyer in writing (para. 3 (4) of the Art. 50). Even if the defendant refuses from *ex-officio* counsel the prosecutor and court have to appoint a lawyer if the defendant’s case fall within a list of cases when the participation of a lawyer is obligatory. Moreover, no procedural action can be

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<sup>154</sup> At the same time, convicted individuals who were provided with free legal aid may have to pay back the costs of legal services and other costs of justice if the court decides so (Art. 132 of the RF Criminal Procedure Code).

carried out without a presence of a defence lawyer in such cases.

Article 51 of the Code enumerates seven cases when participation of a defence lawyer is obligatory: the suspect (accused) *has not refused* from the defence counsel in the order established by Article 52 of the Code; he/she is a minor or cannot defend himself/herself in person because of the physical or mental disability; the suspect (accused) does not know the language in which the proceedings are conducted; the defendant is accused of committing a crime for which he/she can be sentenced to an imprisonment for a term of over fifteen years, of life imprisonment or of capital punishment; the criminal case is tried by a jury; the accused lodged a motion for the examination of his case in accordance with the simplified procedure for trying the cases where a defendant plead guilty (Chapter 40 of the Code).

However, the smaller details of the process of appointment are worth of special attention. First of all, I would like to admit how remarkably unregulated the process of appointing the lawyer is and what problems this causes. Neither legal research, nor the eight interviews with public officials and advocates conducted for the purposes of the present research, did not help to identify any official instruction for the decision-makers on *how* the choice of a lawyer has to be made. The absence of such, meanwhile, creates major problems, first of all, a possibility of collusion between a prosecutor and an advocate - the phenomena that in Russia is called a ‘pocket advocate’.

The ‘pocket advocate’ is an advocate who is routinely appointed by the prosecution for the reason that he or she never ‘create problems’ to the prosecutor and does not ‘ruin’ the case.<sup>155</sup> This means that the ‘pocket advocates’ do not undertake any measures to actually defend their client; they may sign the documents such as protocols of investigative actions and the defendant’s statement

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<sup>155</sup> Interview by Elena Burmitskaya with the senior investigator of Mejdurechensk City Investigator’s Office, on 10 October, 2009.

virtually without being present at the time of carrying out of the action and even reading what is being signed. In many cases such collusion is gainful for ‘pocket advocates’ in terms of systematically receiving money for no effort.

Often these advocates in the past were policemen and prosecutors, discharged from the service for some form of misconduct, including corruption, illegal use of force, being alcohol addicted, etc. The fact that such individuals are being admitted to the Bar and are almost never discharged from their advocates’ status reveals the immense problem of professional integrity and quality of services control in Russian Bar.

Another starting place of the ‘pocket advocates’ problem are numerous rural and underdeveloped areas of Russia where extreme poverty and corruption are flourishing. Thus, a young woman - lawyer from Dagestan (a sub-unit of the Russian Federation in the Caucasus region)<sup>156</sup>, revealed that the *ex-officio* appointments are regarded by local advocates as a good opportunity to earn for leaving. The situation of young women – lawyers who are additionally affected by gender prejudices characteristic of the local culture is critical. She admitted that for them the only alternative to the collusion with the prosecutor and getting appointments is forced termination of work.

The ‘pocket advocate’ may be appointed even when a defendant has retained his/her own lawyer. Thus, according to Article 50 (3) of the Criminal Procedure Code the prosecutor may suggest to a defendant an *ex-officio* defence lawyer in case if the lawyer invited by the defendant fails to take part in the procedural action in course of five days; if the defendant refuses from *ex-officio* counsel, according to the wording of the Article, the procedural action may be carried on without any defence lawyer (except for mandatory defence cases).

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<sup>156</sup> Interview by Elena Burmitskaya with Dina Bijgishieva, State Broadcasting Company “Dagestan” (Machachkala, Republic of Dagestan), Lawyer, Moscow, June, 2008.

In practice the prosecuting authorities often use this opportunity to change the defence lawyer retained by defendant and to replace him/her by a ‘pocket advocate’. In particular, this is achieved by not informing or not timely informing of the defence lawyer invited by defendant about the time and place the procedural action is to take place.<sup>157</sup>

Another major problem with the appointments is a system of ‘duty advocate’ (дежурный адвокат)<sup>158</sup>, which is adopted in some regions as a measure which attempts to avoid the situation when a prosecutor is directly liaising the advocate of his/her choice. The systems were introduced by the regional advocates’ Chambers and are implemented by the Chambers and the prosecuting authorities. Under this system, which is also rooted in the Soviet epoch, a prosecutor has to contact only an advocate who is on duty at the day the appointment. The prosecutors and the courts operating in a given area are provided with the time schedule and the contacts of duty advocates of a district ‘legal consultation office’.

As it was admitted by the head of one of such offices, in any case without clear control mechanism this system cannot guarantee any success.<sup>159</sup> As the head of the consultation office the respondent is responsible for coordination of the legal aid work: she approves the duty schedules, deals with the cases of duty advocate’s failure to appear upon the request of the prosecutor and affirms the lists of legal aid payments, etc. The respondent noticed that many times her attention was attracted by the fact that, whereas all the duty advocates had an equal amount of duty days, some advocates were regularly getting the monthly compensations for the legal aid services that were dozens times higher than those of other lawyers:

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<sup>157</sup> Interview by Elena Burmitskaya with advocate Marina Nosova, March 2009, London.

<sup>158</sup> William Burnham and Jeffrey Kahn, "Russia's Criminal Procedure Code Five Years Out" *Review of Central and East European Law* 33, no. 1-93 (2008), p. 73.

<sup>159</sup> Interview by Elena Burmitskaya with Marina Shipunova, Novokuznetsk, 9 October, 2009.

for instance, some might get 1,500 Rubbles a month, whereas others – 60, 000 Rubbles.<sup>160</sup> She confessed that she was often suspicious that these advocates might have entered into a deal with the prosecutors and therefore were appointed by them much more often, but she never had an opportunity to check this: there is no regular information exchange between the local prosecution authorities and her office to track *when* an advocate was appointed in each case so that to see did he/she indeed was on duty that day. Moreover, a practicing lawyer and an administrator, without any technical assistance except for a secretary and a part-time accountant, she is simply not capable of making inquiries into such cases herself and there is no another mechanism she may employ within the advocate's chamber.

