WORLD MODELS OF STATE-FUNDED LEGAL AID IN CRIMINAL CASES: WHAT CAN RUSSIA BORROW?

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Table of Contents

The Executive Summary

This thesis focuses on the question whether the best of the international experience in organisation of legal aid provision in criminal cases could and should be adopted in Russia. Such values as human dignity, justice, equality and the principles that stem from the latter (presumption of innocence, equality before the law and courts; fair trial, etc.) require that those who are not able to pay for legal assistance are provided with it for free. This concept acquires special meaning when it comes to the criminal procedure, which in many aspects constitutes the infringement of individual liberty by the state; however, there are competing values and interests, as well as problems of implementation, which make the issue quite problematic.

The international standards, in particular the ones, set forth in the ICCPR and ECHR, require that free legal assistance is provided to those, who cannot pay for it, when the interests of justice so require; the way states parties organise their legal aid system is left to their discretion, however, these arrangements should be able to ensure the possibility of practical and effective implementation of the right. The analysis of the advanced models of legal aid provision, such as exist in Canada, the UK, the USA and other countries helps to find the solutions that can be utilised to achieve this.

The analysis of Russian law and practices in the field shows that the existing system of legal aid provision is not able to ensure the effective implementation of right to legal aid in criminal cases; it is not compatible with the international standards and best practices. The proposed amendments to the system mostly focus on amending *organisational* mechanisms of legal aid provision: this follows from the assumption, that every system of public services provision may be organised so that to not only meet the relevant public needs most effectively, but to provide

safeguards against possible abuse of state power.

The solutions selected for the reform target the specific problems in criminal justice system, including corruption, abuse of police power and human rights violations and suggest the relevant reforms: the system of ex-officio appointments to be revised; the effective scheme ensuring early access to legal assistance to be introduced, and other. The proposed model envisages establishing of the National Legal Aid Agency – an independent body specialised in legal aid provision, with responsibilities in such areas as budgeting; selection, contracting and support of prospective aid deliverers; quality control and other. It is suggested to introduce new methods of legal aid delivery, i.e.: public defenders, law firms and civil society organisations to ensure the competition and the civil society involvement. The scope of legal aid available has to be broader and include prisoners, victims of crime and persons, charged with some types of administrative offence. The proposed reforms are based on the foreign experience of legal aid provision with due account of their *pros* and *cons* and their suitability to Russian conditions.

Consequently, the foreign experience of organisation of legal aid provision can be adopted in Russia and the relevant mechanisms adjusted to Russian realities, so that to target the specific problems in the field of criminal justice and to help Russia to better comply with international obligations in the field.

Contributions

I am grateful to everyone, who encouraged me and helped me to write this paper. Special thanks to people who contributed plenty of their time and kindly agreed to give me the interviews, which shed the light on many complicated issues that were rising in course of this research:

Zaza Namoradze, Director of Budapest Office of the Open Society Justice Initiative.

Anna Ficher, Fellows Program Coordinator, Budapest Office of the Open Society Justice Initiative.

Anna Ogorodova, Associate Legal Officer, National Criminal Justice Program, Budapest Office of the Open Society Justice Initiative.

Anita Soboleva, Head of the Non-Governmental Organisation YURIX (Jurists for Constitutional Rights and Freedoms), Russia. Moscow.

Nina Tagankina, Executive Director of Moscow Helsinki Group, Moscow, Russia.

Olga Berdiugina, the Judge of the Federal Court of Zavodskoy District, Novokuznetsk city, Russia

Alexey Ishutin, Senior Investigator of the Investigations Department of Mejdurechensk city at the Investigations Directory at the Prosecutor's Office of Kemerovo Region.

Marina Shipunova, Advocate, Head of the Advocates' Consultation Office of Zavodskoy district of Novokuznetsk city, Russia.

Marina Nosova, Advocate, S. Petersburg, Russia.

Viacheslav Panichkin, Advocate, Novokuznetsk city, Russia.

Dina Bijgishieva, Lawyer, the State Broadcasting Company «Dagestan», Makhachkala city, Dagestan, Russia.

INTRODUCTION

When it comes to discussion whether the international standards and practices can be applied in Russia, the Government frequently argues that they may not, because of the Russia's specialisness ('samobythost').[1] As the search of the special ways is so time-consuming, decision of the vital problems is postponed for decades.

The reform of legal aid in criminal cases is an example of such long-discussed issues: these were late 90s, when the issue appeared on the agenda within a wider criminal justice reform discussion.[2] In early 2000s the RF Government made attempts to get familiar with the foreign experience in the area, however, no changes followed.[3] Today, 10 years later, the Russian model of legal aid delivery 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, badly regulated and organised, corrupted and affording no protection from rights abuse this model may serve anything, but the genuine advocacy of indigent defendants.

The present master's thesis 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,

[1] 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.

[2] 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.

[3] 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.

equality and justice and cause systematic human rights abuse. As long as Russia will delay the reform, it will fail to comply with its international human rights obligations in regard to right to free counsel. The question is which practices could be the best solution for achieving these purposes.

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;[4] as regards the situation of Russia, the scientific data is even less available, then of other former communist states. The domestic research generally focuses on the violations of defendant's rights in criminal cases, the limited scope and quality of legal aid; however, few of the research works contain proposals regarding the possible reforms, including the reform of free legal assistance as an important safeguard of defendant's rights.

The first chapter of the research work will be dedicated to the analysis of societal values underpinning the need for publicly funded legal aid. The analysed values to some extend answer the question why the reforms are necessary. The chapter contains the review of current international discourse on the problems related to state-funded legal aid. In the second chapter I will look at the international human rights standards regarding the free legal assistance with a special focus on the ICCPR and ECHR mechanisms of human rights protection. The analysis of the relevant jurisprudence will be provided. In the third chapter I will assess some of the best practices of legal aid provision, based on the experience of the countries, which are believed to have the best legal aid models in the world, such as Canada, the United Kingdom, the United States, the Netherlands, and some other. The chapter is structured so that to analyse the variety of solutions existing, as well as pros and cons of each arrangement. In the fifth chapter I will develop the recommendations as to the best approaches and mechanisms that can be adopted in

[4] See, for example, Vessela Terzieva, *Access to Justice in Central and Eastern Europe: Comparative Report* (Public Interest Law Initiative, 2003).

Russia. The choice of solutions will be connected to the realities of Russian criminal justice and aim at creation of safeguards against the abuse of state prosecuting power and protection of human rights within the criminal justice system.

The main methods proposed for the research are analysis and comparison of the international human rights standards and best practices in the area of legal aid provision; the comparative analysis of the approaches to organisation of legal aid provision; analysis of the current Russian legislation and practice in the field and developing proposals for the reform of legal aid. Methodology of the research also includes analysis of statistical data and interviewing experts – representatives of Russian judiciary, prosecuting authorities and bar association as well as Russian and international civil society organisations working in the area of law reform.

CHAPTER 1

LITERATURE REVIEW

1.1 State-funded legal assistance and the fundamental societal values

"The *equal justice* … has been the dream of philosopher, the aim of the lawgiver, the endeavour of the judge, the ultimate test of every government and every civilization"[5].

Discussion of the societal values that are inherent in the concept of legal aid is not merely of theoretical but of great practical importance. Different political and legal systems as well as scientific doctrines reflecting these various realities determine the uniqueness of approaches to rights issues. Admittedly, these approaches are not value – neutral; every discourse concerning rights involves various, and at times, competing values underlying the claim of rights: "…The practices which form the subject-matter of criminal justice aspire to moral and political legitimacy, and do so in terms of certain values" – claims Lacey.[6]

The discourse on the right to government-funded legal aid invokes lots of competing views and raises many values-based tensions. Legal aid is expensive. Why at the times of deepening economic crisis to allocate public money for the protection of those who have been accused of crime? The needs of vulnerable children and elderly people gain much more public sympathy. The crime is frightening, its levels often rise and one who is advocating the rights of defendants in these circumstances may be blamed for dalliance with criminals instead of worrying about

[5] Chief Justice Winslow, Address delivered April 25, 1912, Northwestern University Law School, quoted in Journal of Criminal Law and Criminology 620 (1914).

[6] Lacey, N., Making Sense of Criminal Justice in *Criminal justice* / edited by Lacey, N. Oxford : Oxford University Press, 1994, 4.

public security. Public opinion is very important when it comes to lobbying reforms, since politicians are to a certain extent dependent on it.[7] To persuade public and political elite in the need of reforms the fundamental values recognised and shared in a given society must be thoroughly considered on the very early stages of developing of the concept of a reform. In the next paragraphs I am going to reflect on the values that can be invoked when advocating for the developing of the system of state-funded legal aid in criminal cases generally and with regard to Russian conditions.

1.1.1 Human dignity

As it was noted by Dworkin, the very idea of human rights depends upon 'the vague but powerful idea of human dignity."[8] The concept of dignity, however, has been recently subjected to various forms of criticism. It seems that in light of the topic of this research there is no need to discuss the notion of dignity in detail. I think nobody in a constitutional democracy will dispute against the assertion that respect for human dignity requires states to treat all individuals within its jurisdiction with impartiality and respect. In relation to the topic of present research this means that criminal justice system must function with due regard of the principles of fair trial, including the presumption of innocence and equality of arms and not merely act as a bureaucratic machinery designed to proceed with case-files, not human beings, whose destiny is at stake. The respect of human dignity requires that every individual who finds herself alone versus the state prosecution has enough resources to defend herself, be it private or public resources.

[7] Ken Kollman, *Outside Lobbying: Public Opinion and Interst Groups Lobbying* (New Jersey: Prinstom University Group, 1998), 81.

[8] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 198-199.

1.1.2 Justice

The answer to the question what is just, is not that obvious. In this respect Young and Wall noted: “Justice consists, in part, of a fair distribution of goods and burdens throughout society, although what amounts to a fair distribution will clearly differ according to one’s philosophical and political standpoints.”[9] To illustrate the diversity of the attitudes to this issue let us consider the following point of view at legal aid: from the standpoint of radical free-market philosophers such as Hayek and Nozick[10] any attempts by the state to interfere with the free market are unjustified. According to this philosophy, any forms of social welfare beneficial for one society group may turn to be deleterious for the rest of society, for example, cause damage to the economy in a long-term prospective. Higher taxation required for a social welfare according to Nozick is an infringement of individual liberty to dispose of one’s property. In response to this Ashworh argues that since it is the state which makes an accusation of crime, it creates an initial infringement of liberty and thus is putting people in a position where they need legal aid, therefore, legal aid is to "redress the balance disturbed by this action."[11]

Apparently there is no widely accepted consensus on the meaning of justice in contemporary science. However, it is undisputable that the availability of free legal aid to those who cannot afford to pay for the defence in criminal cases is contributing to just outcome of the criminal proceeding. According to Sanders and Young the ultimate objective of criminal justice system is to ‘distinguish guilty from innocent’; a just outcome of criminal procedure is achieved through

[9] Richard Young and David Wall, "Criminal Justice, Legal Aid, and the Defence of Liberty," in *Access to Criminal Justice: Legal Aid, Lawyers & the Defence of Liberty*, ed. Richard Young and David Wall(London: Blackstone Press Limited, 1996), p. 4.

[10] For see, for example, F.A. Hayek, *Law, Legislation and Liberty* (London: Routledge & Kegan Paul, 1981).; R. Nozick, *Anarchy, State and Utopia* (Oxford Basil Blackwell, 1974).

[11] Young and Wall, 7.

fair distribution of such social burden as criminal punishment.[12] The authors argue that because the purpose of the criminal process is to achieve an 'authoritative conclusion' as to whether a person is guilty of the criminal offence, such a conclusion must be reliable: if it is not, it would be 'neither authoritative nor just.'[13]

Whereas substantive justice is a controversial issue, procedural justice is easier to access. The importance of just procedure was analyzed by Röhl: "If people have to make hard choices, more or less formalised procedures are preferred as means to come to decisions. To achieve acceptance of decisions, procedures have to be 'fair' or 'just'." [14] The issue of justness of a criminal procedure inevitably makes us to think about such problems as right to be heard, right to a meaningful participation, equality of arms and various other rights, principles and guarantees that were internationally recognised in regard to criminal procedure. Almost all of them in one or another way require that every individual charged with a criminal offence has access to legal counsel to make these rights and guarantees practical and effective. If such an individual does not have sufficient means to pay for legal services they must be provided free of charge.[15]

Remarkably, the theoretical research on procedural justice leads us to a wide array of arguments in favour of developing more comprehensive and liberal state-funded legal aid model.[16] Thus, the researches of procedural justice claim that public acceptance and recognition of certain procedures and their outcomes depends on perceived fairness of the procedures ('legitimizing'

[12] Ibid., 5.

[13] Ibid.

[14] Klaus Röhl and Stefan Machura, eds., *Procedural Justice* (Dartmouth: Ashgate, 1997), Preface.

[15] Young and Wall, eds. 5.

[16] Röhl and Machura, eds., Preface.

effect of just procedure). [17] If qualified legal counsel is in fact available only to the defendants that are able to pay for it, most probably the trust of the public in criminal justice system will be undermined. Another conclusion achieved by the theorists is that the acceptance of the outcome of a procedure by an individual depends on whether he/she considered the procedure that lead to the outcome to be fair ('procedural justice effect').[18] With regard to criminal justice this may be interpreted as follows: even if a defendant will not consider a decision just, his/her perception of procedure as fair will increase a degree of acceptance of the decision (outcome).[19] Certainly, a defendant who found himself/ herself alone versus the state machinery being deprived of assistance of legal counsel will be reluctant to accept a procedure as just, independently of whether he/she is in fact guilty or not. One of the objectives of criminal punishment is rehabilitation and re-integration of the individuals who committed crimes back into society.[20] A criminal who was convicted as a result of unjust procedure most probably will not be successfully re-integrated into society because such a procedure can hardly teach an individual to respect laws in future ('learning' effect of procedure).[21]

As was rightly admitted by Sanders and Young, the very term 'criminal justice' indicates that the relevant mechanisms are designed so as to regulate criminal conduct and that in doing so, in the first place, it the criminal justice system that has to be just.[22] Justice is, therefore, a value that is inherent in criminal procedure and essential for its legitimacy and safeguarding individual rights from abuse on the part of the state.

[17] Ibid., 15, 191.

[18] Ibid., 7.

[19] Ibid., 9.

[20] Ibid.

[21] Ibid.

[22] Young and Wall, eds., 3.

Apart from the problem of procedure within which an individual is treated fairly, an *access to justice* may be a problem itself in absence of access to legal aid. According to Francioni, "As a term of art [...] access to justice has acquired a variety of meanings. [...] In a more qualified meaning access to justice is used to signify the right of an individual not only to enter a court of law, but to have his or her case heard and adjudicated in accordance with substantive standards of fairness and justice [...]. Finally, in a narrower sense, access to justice can be used to describe the legal aid for the needy, in the absence of which judicial remedies would be available only to those, who dispose of the financial resources necessary to meet the, often prohibitive, cost of lawyers and the administration of justice."[23]

Though various authors emphasise different aspects of access to justice, practically all of them agree that "equal justice" means primarily an equal access to the justice system. According to Manning, "Countries around the world are recognising the need to ensure that their justice systems treat all the members of society fairly and that some level of access to legal advice and representation is necessary in order to achieve 'equal justice for all' There is also increasing recognition enabling the poor and disenfranchised to gain access to the justice system actually improves the system."[24]

Why is representation important in the view of access to justice? "Representation as a value can be seen as non-discrimination in access to justice. This means removing all barriers (substantive or procedural) to justice, and giving equal access to all, basis of the whole procedure up to the final judgement rendered in the case" claims Ng.[25]

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[23] Francesco Francioni, ed. *Access to Justice as a Human Right* (Oxford: Oxford University Press, 2007), 1.

[24] Daniel S. Manning, "Development of a Civil Legal Aid System: Issues for Consideration," (2005). http://www.justiceinitiative.org/activities/ncjr/atj/legalaidresources/organdmanagelegalaid (accessed 05.11.2008), 6.

[25] Gar Yein Ng, "Case Management: Procedural Law V. Best Practices," in *Judicial Case Management and Efficiency in Civil Litigation*, ed. C.H. van Rhee(Antwerpen - Oxford - Portland: Intersentia 2008), 115.

The idea that access to justice requires legal aid being available to the indigent defendants is based on the *adversarial theory of justice*. According to this theory, it is only a competition between the prosecution and the defence, each arguing for their versions of events, which makes it possible for the impartial tribunal to find the truth; to ensure that the adjudicator is able to come to the correct conclusion the contestants have to possess roughly equivalent expertise and resources; if not, the judicial decision will be inevitably affected by the fact that one side had more resources to prove its version than another.[26] Adversarial justice presumes that the state is trying to prove a case against its citizen, therefore it is essential to ensure that there are guarantees against the abuses of investigative and prosecution powers and the violations of the civil rights of defendants are justified and necessary.[27]

1.1.3 Equality

Equality is one of the most disputable categories in social science. Having in mind the topic of present research I find it sufficient to note here that philosophers representing different approaches to equality agree today that in certain respects individuals must be treated equally. "Most contemporary moralists and social theorists, including even anti-egalitarian thinkers on the right (Flew, Nozick, Friedman, Lucas, Hayek), share with egalitarians 'an assumption of moral equality between persons"[28], though they differ in the interpretations of it'.[29] The idea of equal, legal and political rights for all members of a society is now accepted by both egalitarians and conservatives "It is now well known, though perhaps not sufficiently taken to heart, that there can be, and indeed are, in our societies great substantive inequalities in legal protection

[26] Young and Wall, eds., 5.