Another significant deficiency of the 'duty advocate' mechanism is the lack of continuity in the representation of a defendant. Thus, in some regions employing the 'duty advocate' scheme no rule is adopted regarding the obligation of an advocate once admitted to the defence in the case to continue the defence until the case is tried.<sup>161</sup> This causes the situation when every time the prosecutor has to appoint an advocate, for instance, in the situation of detaining a suspect or carrying out of the procedural action he/she is calling upon the advocate who is on duty that particular day. The same occurs when the need to appoint an advocate arises in course of the trial: an advocate who is on duty is often present in the court premises so that to quickly appear before the judge if the need be. This practice creates a situation when the appointed advocate is discharging himself/herself from the representation of his/her client every time when his/ her duty day is over. This is not to mention that under this scheme a duty advocate often enters the courtroom without having a single glance at the case file and without ever meeting a defendant or talking to him/her.

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<sup>160</sup> The rough equivalent of 2,000 USD.

<sup>161</sup> Interview with advocate Marina Nosova.

## **4.2. The implementation of the right to state-funded legal aid for criminal cases in the Russian Federation**

### *4.2.1 The Russian system of legal aid delivery*

Article 49 of the Russian Criminal Procedure Code stipulates that only those lawyers who are members of the Bar (*advokaty*, адвокаты) may be admitted to provide criminal defence. The Bar membership is not compulsory for the Russian lawyers, of whom a great part are practicing law without entering the Bar. The provision of the Code does not prevent non-advocates from providing any kind of legal services to the defendants: for instance, the status of advocate is not necessary to prepare the appeal complaint or any other document that can be used in the course of criminal procedure, including the preliminary investigation and the trial as such; a non-advocate is allowed to represent the victim of a crime without any limitations. However, all state-funded legal aid is delivered through the members of Russian Bar.

The functioning of Russian Bar is regulated by the RF Law ‘On Advocates Activities and Advocates Profession in the RF’ cited above and the decisions adopted by the advocates collegially. All Russian advocates are organized in ‘chambers’; there is a separate chamber in every region (federal entity); the whole system is governed by the Federal Chamber of Advocates. The chambers are private, independent from the state and self-governing professional organisations and decide their internal matters on the regional and federal levels. On the initial level advocates are to function in one of the following organisational forms: ‘*advocate’s cabinet*’ (адвокатский кабинет) is established if advocate chooses to practice individually; ‘*advocates’ collegium*’ (коллегия адвокатов) is a non-governmental non-for-profit organisation established by two and more advocates; ‘*advocates’ bureau*’ (адвокатское бюро) is a confidential partnership between two and more advocates. Somewhat separately standing is ‘*legal consultation*

*office*’ (юридическая консультация). According to the law it is to be created by the advocates’ chambers in the form of private establishment in the judicial districts where the amount of advocates is less than two per one federal judge upon a request and with financial support of the regional government. Although the purpose of this institution as it was designed by the legislator is clearly to fill the legal aid gap in the rural territories, in practice, consultation offices continue their functioning everywhere, but not there. Most of the offices were established during the Soviet era, and since then are operating virtually in all administrative-territorial areas of the cities and countryside districts. Today they continue their functioning independently of the amount of the advocates, and in practice they are still regarded as territorial branches of regional chambers and coordinators of the activity of all the other advocates’ organizations.<sup>162</sup>

Every member of the Bar is legally obliged to undertake an assignment to deliver the state-funded legal aid, however, in practice this may be a subject of a deal between an advocate and the ‘legal consultation office’, including the agreement on compensation that is to be paid by the advocate who is refusing to undertake the ‘appointment cases’.<sup>163</sup>

The major form of activity of Russian advocates is representation of the clients in trials: either upon an agreement with a client or the *ex-officio* appointment. There is no division analogous to the UK system of barristers and solicitors, no salaried advocates, no public defender’s offices. Assistance to the advocate is rarely provided by interns (‘pomoshchnik advokata’) who is usually paid a small salary from the advocate’s honorariums and is only motivated by a possibility to gain some experience and to gain the two years legal experience required to enter the Bar.

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<sup>162</sup> Interview by Elena Burmitskaya with Marina Shipunova, head of the advocates’ consultation of Zavodskoy district of Novokuznetsk city, Novokuznetsk, 9 October, 2009.

<sup>163</sup> Interview by Elena Burmitskaya with Viacheslav Panichkin, advocate, Novokuznetsk, 7 October, 2009.

Often in practice an internship is the only way to pass the examination for the advocate's certificate.<sup>164</sup> In some regions an intern is required to pay for the training he/she receives while working as intern. Thus, in Novokuznetsk city (Kemerovo region) the current price paid by legal interns is 300,000 Roubles which is little less than 10,000 USD. As it was explained by the head of the advocates' consultation of Zavodskoy district of Novokuznetsk city, this money is vital for the consultation office because they receive no support from the Government and all the expenditures including office maintenance and rent are paid by the advocates on their own.<sup>165</sup>

To enter the Bar a prospective candidate has to go through a special procedure that includes examination by the commission consisting of the representatives of the regional Bar. As it was mentioned above, the minimum of two years of legal experience is required. The representatives of the Bar are very reluctant to admit new members. In a number of regions there were no new entries in several passed years. This can be easily explained by a competition that newly admitted advocates create on the market of legal services in the situation that is often characterised by poor clients, low charges, etc.

At the same time, Russia apparently experiences a deficiency of the criminal defence lawyers. Thus, today in Russia there are around 75,000 members of the Bar,<sup>166</sup> whereas the population of Russia is 141,9 million.<sup>167</sup> A number of lawyers, who are admitted to the bar, are practicing in the fields other than

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<sup>164</sup> Ibid.

<sup>165</sup> Interview by Elena Burmitskaya with Marina Shipunova.

<sup>166</sup> Interview with Jurij Solovei, Rector of the Omsk State University, Russia professor, Doctor of Juridical Science, available in Russian at: <http://infomsk.ru/conference/3.php>; Internet; accessed 24 October 2009.

<sup>167</sup> Государственный Комитет Статистики РФ/ The State Committee of Statistics of the Russian Federation, available at: [http://www.gks.ru/free\\_doc/new\\_site/population/demo/demo11.htm](http://www.gks.ru/free_doc/new_site/population/demo/demo11.htm); Internet; accessed 24 October 2009.



criminal law.<sup>168</sup> Therefore, the number of lawyers available for representing the defendants at criminal trial, is even less. Moreover, not all the lawyers are willing to undertake the defence of indigent individuals.<sup>169</sup> Accordingly, in Russia, there is less than 52, 85 advocates per population of 100,000. For the comparison, in the USA, the number of legal professionals per population of 100, 000 is 372, 05; in UK (England and Wales) – 195, 09.<sup>170</sup>

This of course may be explained by different economic conditions and common law legal tradition which dictates higher need in lawyers.<sup>171</sup> However, if we look at the countries with civil law legal tradition, we find that this ratio is also considerably higher than in Russia: in Germany it is 185, 23 lawyers per population of 100, 000; in France – 79, 09.<sup>172</sup>

To finalise this analysis it has to be admitted that even advocates acknowledge many problems that the Russian Bar (Advocatura) faces today.<sup>173</sup> Among them - lack of the meaningful system of professional education and training, absence of efficient quality control mechanisms, which result in significant decrease in prestige of the profession, and other. Apparently, there may be no successful legal aid reform without paying attention to the problems of the Russian Bar and taking them into account when designing the new model of legal aid delivery.