[27] C. Walker and K. Starmer, eds., *Justice in Error* (London: Blackstone Press, 1993), 3.

[28] Thomas Nigel, *Mortal Questions* (Cambridge, England: Cambridge University Press, 1979), 107.

[29] Kien Nilsen, *Equality and Liberty: A Defence of Egalitarism* (New Jersey, USA: Rowman and Allanheld, 1985), 5.

and political power even though there is formal legal and political equality […] Yet these formal equalities, as insufficient as they are, are not to be despised, for they are opening wedge in the struggle to achieve equality and they must be a part of any adequate specification of the criteria for equality."[30]

The equality concerns in the context of the topic of the present research inevitably lead us to fair trial issues: equality before the law, courts and tribunals; equal protection of laws and equality of arms. Thus, according to Young and Wall, "[…] denying legal aid would run contrary to an element of the ideal of the rule of law – that all subjects are entitled to the equal protection of law";[31] Sanders points out that "… It would be contrary to the liberal due process principle of equality were legal aid to be denied to the poor".[32] These arguments are clear enough, however, in reality, the equality considerations are much more complicated, when it comes to the issue of publicly funded legal aid.

The equality principle *inter alia* dictates that individuals in like circumstances are to be treated equally. When it comes to the indigent defendant in a criminal procedure – to whom his/her situation must be compared? To prosecution? To other defendants involved in the case (if any)? To victim of a crime that was allegedly committed by a defendant? Will it be against equality principle if legal aid is granted to a defendant but not to a person who claims to be a victim and is similarly financially disadvantaged? When it comes to distribution of the means allocated for the legal aid how to adjudicate whose application for legal aid is to be granted and whose - not to comply with requirement of equality? What amount of aid is sufficient to meet the demand of equality? I do not pursue here an aim to answer all of these questions in this section: my aim is

[30] Ibid., 6

[31] Richard Young, Wall, David "Criminal Justice, Legal Aid, and the Defence of Liberty" in *Access to criminal justice: Legal aid, lawyers and the defence of liberty*, ed. Richard Young and David Wall (London: Blackstone Press Limited: 1996), 6.

[32] Andrew Sanders and Richard Young, eds., *Criminal Justice* (UK: Butterworths, 2000), 17.

just to identify some basic theoretical reference points that are relevant to the present research and crucial when it comes to distribution of public funds and devising a system of delivery of public legal services.

1.2 The problems of state-funded legal aid in criminal cases

It has to be admitted that to a certain extend the scope of the problems that are discussed in the literature in relation to the advanced legal aid models and the models, which are on the initial phase of their development, differ. The analysis of the research on legal aid provision in the UK, Canada, the USA and some other countries shows that there are several main issues, most frequently attracting the attention of experts and scholars in the field: legal aid funding, quality of services delivered under the legal aid schemes, the role of legal profession, the efficiency of different managing schemes and solutions and their impact on various vulnerable groups.

What expenditures on legal aid are adequate in view of limited public funds? As it was truly pointed by Smith, are much more complex than just raising more funds for more extensive legal aid provision. "[…] 'access to justice' was developed as a motivating concept in the late 1970s by those arguing that more money for legal services was too narrow a response to injustice".[33] Some authors argue for limiting legal aid expenditures, [34] whereas others criticise legal aid cuttings for leaving aside those who are disenfranchised;[35] both sides are trying to determine how broad a scope of legal aid should be; which needs have to be primarily addressed and is legal aid the only way to do this. "Does access to justice also require access to legal assistance

[33] R. Smith, "Models of Organisation of the System for Provision of Legal Aid " (2002). http://www.justiceinitiative.org/db/resource2?res_id=103493 (accessed 05.11. 2008), 3.

[34] See, for example, Francis Regan and others, eds., *The Transformation of Legal Aid: Comparative and Historical Studies* (New York: Oxford University Press, 2002), 123.

[35] See, for example, Alison Brewin and Lindcay Stephens, *Legal Aid Denied: Women and the Cuts to Legal Services in Bc* (The Canadian Centre for Policy Alternatives, 2004), 20 – 25.

and, if so, how much is enough? For what, for whom, from whom? Should government support go only to the officially poor or to all those who can not realistically afford lawyers? Under what circumstances do individuals need full-blown representation by attorneys, as opposed to other less expensive forms of assistance? How do legal needs compare with other claims on our collective resources?" – asks Rhode. [36]

The quality of legal aid services is another major concern. According to Houseman there are "five overachieving goals" for legal services programs: providing quality representation is one of the most important.[37] Nevertheless, in many jurisdictions – even the ones running the most expensive and comprehensive legal aid systems, such as the USA, for instance, there is a lack of control over the quality of state-funded legal services: "Courts have been unwilling to require that an appointed attorney have any experience or expertise in criminal defence. And they have upheld convictions where lawyers have failed to do any investigation, cross-examine any witness, consult any experts, present any evidence, or even remain awake and sober during the proceedings".[38] The experts are concerned that the problem is underestimated, whereas "The adequacy of these [legal aid] lawyers is crucial to the fairness and legitimacy of the justice system"[39].

As regards the situation of the countries that are in the process of reforming their legal aid systems, the issues that are given a priority are: how to successfully integrate the legal aid mechanisms into existing criminal justice systems; what deficiencies in law and practice impede the access of disenfranchised to legal services; what safeguards against such evils, as corruption,

[36] Deborah L. Rhode, *Access to Justice* (New York: Oxford University Press, 2004), 6. See also; Daniel S. Manning, Development of a civil Legal Aid System: Issues for consideration, 2005, 21.

[37] Deborah L. Rhode, 105.

[38] *Perceptions of the U.S. Justice System*, (Chicago: American Bar Association, 2000).

[39] Ibid, 65.

legal nihilism and human rights abuse might be introduced into the mechanism of legal aid provision; what models and approaches might be the most successful in local conditions, etc.

Thus, the current research of the situation of legal aid in Central and Eastern Europe provides the detailed account of the problems of law and practice that circumscribe the access to legal assistance in general and to legal aid in particular.[40] The literature describing the experiences of the countries that recently underwent the reform of legal aid and substantially re-designed the mechanisms of its delivery, such as Bulgaria, Lithuania, Georgia, Israel, and other, is telling how the new arrangements were integrated into specific countries contexts, and what the broader impact of the reform was.[41]

How to successfully integrate the modernized legal aid models into the criminal justice systems? Better understanding of basic principles of national criminal justice systems is essential for building a successful legal aid model, argues Vogler: "Without a better and more sophisticated understanding of the working principles of criminal procedure, little progress can be made and national reform programmes will continue to be developed in isolation and without theoretical direction. The depressing result is that procedural integrity is eroded by undue pressure from donor nations, ill-advised transplants, haphazard or poorly thought-out reform and above all, the baleful influence of treasury-driven 'audit'.[42] The effective legal aid system is not only able to ensure legal protection of defendant's rights, but, without any doubt, is contributing to integrity of criminal justice institutions and practices; it revitalises the criminal procedure through empowering the defendant and enhancing adversarialism. According to

[40] See, for example, Edwin Rekosh and others, "Access to Justice: Legal Aid for the Underrepresented," in *Access to Justice in Central and Eastern Europe: A Source Book*(Public Interest Law Initiative, 2003); Terzieva, 7-10. Seea also, Ph.D. Prof. Hajrija Sijercic-Colic, *Safeguarding Human Rights in Europe: The Rights of Suspects/Accused and Their Defence in Criminal Proceedings in South East Europe* (Bucharest, Romania, 2007), 6 -13.

[41] See, for ex., "Making Legal Aid a Reality: A Resource Book for Policy Makers and Civil Society," (Budapest: Public Interest Law Institute, 2009). http://pili.org/images/pdf/making-legal-aid-a-reality-06-02-2009-web.pdf (accessed 12.11.2009).

[42] Richard Vogler, *A World View of Criminal Justice* (UK Ashgate, 2005), 2.

Rhode, “Without the prospect of an effective adversary, law enforcement officials have less incentive to investigate cases thoroughly and respect constitutional rights”.[43]

Although the range of issues in regard to advanced and less developed legal aid models to some extend differ, the experience of the countries, which achieved a greater success in legal aid provision can and should be considered by the ones, which only start to build their legal aid systems. The data, accumulated throughout decades of experimenting with legal aid schemes in the UK, Canada, the USA and others, helps to understand the weaknesses and the advantages of each model and thus, to optimise the choices of the ‘beginners’. Therefore, the best of the international experience in organisation of legal aid provision can and should be adopted in Russia with regard to the domestic conditions and problems. The research questions, which follow from this statement, are: why should Russia undertake the reform? Which internationally recognised values and principles demand that free legal assistance is available to poor? What are the international standards in the field? How other countries comply with them and what are the approaches they utilise? What problems are characteristic of the Russian model of legal aid provision comparing to the international standards and best practices? Which world models could be the best solution to address the problems?