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<sup>168</sup> The statistic on this matter is unavailable.

<sup>169</sup> It has to be noted, that in Russia there is no compulsory bar membership, and therefore, the number of advocates is smaller than the number of practicing lawyers. However, the lawyers, who choose to focus in the area of criminal law, inevitably enter the bar: in Russia all criminal cases are decided at court trial; being a practicing lawyer you cannot choose criminal specialisation and not be a trial lawyer.

<sup>170</sup> The Ministry of Justice of Japan. "Justice System Reform", available at: [http://www.moj.go.jp/ENGLISH/issues/justice\\_system\\_reform-5.pdf](http://www.moj.go.jp/ENGLISH/issues/justice_system_reform-5.pdf); Internet; accessed 1 November 2009.

<sup>171</sup> Jr. Geoffrey C. Hazard and Angelo Dondi, *Legal Ethics: A Comparative Study* (Stanford, California: Stanford University Press, 2005), 78.

<sup>172</sup> The Ministry of Justice of Japan. "Justice System Reform", available at: [http://www.moj.go.jp/ENGLISH/issues/justice\\_system\\_reform-5.pdf](http://www.moj.go.jp/ENGLISH/issues/justice_system_reform-5.pdf); Internet; accessed 1 November 2009.

<sup>173</sup> Interviews with advocates Marina Nosova, Marina Shipunova, Viacheslav Panichkin.

#### 4.2.2 Financing of legal aid

The mechanism of financing of the legal aid in Russia and the relevant rates are envisaged in the RF Criminal Procedure Code, Federal Law “On Advocate’s Activity and Advocate’s Profession in the RF”, the Joint Directive of the Minister of Justice and the Minister of Finance of the Russian Federation of 15 October 2007,<sup>174</sup> the Governmental Decree of 4 July 2003 N 400,<sup>175</sup> and the Governmental Decree of 22 July, 2008 N 555<sup>176</sup>.

Article 50 (4) of the Criminal Procedure Code establishes that the services of the appointed counsel are to be compensated from the federal budget. Article 25 (8) of the Federal Law “On Advocates Activities and Advocates Profession in the RF” additionally stipulates that the relevant expenditures are to be envisaged in the federal budget as a special-purpose budgetary resources. The amount and the mechanism of the compensation are to be established by the Government of the Russian Federation.

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<sup>174</sup> Приказ Минюста РФ N 199, Минфина РФ N 87н от 15.10.2007 "Об утверждении Порядка расчета оплаты труда адвоката, участвующего в качестве защитника в уголовном судопроизводстве по назначению органов дознания, органов предварительного следствия или суда, в зависимости от сложности уголовного дела" (Зарегистрировано в Минюсте РФ 17.10.2007 N 10349) / Joint Directive of the Minister of Justice and the Minister of Finance of the Russian Federation of 15 October 2007 N 199/87н ‘On the mechanism of calculation of the compensation of the cost of the legal services provided by the defence counsel appointed by the bodies of criminal inquiry, investigatory authorities and courts dependent on the complexity of the criminal case’. Available at Consultant Plus legal database.

<sup>175</sup> Постановление Правительства РФ от 04.07.2003 N 400 (ред. от 28.09.2007, с изм. от 22.07.2008) "О размере оплаты труда адвоката, участвующего в качестве защитника в уголовном судопроизводстве по назначению органов дознания, органов предварительного следствия или суда" / Governmental Decree of 4 July 2003 N 400 ‘On the amount of the compensation of legal services provided by a defence lawyer, who participated in the criminal case by the appointment of the bodies of criminal inquiry, investigation and courts.’ Available at Consultant Plus legal database.

<sup>176</sup> Постановление Правительства РФ от 22 июля 2008 г. N 555 «Об индексации размера оплаты труда адвоката, участвующего в качестве защитника в уголовном судопроизводстве по назначению органов дознания, органов предварительного следствия или суда, и размера выплат при оказании адвокатами юридической помощи военнослужащим, проходящим военную службу по призыву, по вопросам, связанным с прохождением военной службы, а также по иным основаниям, установленным федеральными законами» / Governmental Decree of 22 July 2008 N 555 ‘On the indexation amount of the compensation of legal services provided by a defence lawyer, who participate in the criminal case by the appointment of the bodies of criminal inquiry, investigation and courts...’ Available at Consultant Plus legal database.

The Joint Directive of the Minister of Justice and the Minister of Finance of the Russian Federation N 199/87H and the Governmental Decree N 400 provided for further details of how the compensations have to be calculated based on such criterion as the complexity of a case. Para.1 of the Governmental Decree N 400 established that amount due for one day spent by the appointed lawyer in the court is to be compensated in the amount not less than 275 Roubles<sup>177</sup> and not more than 1100 Roubles<sup>178</sup> (the sum is to be doubled accordingly for the services delivered on weekends, bank holidays and at night time). According to para.3 of the Joint Directive N 199/87H, amount of days spent by the appointed counsel working on the case is counted on the basis of his attendance, independent of the amount of hours spent on the case within the day.

The maximum complexity cases (1100 Roubles per day) as envisaged by the Directive are the cases heard by the RF Supreme Court and by the court of jury. Next follow the cases that fall within the competence of the supreme courts of the federal sub-entities and the cases involving three and more defendants, or the defendant charged of committing three and more crimes, or case materials compiled in more than three volumes (850 Roubles per day). Compensation of 550 Roubles is due in the cases heard in closed or ambulatory court, involving the minor defendants, the defendants who has no command of Russian and disabled defendants. The amount of 275 Roubles is due for the rest of the cases. This amount may be doubled by a body, which appointed a lawyer on the basis of other circumstances increasing the complexity of the case.

The Directive of 22 July 2008 N 555 raised the minimum daily rate of the defence lawyer 1,085 times, and up to now the rates are maintained at the abovementioned level. These charges are extremely low even for the Russian average social – economic conditions, which already gave rise to a number of constitutional

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<sup>177</sup> A rough equivalent of 9,6 USD.