[43] Rhode, 125.

CHAPTER 2

INTERNATIONAL HUMAN RIGHTS STANDARDS REGARDING FREE LEGAL ASSISTANCE

The *right to free legal assistance* is recognised in almost all the leading international human rights documents. Thus, Article 14 of the International Covenant on Civil and Political Rights[44] postulates:

"… 3. 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,*[45] 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 party administers the provision of legal aid within its territory."[46] Thus, in *Ricketts v. Jamaica*[47] the Committee did not found a violation of the applicant's rights and held

[44] 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].

[45] *Tourón v. Uruguay* (R.7/32), ICCPR, A/36/40 (31 March 1981) 120 at paras. 8 and 12.

[46] 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.

[47] *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.

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*[48] 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 defense in circumstances that can ensure justice. This does include provision for adequate remuneration for legal aid..." [49] In another case where a death penalty was at stake, *Collins v. Jamaica*[50] the Committee reiterated that "[…] legal aid should not only be made available; it should also enable counsel to prepare his client's defense 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*[51] the Committee was dealing with issues related to quality of legal aid and state responsibility for the shortcomings of an 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 it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice."[52] However, in many cases invoking similar complaints the Committee quite often found violations of Art. 14 (3) (b) of the ICCPR – right to have adequate time and facilities for the preparation of a defence and to communicate with counsel of his own choosing. In these cases the applicants argued that legal

[48] *Reid v. Jamaica* (250/1987), ICCPR, A/45/40 vol. II (20 July 1990) 85 at paras. 11.4 and 13.

[49] *Reid v Jamaica, para. 13.*

[50] *Collins v. Jamaica* (240/1987), ICCPR, A/47/40 (1 November 1991) 219 (CCPR/C/43/D/240/1987) at para. 7.6.

[51] *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.

[52] *Reece v. Jamaica* at 7.2.

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 an 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).[53]

One of the frequent issues raised in the complaints to the Committee is unavailability of legal aid on the stage of appellation. 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.[54] 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 accessed whether in the circumstances of concrete case unavailability of the instance to a complainant was contrary to the interests of justice. Thus, the Committee adopted the opposite views in two similar cases against Jamaica. In *Gentles v. Jamaica*[55] 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

[53] 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.

[54] See Views on Communication No. 230/1987 (*Raphael Henry v. Jamaica*), adopted 1 November 1991, paragraph 8.3.

[55] *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.

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." [56]

As regards the *right to counsel of one's choice in case if a defendant is provided with state-funded 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.[57]

Right to free legal aid is enshrined in the number of other UN human rights treaties, such as Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Articles 6.1 and 6.3.),[58] the Convention on the Rights of a Child (Articles 37 (d), 40.1 and 40.2(b)(ii) of CRC),[59] and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Articles 18.3(b) and 18.3(d) of CMW).[60] For instance, one of the crucial problems related to the organisation of the provision of state-funded legal aid is problem of the early access to legal services, which means that legal assistance should be available to persons suspected of committing a crime from the moment of arrest and before first police interrogation. Most of the individuals facing criminal charges do not have a

[56] *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.

[57] *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.

[58] 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].

[59] 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].

[60] 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].

lawyer they could immediately contact in such situation; 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. In many international human rights documents the prompt access of a detainee to a lawyer is also regarded as a crucial guarantee for the prevention of torture and ill-treatment. 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 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."[61] Thus, well-organised and efficient system of legal aid provision on the early stages of criminal procedure does not only ensure legal equality, but prevents serious human rights violations.

Unfortunately, the format of this research does not allow for further study of all the provisions and practices related to the right to legal aid adopted on the international level. I would only like to briefly analyze one more international human right mechanism of human rights protection of great importance for Russia: the European Convention for the Protection of Human Rights and Fundamental Freedoms ,[62] 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

[61] 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].

[62] 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]

sufficient means to pay for legal assistance, to be given it free when the interests of justice so require".

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. [63] According to Leach, another factor the Court is taking into consideration when deciding whether procedure has to be regarded as criminal under the Convention is severity of the possible punishment.[64]

In the Court's case-law we can find references 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 national law and character of the penalty it is *nature of the proceedings*. Thus, when accessing the nature of proceedings, the court found that proceedings which originated 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.[65]

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 invoke two criteria which has to be met to make a successful claim under the article. Firstly, state-funded

[63] Philip Leach, *Taking a Case to the European Court of Human Rights*, ed. John Wadham, 2nd ed. (New York: Oxford University Press, 2005), 242.

[64] 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.

[65] Benham v the UK, Application no. 19380/9, para. 56, 10 June 1996.

legal aid has to be provided for free when a defendant '*lacks sufficient means'* to pay for it and, secondly, when legal assistance is essential in the '*interests of justice'*. [66] 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. [67] 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.[68]

The following standards where developed in the Court's jurisprudence regarding the right to free legal aid in criminal cases. In *Benham v UK*[69] 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*[70] 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.

[66] 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.

[67] Leach, 273.

[68] Ibid., 274.

[69] Application no. 19380/9, paras. 60 – 63,10 June 1996.

[70] Applications nos. 29692/96 and 34612/97, paras. 48-50, 18 December 2001.

In *Kamasinski v. Austria,*[71] *Imbrioscia v. Switzerland,*[72] *Daud v Portugal,*[73] *Czekalla v Portugal*[74] and number of other cases the Court was dealing with an issue of failure by the state assigned defence 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".[75]

[71] Application no. 9783/82, paras. 33, 64. 19 December 1989.

[72] Application no. 13972/88, para. 38, 24 November 1993.

[73] Application no. 11/1997/795/997, para. 38, 21 April 1998.

[74] Application no. 38830/97, paras. 59-71, 10 January 2003.

[75] see *Daud,* cited above, para. 38.

CHAPTER 3

THE WORLD MODELS OF STATE-FUNDED LEGAL AID IN 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 said 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 'best in the world', moreover, system which proved to be a success in one country, may fail 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".[76]

However, such parameters as availability of legal aid (the range of cases and the 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 models of organisation of state-

[76] Smith , 3.

funded legal aid provision. This is important in view of my aim to further suggest which of them (combination of) may be adopted in Russian conditions.

3.1 What is covered by the right to free legal aid in criminal cases in different systems?

Every system of publicly funded legal aid envisages some classification of cases and services when legal assistance is being delivered free of charge. These cases (services) for the purposes of the present discussion may be divided into 'mandatory' (*i.e.* there is an obligation on the part of state to provide free legal aid when it comes to certain types of offences or some stages/ types of criminal procedure; depending 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) and 'discretionary' (it is up to a decision- maker to grant free legal aid or not in a given case or for a certain procedural activity, usually based on 'merits' test).

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 define the basic standards that constitute right to legal aid from the point of view of the international human rights law. Domestic laws and practices, however, may vary significantly while being in conformity with the international human rights standards due to the 'margin of appreciation' doctrine which allows states to decide themselves how to arrange legal aid provision in respective jurisdictions.

The issue of scope of legal aid is to be analysed from the point of view of the 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 scope of services available, depending on situation, these may be limited services: legal advice, preparation of relevant documents, etc. and full conduct of the case, including participation of the lawyer in trial proceedings.

The scope of services provided may vary on different stages of the procedure depend on the gravity of charges and individual characteristics of the recipient. Thus, in many systems, like, for instance, 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 representation of an applicant in court requires going through application procedure and testing.[77]

In the present section I will focus on some issues that seem to be most problematic, these are: access to legal services on early stages of the procedure; the availability of legal aid beyond the criminal procedure as defined in domestic law; the availability of legal aid for the appellation proceedings.

3.1.1. Early access to legal counsel and legal aid

One of the important issues regarding the scope of a right to legal aid is a moment when it becomes available to 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.

[77] See, for example, Legal Aid Ontario,"Criminal Cases"; available from http://www.legalaid.on.ca/en/getting/type_criminal.asp; Internet; accessed 14 November 2009.

Many European and non-European jurisdictions are reporting that legal aid is available for suspects *in custody* before charges are laid.[78] 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[79]; in UK – through the 'Defence Solicitor Call Centre.'[80]

However, in practice placing a suspect into police custody is not the only situation 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.[81] 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

[78] 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.

[79] 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.

[80] Legal Services Commission, "Defence Solicitors Call Centre"; available from http://www.legalservices.gov.uk/criminal/defence_solicitor_call_centre.asp; Internet; accessed 26 November, 2009.

[81] David Harris and others, eds., *Law of the European Convention on Human Rights*, 2nd ed. (New York: Oxford University Press, 2009), 125.

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.[82]

3.1.2 The availability of legal aid beyond the criminal procedure as defined in domestic law

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.[83] Thus, state-funded legal aid according to the international standards and best 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.