<sup>178</sup> A rough equivalent of 38,6 USD.

complaints on part of defence lawyers.<sup>179</sup>

Para.5 of the Governmental Decree N 400 establishes that the remuneration for the legal aid services is provided upon the submission of the application by the advocate. The application must be based on the *order* issued by a body, which appointed the advocate. The order should identify the amount due, the name of the case and contain the ink stamp of the body that appointed the advocate and the signature of the public officer responsible. The order is to be directed to the relevant financial department (body) for the transfer of the funds to the account of the advocate's organisation. Therefore, the amount due is calculated and the payment ordered by the public official (almost in all cases a prosecutor, with whom the defence lawyer is supposed to compete).

It is not clear how the compensation of the lawyer's activities conducted out of the prosecutor's office or the courtroom, such as searching out and interviewing witnesses, visiting the defendant who is in the pre-trial detention, making inquiries, etc. should be made and who is to decide whether such activities were relevant in the context of the case and whether the amount of time spent by an advocate is adequate for this type of activity. Nor such expenses as transportation and copying may be covered from the budget resources according to the current regulations.

As it was rightly noted by William Burnham and Jeffrey Kahn, Russian appointed lawyers merely see their role in observing whether the procedure is satisfying to the minimum requirements of legality, but not in being advocates to their clients.<sup>180</sup> The appointed advocate almost never undertakes any activities beyond those for which he was invited by the prosecutor or the court, for instance, search

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<sup>179</sup> For instance, the latest ruling of the Constitutional Court in regard to such a complaint was delivered on 29 September 2011 (the complaint was found inadmissible for the reason that the Court did not find that any of the applicant's constitutional rights were violated without even looking into a case). See the document in Russian: Определение Конституционного Суда Российской Федерации от 29 сентября 2011 г. N 1278-О-О "Об отказе в принятии к рассмотрению жалобы гражданина Тимушева..." Available at Consultant Plus legal database.

<sup>180</sup> Burnham and Kahn, 71.

and interview potential witnesses, making inquiries, etc., in particular, because there is no clear mechanism how the costs of these services and expenditures that are attached to them should be compensated; while the disputes between the governmental agencies that are expected to pay are going on for years, it remains clear that such expenses as transportation, copying and other are not to be compensated at all.<sup>181</sup>

For the same reason – because of the absence of any meaningful mechanism of implementation - despite all the RF Constitutional Court decisions, which stated that the defendants have the right to state-funded legal aid on all stages of criminal procedure including the appellate instances,<sup>182</sup> this is not being realised in practice.

The analogous situation takes place in relation to the prisoners: regardless of the position of the Constitutional Court of RF, which held that legal aid should be available to the prisoners including the disputes arising from the prison law the situation of access of prisoners to legal aid in Russia did not change, whereas in 2008 the prison population reached 890,000.

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<sup>181</sup> Interviews with advocates Viacheslav Punichkin, Marina Nosova.

<sup>182</sup> See analysis of the Constitutional Court jurisprudence in section 4.1.1.

## CHAPTER 5

### **THE AMENDMENTS PROPOSED TO THE RUSSIAN MODEL OF STATE - FUNDED LEGAL AID IN CRIMINAL CASES**

The following chapter is devoted to the recommendations on the reform of the mechanism of state-funded legal aid in criminal cases with regard to the international minimum standards and the experience of the countries with the advanced legal aid models. The recommendations are designed so as to target the most serious deficiencies of the mechanism of indigent defence that is currently operating in Russia and the country's international obligations in the field of human rights.

#### **5.1. The amendments to the scope of state-funded legal aid for criminal cases in Russia**

##### *5.1.1 Improved regulation of the scope of legal services available to the indigent defendants*

Despite the fact that state-funded legal assistance as it was stipulated in the abovementioned decisions of the RF Constitutional Court has to be delivered to indigent defendants at all stages of criminal procedure without any difference in scope comparing to services available to defendants who are able to pay for them, in fact, the range of legal services available to indigent defendants in Russia is extremely narrow.

As it was mentioned earlier, although there are no limitations in the law that prevent an appointed lawyer from undertaking all the necessary steps to effectively defend indigent clients, including search and interviewing of the witnesses, ordering expertises, requesting information, etc., there is no clear mechanism of how this has to be implemented in practice in terms of remuneration for such activities and compensation of the relevant lawyer's expenses (transportation, telephone, and other).

Taking into consideration extremely low rates paid to the ex-officio lawyers in Russia and their view of such assignments as a burden it is necessary to develop a *methodology* envisaging a minimum scope of defence activities for relevant cases and to control the lawyer's performance in this regard. Such methodologies are adopted in many countries running the advanced legal aid models. They not only serve to protect indigent defendants but help to avoid excessive legal aid expenditures.

In Russian conditions it is important that this function is performed by an independent legal aid body<sup>183</sup> responsible for selecting, contracting and appointing of lawyers, as well as remuneration for their work. Such a methodology should have a recommendatory character so that not to violate the *principle of lawyers' professional independence*. Nevertheless, if the scope of the assigned lawyer's activities in regard to the defence of the indigent client appears manifestly insufficient, an independent body should be able to react at any stage in the interests of such client and to make certain conclusions as regards the lawyer's professional performance, which can affect his/her ability to gain a legal aid contract in future<sup>184</sup>.

Even in the existing conditions, in the absence of an independent legal aid body in

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<sup>183</sup> Its proposed structure and functions is described below in section 5.2.1

<sup>184</sup> This scheme, of course, can work effectively only in case when legal aid work is financially attractive for lawyers and there is a competition between them for such assignments.

Russia, there is an urgent need to introduce regulations envisaging the mechanism of evaluation of the range of defence activities suitable for different types of criminal cases and to make it clear how they should be remunerated (and the relevant legal expenses compensated) from the state budget. Anyway, the competence to decide these matters should not rest with investigating/ prosecuting authorities.<sup>185</sup>

### *5.1.2 Early access to legal aid*

Free legal counsel must become available to every apprehended and arrested person in Russia not only theoretically, but in practice. It is necessary to introduce national 24 hours toll-free call-service and to ensure the possibility for the defendants to dial this service in every police station. Every apprehended has to be effectively informed of his/her right to free legal assistance and given an opportunity to make a call to this service so that to receive advice or representation by a lawyer. Such calls have to be recorded. The information about the defence rights has to be handed to a defendant in form of printed document and the defendant has to put his signature saying that he was properly informed.