3.1.3 Availability of legal aid for the appellation proceedings

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 available on each of them.[84] 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 the complaint, whereas in Ontario, Canada, Denmark, England and Wales, Finland, Germany, the Netherlands– it is available to everyone who was granted legal aid from a court of

[82] 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.

[83] See Chapter 2 of the paper for the relevant analysis.

[84] See Chapter 2 of the paper for the relevant analysis.

first instance.[85]

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 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 on the appellate proceedings seems to be problematic at least because of two reasons: first, the application for legal aid and granting procedure take time, whereas the possibility of submission of the petition for appeal is limited in time: it either creates a danger of omission of the time limit by the defendant, or requires that the court suspends the periods of limitation. In any case the defendant will most probably wait for the relevant decision 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 financially and in terms of 'interests of justice' criterion).

3.2 Who is entitled to state-funded legal aid?

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 way of using means and merits tests. In some situations only one test or neither of them may apply.

In UK merits test is named 'Interests of Justice test' or the "Widgery Criteria".[86] To pass this test the situation of an applicant should conform with the following criteria: the likelihood of

[85] Soar, ed.

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. [87]

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). [88] 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).[89]

Independently of merits of a case, a prospective recipient of legal aid should 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 and income.[90] When LAO is checking an

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[86] Legal Services Commission, "Interests of Justice Test"; available from http://www.legalservices.gov.uk/criminal/getting_legal_aid/interests_of_justice_test.asp; Internet; accessed 26 November, 2009.

[87] Ibid.

[88] 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; Internet; accessed 26 November, 2009.

[89] 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.

[90] Legal Aid Ontario,"Getting Legal Aid"; available from http://legalaid.on.ca/en/getting/eligibility.asp; Internet;

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 seize of an applicant's family, etc. When accessing 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 own representation."[91]

accessed 14 November 2009.

[91] 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; Internet; accessed 26 November, 2009.

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 for a part of wider anti-discrimination policies[92], 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[93]. In Canadian Ontario, on the contrary, legal aid to the juveniles may only be provided if their parents or guardians meet general eligibility requirements.[94]

Examples of another category of individuals who may qualify for legal aid according to special eligibility rules are 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'.[95]

Prisoners are another category of individuals that in many jurisdictions qualify for legal aid under special rules. Thus, in UK legal aid is available for prisoners in cases relating to 'progression through the prison system', disciplinary and parole board hearings.[96] It is worth

[92] 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.

[93] Ibid.

[94] Legal Aid Ontario,"Getting Legal Help"; available from http://www.legalaid.on.ca/en/getting/type_youthcriminal.asp; Internet; accessed 26 November 2009.

[95] Legal Aid Ontario,"Getting Legal Help"; available from http://www.legalaid.on.ca/en/getting/aboriginal.asp; Internet; accessed 26 November 2009.

[96] Vicky Ling and Simon Pugh, *Understanding Legal Aid: A Practical Guide to Legal Aid Funding* (Law Society Publishing, 2003), 191.

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.[97]

In many countries, including the USA, UK, Canada, New Zeeland, 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.[98]

3.3 How legal aid is delivered?

Commentators usually refer to three main types of actors who are directly 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'[99] - staff attorneys employed by an independent organization (Public defender office) and undertaking a full representation of defendants.[100] 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* which will be briefly summarized below.

The *ex-officio* model of legal aid delivery makes it possible to more thoroughly decide whether

[97] Legal Services Commission, "Prison Law Funding"; available from http://www.legalservices.gov.uk/criminal/prison_law_funding.asp; Internet; accessed 26 November, 2009.

[98] See, for example, Legal Aid Ontario, "Getting Legal Help: Domestic Violence"; available from http://www.legalaid.on.ca/en/getting/type_domesticviolence.asp; Internet; accessed 26 November 2009.

[99] The term may have different meaning in some jurisdictions

[100] Smith,6. See also: "Making Legal Aid a Reality: A Resource Book for Policy Makers and Civil Society", 87.

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.[101] 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. [102] It is worth noting that number of researches carried out in the field prove that *ex-officio* model of delivery not always means higher costs.[103]

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 private 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.[104]

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 salaries).[105] Comparing to the two prior models

[101] Smith, 6.

[102] Smith, 7. See also: Rekosh and others., p.p. 19 - 20.

[103] 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.

[104] See, for example, "Making Legal Aid a Reality: A Resource Book for Policy Makers and Civil Society.", 12.

[105] Rekosh and others, 28.

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.[106]

In practice most of the existing public legal services systems combine two or three enumerated models. Employing various 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 – not.[107]

3.4 How is the system of publicly funded legal aid administered and financed?

3.4.1 Administering Legal Aid

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

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 governmental body (as a

[106] "Making Legal Aid a Reality: A Resource Book for Policy Makers and Civil Society", 55.

[107] See, for ex., Soar, ed., p.p. 54, 126, 201, 220, 223, 226.

rule, - Ministry of Justice), legal profession, or 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). [108]

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 this type of activities 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.[109]

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

[108] See, for ex. ibid., 52, 60, 124. For the description of existing mechanism of the administration of legal aid see also: Smith, 4-6;

[109] 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.

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.[110] Depending on jurisdiction this body may be called 'commission', 'board' or 'corporation'. Examples of such bodies are Legal Services Commission (UK), Legal Services Corporation (civil cases) (the USA), 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.[111]

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.[112]

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

[110] Rekosh and others, 18.

[111] 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 (accessed 25 November 2009), 14.

[112] 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.

forms of delivery and ability to meet the varying needs of the applicants for legal aid.[113] 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.[114]

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.[115]

3.4.2 Financing 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 the Parliament to an independent body administering legal aid as a separate item in the budget.[116] 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

[113] Ibid., 61.

[114] Smith, "Models of Organisation of the System for Provision of Legal Aid", 4.

[115] Ibid.

[116] "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.

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.[117]

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.[118]

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 private practitioner, appointed as 'ex-officio' or staff attorney. 'Salaried' lawyers and so-called 'public defenders' are usually paid stable rates. '*Ex-officio'* practitioners may be paid by time spent, by grade of the case or by block contract that envisages a 'package' of cases and services for certain reward. Until recently in UK legal aid charges were calculated on the basis of the 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 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". [119]

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[117] Soar, ed., 48.

[118] 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; Internet; accessed 12 November, 2009, 37.

[119] Legal Services Corporation, "Transforming criminal legal aid"; available from http://www.legalservices.gov.uk/criminal/transforming_criminal_legal_aid.asp; Internet; accessed 25 November, 2009.

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 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.[120] 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.[121] Not surprisingly the governments are pushing for lowering levels of expenditures.

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.[122] 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

[120] "Making Legal Aid a Reality: A Resource Book for Policy Makers and Civil Society", 54.

[121] Nuno Garoupa and Frank H. Stephen, "Optimal Law Enforcement with Legal Aid " *Economica* 2004, 493.

[122] Smith, Biggelaar, and McQuoid-Mason, "Models of Organization of a Legal Aid Delivery System", 4.

part: "…up to 50 per cent of firms are seriously considering stopping or significantly reducing publicly funded work."[123]

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).[124] The countries where inquisitorial systems of criminal justice operate are believed to have their legal aid expenditures much lower because inquisitorial criminal process "reduces the need for expensive, adversarial court-based proceedings."[125]

And, finally, in terms of decision-making the best world practice as regards legal aid budgeting consists in elaboration of legal aid budget by an independent body administering legal aid (upon consultations with relevant governmental bodies and legal profession) and consequent adoption of final decision by the legislature. It is important that not only adoption of legal aid budget, but budget cuts were exclusively in legislature's competence for it ensures transparency and allows stake-holders to raise their concerns within an open public debate.

Finally, it has to be mentioned here that in many jurisdictions with advanced systems of legal aid direct funding of legal assistance from the state budget is not regarded as only avenue to ensure the availability of free legal assistance. The state support of the *pro bono* work, the legal clinics, and the civil society organisations, delivering legal assistance to the indigent defendants, in form of tax benefits, governmental grants, etc.; launching special insurance programmes are good alternatives to traditional schemes.

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[123] Legal Services Commission, "About us", available from: http://www.legalservices.gov.uk/archive/archive_about.asp*Annual Report 2001/02* HC949; Internet; accessed 25 November 2009, para 2.7.

[124] Bowles and Perry, 23.

[125] Alastair Hudson, *Towards a Just Society: Law, Labour and Legal Aid* (New York: Continuum International Publishing Group Ltd., 1999), 151.

CHAPTER 4

THE RUSSIAN MODEL OF STATE-FUNDED LEGAL AID IN CRIMINAL CASES: PROBLEMS AND PERSPECTIVES OF REFORM

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')[126] 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 body has to appoint a lawyer for the defence if the defendant requires it or if he/she at least *did not refuse from it in writing* (Art. 52 (1) of the RF Criminal Procedure Code (CPC)[127]). No financial or merits test apply and, thus, even those defendants who in principle can afford paying for legal services are provided with an *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

[126] The term is used conditionally for the purposes of the instant research.