If the apprehended (arrested) individuals refuse from state-funded legal aid, they have to dial the call service and after compulsory listening to the information about their rights and the consequences of the refusal from legal aid, they must be given an opportunity to voice their decision (to be recorded).

This scheme is aimed at prevention of cases when the waiver of the right to legal counsel is made in the result of illegal pressure on part of police/ investigating authorities. The call service dispatcher has to be instructed how to react, when he/she notices signs of possible ill-treatment of the suspect/ detained; in such cases a duty lawyer has to be sent to the police station immediately.

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<sup>185</sup> For the proposal on establishing of the independent body, specialized in legal aid provision, see section 5.2.



In cases, when legal assistance is mandatory, the policemen/investigators have to dial an independent agency<sup>186</sup>: the request for a lawyer has to be made from the police station, a record has to be made and the advocate has to be selected only by an independent agency (legal profession body/service).

When ordering remuneration of the lawyer's services an independent body (legal profession body/service) should be *legally obliged* to check, whether the lawyer who was participating in the case was exactly the lawyer who was selected by an independent body (legal profession body/service).

The described system of legal aid requests recording, selecting and appointing ex-officio lawyers on a random basis by the bodies/ services independent from investigation/ prosecution authorities, as well as compulsory posterior control of participation of an independently selected lawyer in the defence has to be introduced and regulated on the legislative level as an ultimate measure aiming to prevent corruption and 'pocket advocate' practices in the criminal justice system.

### ***5.1.3 The availability of legal aid for the appellate proceedings***

As it was shown above the international standards set within the UN and CoE systems of human rights protection require the states-parties to ensure that the right of indigent defendants to appeal is respected. Russia being a member of all the relevant treaties has to respect this obligation. Moreover, as it was already mentioned, the RF Constitutional Court held that all defendants are entitled to state-funded legal assistance at *all appellate stages*, including the supervisory control instance (nadzornay instantsiaja, надзорная инстанция). Still, in practice the indigent defendants' right to appeal is not implemented effectively for several reasons.

The remuneration of the relevant defence lawyer's activities, in fact, is left to the

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<sup>186</sup> In absence of such – a service created within the legal profession. Further in the text the recommendations regarding the creation of the specialized body administering legal aid (the National Legal Aid Agency, NLAA) will be developed.

discretion of the prosecuting authorities and courts, whereas neither the prosecution that ‘won the case’, nor the court is interested in the decision to be revoked.<sup>187</sup> Often the defence lawyers themselves express no willingness to prepare the appellate complaint, because they pursue their indigent clients’ cases as a burden.

Another important problem is that convicts are often not aware of their right to free assistance at the appellate proceedings and/ or are unable to request it: first, there is no clear and available mechanism of doing this, and, second, they usually get no cooperation on this matter from prosecuting authorities or the court for the reasons mentioned above.<sup>188</sup>

My proposal is that right to legal aid on the appellate stage of criminal procedure is clearly articulated in law. It has to envisage a system of informing the indigent defendants of this right. The remuneration for the lawyer’s work at the appellate stages has to be guaranteed and must not depend from discretion of courts or prosecuting authorities.

I suggest that legal aid for the first appellate stage is granted to everyone who received legal aid for the duration of the case, automatically. The practice of deciding on eligibility for legal aid on the appellate stage separately,<sup>189</sup> is not suitable for Russian conditions: the decision-making process in Russian courts is very bureaucratic and extensive; for most convicts it is going to be quite problematic to apply for legal aid for the appellate stage, because in all cases when the punishment is imprisonment after the guilty verdict they are immediately put in detention facilities that offer no adequate conditions for this.

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<sup>187</sup> Interview by Elena Burmitskaya with an advocate, who wished to remain anonymous, Novokuznetsk, October, 2009.

<sup>188</sup> Ibid.

<sup>189</sup> See the analysis in section 3.1.

Finally, I consider that availability of legal aid for the supervisory review proceedings ('Nadzornaya instantsija', надзорная инстанция) has to depend on the merits of case; therefore, the application for it must be made separately.

#### *5.1.4 The availability of legal aid beyond criminal cases*

As compared to the international standards and best foreign practices, the scope of legal aid available in Russia also fails to cover the cases which, although are not considered criminal domestically, are regarded as criminal cases by the international human rights bodies (i.e. some administrative offences).

This is a serious shortcoming taking into consideration that many delicts envisaged, for instance, by the RF Code of Administrative Offences<sup>190</sup> may in certain circumstances fall under the international human rights law interpretation of 'criminal charges' and, consequently, the right to legal aid has to be available to those charged with such offences.

For instance, possible punishment under the Article 3.2 of the RF Code of Administrative Offences is administrative arrest: deprivation of freedom up for a term of up to a month; disqualification (prohibition to hold a public office; to hold a position in the managerial board of private enterprise, etc. for a term up to 3 years), etc.; in the course of administrative procedure the questions of guilt are being considered. In such circumstances interests of justice certainly require that legal aid is provided to those who are not able to pay for the legal assistance.

Therefore, the right to free legal assistance in administrative offence cases has to be introduced on the legislative level: the relevant regulations must envisage the mechanism of deciding on financial eligibility and assessment of the merits of case (the 'interests of justice' test).

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<sup>190</sup> Кодекс Российской Федерации об Административных Нарушениях / Code of Administrative Offences of The Russian Federation No. 195-FZ of December 30, 2001 (with the Amendments and Additions of April 25, December 31, 2002, June 30, July 4, November 11, December 8, 2003, April 25, 2002). Adopted by the State Duma on December 20, 2001. Came into force on December 26, 2001.

### *5.1.5 The groups left outside*

In present sub-section I decided to focus on two major groups of individuals that are virtually left outside the Russian system of legal aid provision: prisoners and victims of crime. According to the experts in the area of human rights and criminal justice, these two groups are the largest by amount and treated most unjustly by the existing system of legal aid provision.<sup>191</sup>

As it was mentioned above the RF Constitutional Court stated that for the purposes of the interpretation of the right to legal aid the term ‘defendants’ has to be extended to convicts and prisoners and, thus, prisoners like all the other defendants have to be provided with legal aid upon their request, including state-funded legal aid. Unfortunately, the concrete mechanism of delivery of state-funded legal aid to prisoners was not developed by the legislator and Russian prisoners still do not have meaningful access to it in practice.

In my opinion, the relevant legal provisions have to be introduced without delay. As a minimum, free legal aid should be immediately provided to those prisoners who are facing the disciplinary charges that can result in further liberty limitations or seriously affect the possibility of release on parole; it should be also available to the prisoners who apply for release on parole.