[127] Уголовно-процессуальный Кодекс Российской Федерации/ Code of Criminal Procedure of the Russian Federation, adopted by Federal Law No. 174-FZ, Rossiiskaia Gazeta [official publication] No. 249, Dec. 22, 2001.

from the lawyer in writing.[128] 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 as it is 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 evils of Russian criminal justice system: corruption, impunity of the public officers abusing their power, unprofessionalism, disrespect to law and human dignity, presumption of innocence and other core principles of fair trial are inevitably affecting the legal aid practices.

4.1. The scope of the right to free legal aid in criminal cases recognised in 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 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 strictly on the basis of the texts of the normative acts and their interpretation by the high courts. 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[129] are not implemented in Russia either because of

[128] Article 52 of the RF Criminal Procedure Code.

[129] Конституция Российской Федерации/ The Constitution of the Russian Federation, Adopted at National Voting

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"[130] 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 legal aid in the Russian Federation

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. The cited constitutional provisions mean that the scope of the right to state-funded legal aid as defined in the domestic law of the RF 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

on December 12, 1993. *Came into force on 25 December, 1993.*

[130] 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.

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,[131] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Articles 6.1 and 6.3.),[132] the Convention on the Rights of a Child (Articles 37 (d), 40.1 and 40.2(b)(ii) of CRC),[133] and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6(3) (c))[134] 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. It is important to note, that this is not only the provisions of the international instruments but the relevant jurisprudence, which is recognised by the Russian Federation as legally binding.[135]

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

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[131] 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].

[132] 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].

[133] 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].

[134] 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].

[135] 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.

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 the legal assistance enjoyed their rights and freedoms without unjustified discrimination and that state-funded legal aid provided to the indigent defendants could ensure that their fair trial rights will be fully respected. The scope of the right to legal aid in criminal cases is further defined in the decisions of the RF Constitutional Court. Although only two decisions directly address an issue of the state-funded legal aid, the interpretations of a right to legal assistance given by the Court in other decisions had enormous impact on the practice of legal aid provision.

Thus, in two decisions - the Ruling of the Constitutional Court of 27th March 1996 N 8-П re the complaint of Mr. Gurdzhijants and others[136] and the Ruling of 25 October 2001 г. N 14-п re the complaint of Mr. Golomidov and others,[137] 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 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

[136] 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 27th 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.

[137] 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.

defendant's right to timely access legal counsel.[138]

In the Rulings of 26 December 2003 No. 20 – п re the complaint of Mr Shengelaya and others[139] and of 08.02.2007 N 252-О-П re the complaint of Mr Efimenko[140] 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, which 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-О-П re the complaint of Mrs Murtazina[141] was related to the specific issue of availability of state-funded legal aid for the appellation proceedings. In this ruling the Court reiterated its previous positions delivered in regard to the right to legal counsel as such and stated that they are applicable to the right to legal aid.[142] The Court held that in the RF the right to free legal aid is not limited to some separate

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[138] Ibid., para.4.

[139] 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.

[140] 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.

[141] 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.

[142] Ibid, para. 3 of the reasoning part.

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. [143] The principle of equality of arms, in view of the Court, requires that on all the stages of the criminal proceedings the defendant and the prosecution where in equal positions: for the indigent defendant this means, *inter alia* access to free legal aid.[144]

In the Ruling of the Constitutional Court of 6th February 2004 N 44- O re the complaint of Mr Demianenko[145] 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 the criminal proceedings.

4.1.2 The right to free legal assistance according to the RF Code of Criminal Procedure: theory and practice

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 when a person is being accused of committing a crime; if a case was open in respect of specific person – immediately

[143] Ibid.

[144] Ibid., para. 5 of the reasoning part.

[145] 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 6th February 2004 N 44- O re the complaint of Mr Demianenko, para. 2 of the reasoning part. Available at Consultant Plus legal database.

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 the criminal proceedings, when such need occurs.[146] 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 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

[146] 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).

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 decision making is and what problem 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 an advocate 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.[147] This means that the 'pocket advocates' do not undertake any measures to actually defend their 'assigned' client; they may sign the documents such as protocols of investigative actions and the defendant's statement 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 receiving money for no effort.

Often these advocates in the past were policemen and prosecutors, discharged from the service

[147] Interview by Elena Burmitskaya with the senior investigator of Mejdurechensk City Investigator's Office, on 10 October, 2009.

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)[148], 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 prejudice 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 retained his 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 a defence lawyer (except for mandatory defence cases). In practice the prosecuting authorities often use this opportunity to change the defence lawyer retained by defendant for a 'pocket advocate'. In particular, this is done 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.[149]

Another major problem with the appointments is a system of 'duty advocate' (дежурный

[148] Interview by Elena Burmitskaya with Dina Bijgishieva, State Broadcasting Company "Dagestan" (Machachkala, Republic of Dagestan), Lawyer, Moscow, June, 2008.

[149] Interview by Elena Burmitskaya with advocate Marina Nosova, March 2009, London.

адвокат)[150] which is adopted in some regions as a measure which attempts to avoid the situation when a prosecutor is directly liaising the advocate of is choice. The systems where introduced by the regional advocates' Chambers and are implemented by the Chambers and the prosecuting authorities. Under this system, which is routed in the Soviet epoch, a prosecutor has to contact only an advocate who is on duty at the day the appointment has to be done. The prosecutors and the courts operating in a given area are provided with the time schedule and the contacts of duty advocates 'attached' to 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 will not guarantee a success.[151] As the head of the consultation office she 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 equal amount of duty days, some advocates were regularly getting the monthly compensations for the legal aid services that were dozens times higher than the others: for instance, some might get 1,500 Rubbles, whereas others – 60, 000 Rubbles.[152] She confessed that she was often suspicious that these advocates might have entered into a deal with the prosecutors and therefore appointed much more often than the others, 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 who was on duty that day. Moreover, herself a practicing lawyer and administrator,

[150] 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.

[151] Interview by Elena Burmitskaya with Marina Shipunova, Novokuznetsk, 9 October, 2009.

[152] The rough equivalent of 2,000 USD.

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 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.[153] 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 and a duty advocate enters the courtroom without having a single glance at the case file and without ever meeting a defendant or talking to him/her.

4.2. The mechanism of delivery of free legal aid in criminal cases in the RF

4.2.1 How is legal aid delivered in Russia?

Article 49 of the Russian Criminal Procedure Code stipulates that only members of the Bar ('*advokaty*', адвокаты) may be admitted to provide criminal defence. The Bar membership is not compulsory for the Russian lawyers, a great part of which 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

[153] Interview with advocate Marina Nosova .

prepare the appeal complaint or any other document that can be used in course of the criminal proceedings, 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" and the decisions adopted by the advocates collegially and/or individually dependent on the essence of the issue. 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.[154]

Every member of the Bar is legally obliged 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'.[155]

The major form of activity of the Russian advocate is representation of the client 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 ('pomoshcnik advocata') 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 satisfy the two years experience requirement to enter the Bar.

Often in practice an internship is the only way to pass the examination for the advocate's certificate.[156] In many regions the practice when an intern is required to pay for the training he/she allegedly 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. [157]

[154] Interview by Elena Burmitskaya with Marina Shipunova, head of the advocates' consultation of Zavodskoy district of Novokuznetsk city, Novokuznetsk, 9 October, 2009.

[155] Interview by Elena Burmitskaya with Viacheslav Panichkin, advocate, Novokuznetsk, 7 October, 2009.

[156] Ibid.

[157] Interview by Elena Burmitskaya with Marina Shipunova.

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. The minimum of two years of experience in legal profession 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 a newly admitted advocate creates 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,[158] whereas the population of Russia is 141, 9 million.[159] A number of lawyers, who are admitted to the bar, are practicing in the fields other than criminal law.[160] 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.[161] 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.[162]

This of course may be explained by different economic conditions and common law legal

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[158] 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.

[159] 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; Internet; accessed 24 October 2009.

[160] The statistic on this matter is unavailable.

[161] 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.

[162] The Ministry of Justice of Japan. “Justice System Reform", available at: http://www.moj.go.jp/ENGLISH/issues/justice_system_reform-5.pdf ; Internet; accessed 1 November 2009.

tradition which dictates higher need in lawyers.[163] However, if we look at the countries with civil law legal tradition, we find that this ratio is considerably higher than in Russia, anyway: in Germany it is 185, 23 lawyers per population of 100, 000; in France – 79, 09.[164]

To finalise this analysis it has to be admitted that even the advocates admit many problems that the Russian Bar (Advocatura) faces today. [165] 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.

4.2.2 How the mechanism of legal aid provision is financed?

The mechanism of financing of the legal aid in Russia is 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[166] and the Governmental Decree of 4 July 2003 N 400.[167]

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[163] Jr. Geoffrey C. Hazard and Angelo Dondi, *Legal Ethics: A Comparative Study* (Standford, California: Standford University Press, 2005)., 78.

[164] The Ministry of Justice of Japan. "Justice System Reform", available at: http://www.moj.go.jp/ENGLISH/issues/justice_system_reform-5.pdf ; Internet; accessed 1 November 2009.

[165] Interviews with advocates Marina Nosova, Marina Shipunova, Viacheslav Panichkin.

[166] 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.

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.

The Joint Directive of the Minister of Justice and the Minister of Finance of the Russian Federation N 199/87н and the Governmental Decree N 400 are providing for further details of how the compensations have to be calculated based on such criterion as the complexity of a case. Para.1of the Governmental Decree N 400 establishes 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[168] and not more than 1100 Roubles[169] (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 199/87н, amount of days spent by the appointed counsel working on the case is counted on the basis of his attendance, independent of the mount of hours spent 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

[167] 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.

[168] A rough equivalent of 9,6 USD.

[169] A rough equivalent of 38,6 USD.

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.

Para.5 of the Governmental Decree N 400 establishes that the financial compensation 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.

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.[170] The appointed advocate almost never undertakes any activities beyond those for which he was invited by the prosecutor or the court, for instance, search and interview potential witnesses, making inquiries, etc.,

[170] Burnham and Kahn, 71.

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 no to be compensated at all.[171]

For the same reason despite the RF Constitutional Court decisions, which stated that the defendant has a right to legal aid on all stages of the proceedings and in all appellate instances,[172] this is not being realised in practise. Thus, in Russia there is no effective right to legal aid in the criminal appellate proceedings.

The analogous situation takes place in relation to the prisoners: regardless of the position of the Constitutional Court of RF, which held that legal laid 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 of 2008 the prison population reached 890,000.

[171] Interviews with advocates Viacheslav Punichkin, Marina Nosova.

[172] See analysis of the Constitutional Court jurisprudence in section 4.1.1.

CHAPTER 5

HOW TO AMEND RUSSIAN MODEL OF STATE - FUNDED LEGAL AID IN CRIMINAL CASES WITH REGARD TO THE INTERNATIONALLY RECOGNISED STANDARDS AND BEST PRACTICES?

In the following chapter I will develop the recommendations for the reform of Russian mechanism of the provision of state-funded legal aid in criminal cases with regard to the international minimum standards and the experience gained by 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 scope of free legal aid available in Russia to be re-designed

5.1.1 Scope of the free services available.

Paradoxically, despite of the absence of means and merits tests that the prospective legal aid receiver has to pass and the fact that legal aid has to be delivered to a defendant at all stages of the criminal procedure and in any type of criminal case there are serious problems with the scope of the legal aid available to the indigent individuals in Russia.

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 an indigent client, 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.

The relevant regulations have to be adopted; they should envisage the mechanism of evaluation

of the range of defence activities suitable for different kinds of cases so that to avoid the excessive expenditures, but, at the same time make it clear that the relevant fees will be compensated from state budget. The competence to decide these matters should rest with the independent body, not the prosecution or court.[173]

5.1.2 Early Access to legal aid

Free legal counsel must become available to every apprehended and arrested person not only theoretically, but in practice. It is necessary to introduce national 24 hours toll-free call-service and to ensure the technical possibility of dialling this service in every police station. Every apprehended has to be 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. The call has to be recorded. If the apprehended (arrested) individual refuses from legal aid, he/she has to dial the 24 hours service and after listening to the information about their rights and the consequences of the refusal from legal aid, he/she must be given an opportunity to voice his/her decision. This scheme is aimed at prevention of cases when the waiver of legal counsel will be made in the result of illegal pressure on the part of police. 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 lawyer has to be sent to the police station immediately.

In cases, when legal assistance is mandatory, the policemen have to dial the NLAA; the request for a lawyer is made from the police station a record has to be made and the advocate has to be selected only by an independent agency: when compensating the lawyer's services, an independent body should check, whether it was the lawyer, who was selected by the agency, who was participating in the case, or not.

[173] For the proposal on establishing of the independent body, specialized in legal aid provision, see section 5.2.

5.1.3 Availability of Legal Aid at the Appellate Proceedings

Although the RF Constitutional Court held that there is a right to free legal assistance at appellate stage, the compensation of the relevant costs is still often rejected by the prosecuting authorities and courts: neither the prosecution that 'won the case', not the court wishes that the decision is appealed.[174] The next problem is that convicts are often not aware of their right to free assistance at the appellate proceedings and/ or do not have an opportunity to request it: usually, they will get no cooperation on this matter from prosecuting authorities or the court for the reason, mentioned above.[175] My proposal is that right to legal aid on the appellate stage of criminal proceedings is clearly articulated in law. 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,[176] is not suitable for Russian conditions: the decision-making process in Russian courts is very extensive; it will be difficult for many convicts 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 custody.

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.

[174] Interview by Elena Burmitskaya with an advocate, who wished to remain anonymous, Novokuznetsk, October, 2009.

[175] Ibid.

[176] See the analysis in section 3.1.

5.1.4 The availability of Legal Aid Beyond the Russian Criminal Procedure

As compared to the international standards and best foreign practices, the scope of the legal aid available in Russia also fails to cover the administrative offences cases. This is a serious shortcoming taking into consideration that many offences envisaged by the Code of Administrative Offences[177] might in certain circumstances fall under the interpretation of 'criminal charges' given by the European Court of Human Rights and, consequently, are covered by the guarantees of Article 6 (3) (c) of the European Convention – right to legal aid. For instance, possible punishment under the Article 3.2 of the Code 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 proceedings the questions of guilt are being considered. In such circumstances interests of justice will certainly require that legal aid will be provided to those who are not able to pay for the legal assistance. The right to free legal assistance in administrative offence cases has to be fixed in law: the relevant regulations must envisage the mechanism of deciding on financial eligibility and assessment of the merits of case.

The changes in the scope of the legal aid available alone, however, will not transform the existing system into a modern, diverse, flexible, responsive to the needs and comprehensive model of legal aid provision, capable of providing a full-fledged protection and meeting the minimum international standards in the field. It is obvious that the successful model of legal aid provision may not be exclusively limited to the system of *ex-officio* appointments.

[177] 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 system of legal aid provision: victims of crime and prisoners. According to the experts in the area of human rights and criminal justice, these two groups are the largest by amount and treated unjustly by the existing system of legal aid provision.[178]

Unavailability of legal aid to the victims of crime is incompatible with the best world practices in the field. Right to free legal assistance of the victims of crime is currently not envisaged in the federal legislation. 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. Given to a fact that in most of the Russian regions there is a significant deficit of the public funds and they experience serious difficulties even with funding of the most vital needs, such as medical treatment, support of the families in extreme poverty, etc. it is doubtful that they are able to ensure a meaningful legal aid to the victims of crime. 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.[179]

Russian prisoners must have an effective access to free legal services not only in theory, but in practice. The schemes to be employed so that to deliver free legal aid to prisoners may vary

[178] 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.

[179] See the analysis in section 3.2.

from region to region, as the 'prison population' in different regions of Russia varies considerably. 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. The prisoners must have an opportunity to apply for free legal aid directly to an independent agency to avoid possible pressure on part of the prison administration.

5.2. The proposed amendments to the mechanism of provision and funding of legal aid in criminal cases

It has already become obvious that the existing system of advocates' appointments and splitting of the compensation mechanism between several governmental departments is not only too narrow in scope, full of deficiencies and unable of ensuring a meaningful defence counsel 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 the defence and to make order for the compensation.

It is undisputable that the power of appointing of the defence counsel 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 prosecution and courts. In cases, when the legal assistance is mandatory according to the law or if the court considers that interests of justice require that the defendant is represented by a counsel, the competent state officials should only submit the relevant request,

but not decide who is to be invited. The 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 the *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 will refuse from his/her services, or the extraordinary circumstances will prevent the lawyer from further participation in the case.

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 the state-funded legal aid to the independent agency. They must have a right to apply for the legal aid to cover for the services of the private practitioner or to resort to other 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 criminal proceedings. In Russia 90% of suspects are routinely placed in pre-trial detention[180] by courts decisions. In the conditions of Russian pre-trial detention it will be problematic for the defendant to prepare the application for legal aid. Moreover, the police may easily submit the detainee to ill-treatment so that to prevent him from applying for lawyer. In many pre-trial detention premises there are no basic conditions for the preparation of the documents: no table, no pen, paper or postal envelope available.[181] As to the

[180] 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.