The relevant regulations and policies have to be adopted by the federal government, however, the schemes to be employed so that to deliver free legal aid to prisoners may vary from region to region, as the ‘prison population’ in different regions of Russia varies considerably. The prisoners must have an opportunity to apply for free legal aid directly to an independent agency (or a legal profession body) to avoid possible interference on part of the prison administration.

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<sup>191</sup> Interviews by Elena Burmitskaya with the Executive Director of the Moscow Helsinki Group, Nina Tagankina, on 25 July, 2009, Moscow and Anita Soboleva, Head of JURIX (Lawyers for the Constitutional Rights and Freedoms), May, 2009, Budapest.

Unavailability of state-funded legal aid to the victims of crime, which is a case in Russia, is incompatible with international human rights standards and the best world practices in the field. Right to state-funded legal assistance of the victims of crime as such is currently not envisaged in the federal legislation. Remarkably, the newly adopted law on state-funded legal aid (in civil cases)<sup>192</sup> does not envisage availability of legal aid for victims of crime seeking to obtain compensation through civil procedure.

Theoretically, relevant laws might be adopted and, accordingly, their realisation financed, by the federal sub-units. I failed to find any information about such initiatives in Russian regions and this is not surprising given to a fact that most of the Russian regions experience significant deficit of public funds even for funding the most vital needs, such as medical treatment, support of the families in extreme poverty, etc.

My suggestion is, firstly, to recognise on the federal level the right of victim to free legal aid in cases, envisaged by law, and, secondly, to gradually expand the range of these cases, starting with introduction of specialised federal programmes making free legal aid available at list to the victims of crime that raises particular public concerns, i.e.: violence against women and children, trafficking in women and children, etc., as it is made in the UK, the USA, Canada and other countries.<sup>193</sup>

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<sup>192</sup> Federal Law of 21 November 2011 N 324-FZ 'On free legal aid in the Russian Federation' / Федеральный закон Российской Федерации от 21 ноября 2011 г. N 324-ФЗ "О бесплатной юридической помощи в Российской Федерации". Available in Russian from Consultant Plus Legal Database.

<sup>193</sup> See the analysis in section 3.2.

## **5.2. The amendments to the mechanism of provision and funding of legal aid for criminal cases in Russia**

It has already become obvious that the existing Russian system of ex-officio appointments and the mechanism of legal aid financing is not only badly regulated, full of deficiencies and unable of ensuring a meaningful indigent defence in criminal cases, but also causes serious problems in terms of human rights. Prosecution and defence must be two competing parties - independent and equal. It is unacceptable to put a defence lawyer in the position of a petitioner who has to ask the prosecutor to verify the amount of work that has been performed by him/her and to order the compensation.

It is undisputable that the power of appointing of ex-officio lawyers as it exists now, should be completely revised so that to exclude any possibility of employing the 'pocket advocates' as well as other tools of influence, including financial manipulation.

First of all, the body, which is responsible for selection of legal aid deliverers, should be independent from the investigation/prosecution authorities and courts. In cases, when legal assistance is mandatory according to the law or if a court considers that interests of justice require that the defendant is represented by a lawyer, the competent state officials should only submit the relevant request, but not to decide who is to be invited. State officials should not only have no right to appoint a lawyer of their choice, but every such attempt must be a subject to a disciplinary investigation and accountability.

There must be a clear legal provision prohibiting a practice of rotation of *ex-officio* lawyers within one case. Once the lawyer was assigned for a defence, he/she must be obliged to represent the client unless the latter refuses from his/her

services, or the extraordinary circumstances prevent the lawyer from further representation.

Finally, as regards the mechanism of legal aid provision generally, the ex-officio appointments should not be the only method of legal aid provision. The defendant or his relatives must have an alternative opportunity to directly submit an application for state-funded legal aid to the independent agency. They must enjoy the right to apply for legal aid which allows to cover for the services of the private practitioner of their choice (within certain financial limits) or to resort to alternative forms of legal aid delivery that will be discussed below.

As to the eligibility rules, I don't recommend to apply merits/ means tests when legal aid is required to suspects or defendants. In Russia 90% of suspects are routinely placed in pre-trial detention<sup>194</sup>. In the conditions of Russian pre-trial detention it is quite problematic for defendants to apply for legal aid. Moreover, the police may easily submit the detainee to ill-treatment so that to prevent him from applying. In many pre-trial detention premises there are no basic conditions for the preparation of the documents.<sup>195</sup> As to the prisoners, the means/merits test has to apply in cases that are not requiring emergency, as described above.

Financial eligibility/ merits test have to apply to victims and those who are charged of committing administrative offence. Financial eligibility formula has to take into account the subsistence minimum in the relevant region (is defined yearly by the regional governments), the applicant's income and seize of family.

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<sup>194</sup> Куликов, Владислав, "В тюрьму успеется: Верховный суд решил изменить порочную практику почти поголовной посадки подозреваемых до суда" / Kulikov, Vladislav, "Don't Hurry to Prison: The Supreme Court Decided to Abolish the Practice of Putting of Virtually Every Suspect into Pre-trial Detention"; Rossijskaya Gazeta – Federal Issue №4874 of 25 March 2009 г.; available from: <http://rg.ru/2009/03/25/tyurma.html>; Internet; Accessed 21 November 2009.

<sup>195</sup> See, for example, Борщов, Валерий, "Задача следствия - сломать человека, попавшего в СИЗО" / Borschov, Valeriy, "The Task of The Investigation Is To Break Down The Person Who Got Into to Pre-trial Detention"; available from: <http://vremya.ru/2009/218/46/242485.html>; Internet; accessed 21 November 2009.

My recommendation is to take into account the property belonging to an applicant only in cases when its value exceeds certain threshold.

As to the merits test, my proposal is to apply the following criteria: possibility of further limitations of freedom and possibility of losing livelihood (as applied in the UK);<sup>196</sup> complexity of case and disadvantage that may be caused by rejecting legal aid (as applied in Australia).<sup>197</sup> I would add serious health problems criterion making the prisoners eligible for legal aid.

As to the victims of crime, there should be emergency schemes that do not require testing for special categories of victims, such as victims of domestic violence, minors, etc. For the other cases the merits test should be based on such criterions as complexity of case and disadvantage that may be caused by rejecting legal aid.

### *5.2.1 The National Legal Aid Agency*

As it was demonstrated in Chapter 3 of the research work, creation of an independent body specialized in legal aid administration proved to be one of the best world practices. The introduction of an independent specialised bodies administering legal aid was successful in many countries, including Canada, UK, Ireland, New Zealand and Australia.

With this regard my suggestion consists in creation of a specialized independent body - National Legal Aid Agency (further in the text, NLAA) in Russia, with the following key responsibilities: elaboration and implementation of the legal aid policies; developing and managing the legal aid budget; selection and contracting of legal aid providers, and ordering remuneration for their work; providing education and training for legal aid providers; ensuring the quality control of legal services.

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<sup>196</sup> See the description of UK ‘Widgery Criteria’ test in section 3.1.

<sup>197</sup> See the description of merits test ‘A’ applied in New South Wales, Australia, in section 3.1.



To ensure the true *independence* of the National Legal Aid Agency and to prevent possible *corruption*, its relations with the other state authorities should be construed as follows: the managerial board of the NLAA should be appointed by and accountable before the legislature – the State Duma of the Federal Assembly of the Russian Federation (the lower chamber of the national representative and legislative body); the audit of its financial activities should be conducted by the Accounts Chamber of the Russian Federation (central audit body accountable to the Federal Assembly); a responsible governmental body – the RF Ministry of Justice should cooperate with the National Legal Aid Agency on developing of the relevant state policies, preparation of recommendations on amending the relevant acts of legislation, developing methodologies, setting out the quality standards, etc.

The managerial board of the NLAA should be composed of the representatives of legal profession, experts in the field of criminal justice, human rights and public administration issues, as well as civil society organisations. The mechanism of shaping of the managerial board has to envisage the right of the relevant bodies to nominate their members and setting the time limits for their service (for instance, 5 years).

Because of the huge territory of Russia, its federal structure and diversity of the local conditions, the National Legal Aid Agency must have its regional offices – Legal Aid Agencies (LAA). While the NLAA develops relevant strategies and policies, prepares the legal aid budget and distributes legal aid funds among the regions, designs quality control standards and mechanisms, as well as education and training programmes on the federal level, its offices in the federal sub-units shall select and contract service providers, exercise quality control, manage relevant information databases, and conduct professional trainings.

This solution in substance envisages the creation of a *centralized* public service system in a federal state. In Russian conditions such a solution allows avoiding

competence disputes between federation and federal subunits: criminal law and procedure, according to Article 71 (o) of the RF Constitution, are *exclusively* matters of federal competence as well as ‘regulation of rights and freedoms of individual and citizen’ (Art. 71 (c) of the RF Constitution). Whereas there are certain norms in the RF Constitution that theoretically might allow the developing of criminal legal aid programs on the level of federal sub-units<sup>198</sup>, it is obvious that the leading role in regulation of these matters belongs to the federal authorities.

Another important rationale for opting for the centralized model of administration of legal aid in Russia is ensuring *equal access* to legal aid in various Russian regions that have extremely diverse economic conditions. The proposed model is able of considering local specifics and providing equal financial support for legal aid in Russian regions. In any case, it does not limit the possibility of creation of parallel legal aid programmes on the level of the federal sub-units.

### **5.2.2 Service deliverers**

#### **Advocates**

It is clear that the most qualified and experienced legal cadres today are concentrated in the Russian Bar Association. Only advocates may represent the defendants at preliminary investigation and criminal trial; therefore, in any case the advocates will remain the leading actors in the area. Nevertheless, the reform suggested in the present paper partly consists in the diversification of the service – deliverers. It is based on several pre-conditions: first, the number of advocates registered in Russia and willing to undertake the indigent defence is apparently not sufficient to meet the relevant needs; second, the advocates’ monopoly on legal aid that exist today allows for no competition and, consequently, causes low quality of services.

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<sup>198</sup> Article 72 (1) (a) and (b) of the RF Constitution.

There are several avenues to expand the amount of legal professionals capable of representing indigent defendants in criminal trials: the Russian government or the Russian advocate's organization shall liberalize the policies regarding the admission to the Bar, or the monopoly of the Bar in the field of criminal defense has to be somehow limited.

Another possibility is to allow non-advocates to deliver state-funded legal aid in criminal proceedings: in many cases a significant amount of legal aid services as it will be shown later may be delivered by non-advocates. Therefore they may be integrated into the legal aid delivery system even without introducing major legislative changes. As the experience of foreign countries prove, the variety of types of service-deliverers is able to ensure cost-effectiveness and to enhance a competition between service-deliverers, which, in its turn, results in higher quality of services.

Finally, it is relevant to note here that advocates should at all times have a choice whether to undertake the legal aid defence or not; the opposite would not only be violation of professional freedom, but is unreasonable and ineffective: it is doubtful that the advocate who defends his client under coercion is able to provide sound defence. With this regard the provision of the RF Law "On Advocates Activity and Advocates Profession" establishing an obligation of every advocate to undertake the defence in the capacity of an assigned lawyer should be abolished. Instead the register of advocates wishing to participate in the legal aid cases should be created and the body competent to administer legal aid should cooperate with this group of professionals. As it was admitted earlier, to make the delivery of legal aid attractive for experienced and qualified advocates the compensation for their services has to be competitive. The economic conditions in Russian regions vary significantly, so do the levels of the advocate's charges: this has to be thoroughly considered, when developing the budgets for the relevant regions.

## Public defenders

In a number of post-Soviet countries, such as Bulgaria, Ukraine and Lithuania, the pilot projects establishing public defender's offices became the first steps towards the legal aid reform.<sup>199</sup> Many experts in the field of criminal justice reform in the Eastern Europe argue for the introduction of the Public Defender's offices (further in the text - PDO), which may help to create a pool of young and qualified legal cadres, make the criminal justice more transparent and increase the involvement of the civil society into the criminal justice matters.<sup>200</sup>

Current legal framework allows public defender's offices to undertake such functions as representation of victims in criminal proceedings; representation of individuals in the administrative proceedings; representation of prisoners in disciplinary and release on parole proceedings; representation of indigent defendants in civil proceedings (civil claims lodged by the victims of crime). Out of court room: provision of legal aid to defendants in form of preparation of procedural documents and providing legal advice, etc. The officers of the PDO might participate in the criminal proceedings in the capacity of defence counsel: according to the Article 49 (2) of the RF Code of Criminal Procedure, non-advocates may be admitted by the court in this capacity *alongside the advocate*. Thus, PDOs, for example, can take part in the public interest cases: represent victims of domestic violence and other strategic litigation to promote social change. PDOs are a perfect solution for the rural areas, where the number of lawyers is extremely low.

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<sup>199</sup> Interview by Elena Burmitskaya with Zaza Namoradze, head of Budapest office of Open Society Justice Initiative, May 2009, Budapest.

<sup>200</sup> "Making Legal Aid a Reality: A Resource Book for Policy Makers and Civil Society", 102.

It has to be admitted, that there is a number of risks that have to be considered when introducing the PDO programmes. First of all, these are related to human resources. It will be not easy to attract well-educated, talented and energetic cadres if the PDOs do not offer a reasonable remuneration and a social package. Therefore, funding of the PDOs has to be thoroughly considered: the remuneration has to take into account local levels of lawyer's charges, which can differ significantly. The work at PDOs must be accompanied by quality professional training and be recognised as legal experience required entering the Bar and other positions requiring legal expertise.

### **Law firms and civil society organisations**

Other types of potential deliverers of state-funded legal aid that may be a good solution for Russia are legal firms and civil society organisations (SCOs). As it was already noted, the advocate's status is necessary for the lawyer to be admitted to defence on the stage of preliminary investigation and at trial. However, as it was demonstrated earlier, there are other types of legal assistance that can be provided by non-advocates for criminal and related proceedings.

Delivery of legal aid by law firms has obvious advantages comparing to establishing the PDOs: legal firms already possess their own material and human resources; there is an opportunity to evaluate their expertise and to make a judgement of their capability to perform legal aid work based on their previous performance.

As to the SCOs, many Russian non-governmental organisations have a considerable experience of providing legal assistance to certain vulnerable groups, including prisoners, migrants, mentally disabled individuals, women victims of domestic violence, minors, etc. These organisations are well-known among their target groups; they perfectly know their needs, the legislation and practice applicable to their situation, and often have expertise in human rights litigation at

high courts and international human rights institutions. This makes their participation especially valuable.

### *5.2.3 Contracting, quality control, budgeting and other arrangements*

In the previous section it was already mentioned that the diversity of service providers is aiming to create certain competition and to ensure higher quality. To enhance a competition between the prospective service providers – law firms, non-advocate lawyers and bar members – I propose to utilize a contracting scheme that was described in Chapter 2 of the paper (the UK experience).

A system of contracting supposes that the prospective service-providers are competing for a contract for delivery of legal aid. The contract may envisage a ‘package’ of services of certain type related to specific subject areas or territories with the cost of services determined in advance – the analogue of the UK ‘block contracts’. The choice of aid providers can be made by the regional NLAA with consideration of general recommendations of the central NLAA office. The procedure of selection of legal aid providers must be transparent and based on the principles of fair competition. If there are several applicants for one contract, a tender should be carried out. There should be some uniform agreements and rules determining the rights and obligations of the service deliverers willing to cooperate with the NLAA, setting out the ethical and quality standards, other essential conditions. The regional office of the NLAA should be able of keeping and updating the lawyer’s records, gathering and analysing the information related to professional performance of the aid deliverers, engage them in educational activities, etc. Being registered in the NLAA list must be a pre-condition for being admitted to the legal aid work. The NLAA must have the right to suspend and to terminate the advocate’s registration in case of serious professional negligence.

The proposed model envisages the following mechanisms of quality control. Monitoring of quality shall be exercised by the regional NLAA offices on the

basis of quality standards and methodology elaborated by central NLAA office in cooperation with the RF Ministry of Justice. The regional office shall control the amount of legal aid cases managed by every lawyer to prevent overload and, consequently, reduction of quality. The regional NLAA office shall have a competence to review the complaints of the professional negligence, allegedly committed by the lawyers, who were delivering legal assistance under the NLAA funding (organisations of aid deliverers), and maintain relevant records that can be further employed in order to suspend their status. The key role in maintaining high quality standards should belong to education and training of the lawyers.

Gathering and analyzing statistic data relating to the criminal justice issues; elaboration of recommendations on improving the situation in the area of criminal justice; education, dissemination of rights information might become a serious contribution of the NLAA into a broader criminal justice reform.

Legal aid funds and funds allocated for the maintenance of the NLAA should be envisaged as a separate item in the federal budget of the Russian Federation. The money should be transferred by the Ministry of Finance to the National Legal Aid Agency directly, avoiding the intermediate agencies, so that to protect the budget from unauthorised use. The NLAA shall further allocate the legal aid funds for the regional offices which in their turn distribute them between the legal aid deliverers. The way of funds distribution should be determined by the NLAA budget, which has to be prepared in coordination with the RF Ministry of Economics and Social development. Certain degree of flexibility has to be envisaged as well. The opportunity to raise private funds for legal aid activities and programs run by the NLAA should be envisaged.

## **Conclusion**

The present research was aiming to prove that internationally recognized standards on the right to free legal aid for criminal cases and the best world practices in the field should become a basis for the legal aid reform in Russia. Such reform alongside with its immediate objectives could tackle the number of other unresolved problems of the Russian criminal justice system (lack of adversariality; systematic rights abuse by the investigative and prosecuting authorities, etc.). Moreover, the reform could ensure a better respect of such societal values as equality, human dignity and justice, and enhance the trust of the Russian population in the criminal justice system.

[...]

The leading international human rights instruments, to which Russia is a party, including the ICCPR and the ECHR, envisage the obligation of states-parties to provide free legal assistance in criminal cases; in the jurisprudence developed by the HRC and ECtHR legal aid is viewed as an important guarantee of fair trial and as a safeguard against human rights violations; the standards developed by these bodies are obligatory for Russia as a party to the relevant treaties.

The study of existing Russian legal framework governing the delivery of legal aid in criminal cases and the practice of implementation of the relevant provisions allow identifying the deficiencies to be addressed. In general the indigent defence in today Russia has to be characterized as limited in practical scope and archaic in terms of organization and administration; it is not only unable to ensure the meaningful legal assistance to the needy, but creates the conditions for the gross violations of the rights of indigent defendants. It may be said without exaggeration



that the flaws of the legal aid system existing in Russia have a disastrous influence over the system of criminal justice as a whole.

[...]

The proposed recommendations address the issue of narrow scope of legal aid provided to the indigent defendants in Russia, its practical failure to deliver services that are necessary for the efficient defence; the problem of unavailability of legal aid on the appellate stages of criminal procedure, as well as in the administrative offence cases when the character of possible sanctions make the relevant charges ‘criminal’ from the point of view of the international human rights standards.

[...]

The proposed reforms appear to be realistic; they envisage mechanisms, ensuring the financial sustainability (such as introducing means/merits tests; cost-effective strategies of service providers’ selection; possibility of raising private funds, etc.); they take into account the current situation of legal profession in the country, and the existing legal framework.