[181] 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";

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. My recommendation is to take into account the property 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);[182] complexity of case and disadvantage that may be caused by rejecting legal aid (as applied in Australia). [183] I would add serious health problems criterion for the prisoners testing. As to the victims of crime, there should be emergency schemes that do not require testing; beyond this, there should be no 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 Legal Aid Agency

As regards the administration of legal aid, my suggestion consists in creation of a specialized agency responsible for the elaboration and implementation of the relevant policies, managing the legal aid budget, distributing the financial resources between legal aid providers and ensuring the quality control (further in the text – National Legal Aid Agency, NLAA). As it was demonstrated in chapter 3 of the research work, creation of an independent body specialized in legal aid provision proved to be one of the best world practices in organization of legal aid provision.

available from: http://vremya.ru/2009/218/46/242485.html; Internet; accessed 21 November 2009.

[182] See the description of UK 'Widgery Criteria' test in section 3.1 of the present master's thesis.

[183] See the description of merits test 'A' applied in New South Wales, Australia, in section 3.1 of the present master's thesis.

To ensure the independence of the National Legal Aid Agency, its relations with 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 representative and legislative body); the audit of its financial activities should be conducted by the Accounts Camber 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 Legal Aid Agency on developing of the relevant state policies, preparation of the recommendations on amending the laws, 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, as well as civil society organisations.

Because of the huge territory, federal structure and diversity of the local conditions, I consider that it is justified that the National Legal Aid Agency must have its regional offices. While the NLAA will develop relevant strategies and policies, prepare the legal aid budget, design quality control standards and mechanisms, as well as education and training programmes, its offices in the federal sub-units will contract service providers and distribute legal aid funds, exercise quality control, create and manage the relevant information databases, and conduct professional trainings. The introduction of an independent specialised bodies administering legal aid was successful in many countries, including Canada, UK, Ireland, New Zealand and Australia. The similar system is adopted in Australia: the National Legal Aid (NLA) and territory Legal Aid Commissions.[184]

In Russian conditions this type of solution will also help to avoid the competence disputes between federation and states (Russian Criminal law and procedure, according to Article 71 (o)

[184] National Legal Aid, available from http://www.nla.aust.net.au/; Internet; accessed 27 November 2009.

of the RF Constitution, are exclusively in the federal competence as well as 'regulation of rights and freedoms of individual and citizen' (Art. 71 (c) of the RF Constitution)) and to provide equal access to legal aid in different regions of Russia, with consideration of local specifics.

5.2.2 Service - deliverers

5.2.2.1 Advocates

It is clear that the most highly qualified and experienced legal cadres today are concentrated in the bar association; only advocates may represent the defendants at preliminary investigation and 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 causes the low quality of services. There are two avenues to expand the amount of legal professionals capable of representing defendants in criminal trials: either the advocate's organization changes its policies as regards admission to the Bar, or the monopoly of the Bar in the field of criminal defence has to be somehow limited. In any case a significant amount of legal aid services as it will be shown later may be delivered by non-advocates. They must be integrated into the legal aid delivery mechanism. 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 the advocates should at all times have a choice whether to undertake the legal aid defence or not; the opposite is not only a violation of professional freedom, but is unreasonable and ineffective: it is doubtful that the advocate who defends his

client under coercion will provide a 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 local LAA offices should create registers of advocates who wish to participate in the legal aid cases and cooperate with this group of professionals. To make the cooperation with the NLAA 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.

5.2.2.2 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.[185] 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 the young and qualified legal cadres, make the criminal justice more transparent and increase the involvement of the civil-society into the criminal justice matters.[186] The public defender's offices might undertake such functions as in-court representation of the defendants as regards the civil suits lodged against them by the alleged victims in separate civil procedure; in-court representation of victims in criminal cases; representation of individuals in the administrative offence proceedings; representing prisoners in disciplinary proceedings; providing legal aid to defendants in form of preparing procedural documents and advice, etc. The officers of the PDO might participate in the criminal proceedings as the defence counsel:

[185] Interview by Elena Burmitskaya with Zaza Namoradze, head of Budapest office of Open Society Justice Initiative, May 2009, Budapest.

[186] "Making Legal Aid a Reality: A Resource Book for Policy Makers and Civil Society", 102.

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.

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, this is a human resources problem. It will be not easy to attract well-educated, talented and energetic cadres if the PDOs will not be able to offer a competitive remuneration and 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 count as a professional experience necessary to enter the Bar and other positions requiring legal expertise.

5.2.2.3 Law-firms and civil society organisations

Another form of legal aid provision that may be successful in Russia is contracting legal firms that employ lawyers who are not certified advocates and awarding grants to the 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 no-advocates. Contracting the law-firms has obvious advantages comparing to the establishing the PDOs: they possess their own material and human resources; there is an opportunity to evaluate their expertise and make a judgement of their capability to perform the legal aid work.

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, victims of domestic violence, etc. These organisations are well-

known among the target groups; they perfectly know their needs; they often have expertise in human rights litigation at high courts and are working with international human rights instruments. This makes their participation especially valuable.

The optimal method of funding of the private law firms, in my opinion, is 'block' contracting; for the civil society organisations – awarding grants, which is more suitable for them in terms of tax benefits and more familiar way of funding.

5.2.3 Contracting, quality control, budgeting and other arrangements

In the previous section it was already mentioned that diversity of the service providers is sought to create certain competition and ensure higher quality. To enhance a fair competition between the prospective service providers I propose to utilize a contracting scheme that was described in Chapter 2 of the paper. 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 will be made by the regional NLAA with consideration recommendations of the central NLAA office. The procedure of choosing the provider must be transparent and based on the principles of fair competition. If there are several applicants for one contract, there 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 a 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 will be exercised by the regional NLAA offices on the basis of quality standards and methodology elaborated by the central NLAA office in cooperation with Ministry of Justice. The regional office will control the amount of legal aid cases managed by every lawyer to prevent overload and, consequently, reduction of quality. The regional NLAA office will have competence to review the complaints of the professional negligence, allegedly committed by the lawyers, which 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 a 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 may become a serious contribution of the NLAA into a broader criminal justice reform.

Legal aid funds and the funds for the maintenance of the NLAA should be envisaged as a separate item in the federal budget of the RF. 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 should further distribute the legal aid funds to the regional offices, which, in their turn – to the aid deliverers. The way of funds distribution should be determined by the NLAA budget, which should 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 right to free legal aid and the best world practices of its implementation should become a basis for the legal aid reform in Russia. The expected impact of the reform is the following: the reform will help to tackle a number of unresolved problems in criminal justice system (lack of adversariarity; human rights abuse by the investigative authorities, etc.); it will allow Russia to better comply with the international human rights obligations; on macro-level it will ensure the better respect of such societal values as equality, human dignity and justice and enhance the trust of the population in criminal justice system.

The respect for such values, as human dignity, justice and equality, and the principles which stem from the latter: fair trial, presumption of innocence, equality before the law and courts, etc. require that every person charged of committing a crime and not able to pay for the legal assistance must be provided with the state-funded legal aid. These values are widely shared in Russia and find reflection in its Constitution as the leading principles of the Russian statehood. The review of the international discourse in the area demonstrated that the problems and doubts, attached to the concept of state-funded legal aid, e.g.: rising levels of crime concerns, high costs that, possibly, should be spent to address other social needs, etc., are typical for many societies, independently of the economic development and legal culture, and Russian society is not an exclusion.

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

The world practices of provision of state-funded legal aid were reviewed in chapter three; the analysis of the *pros* and *cons* of the various approaches made it possible to identify the possible solutions for the reform. The advanced legal aid models provide a broad scope of free legal services including administrative offence proceedings, assistance to victims of crime, special programs for migrants, aboriginal people, juveniles, etc., which fully conforms to the international standards and appears to be human rights – oriented and sensitive to the needs of diverse social groups. As regards the mechanism of administering legal aid, the practice when these functions were diffused between the governmental bodies and legal profession, were generally abandoned; instead, the independent agencies specialised in legal aid provision were introduced. The 'independent agency' scheme offers many advantages: impartiality and non-involvement in politics; effective management, including cost-effective budgeting, innovative solutions, quality control instruments, ability to satisfy different needs. The mixed system of legal aid delivery, allowing various types of legal aid providers (private practitioners, staff attorneys, paralegals, etc.), ensures competition, wiser distribution of funds and broader involvement of the civil society.

In the forth chapter the Russian legal aid model is analyzed. The study of current legal framework and the practical implementation of the relevant provisions helped to identify the deficiencies of law and practice to be addressed. In general the indigent defence in today Russia has to be characterized as limited in scope and archaic in terms of management; it is not only unable to ensure the meaningful legal assistance to the needy, but creates the conditions for the gross violations of the defendants' rights and has a disastrous influence over the whole system of criminal justice.

The amended model of provision of state-funded legal aid in criminal cases was proposed in the fifth chapter. The model was designed with due account of the international best practices and human rights standards. To a great extent, the idea behind the choice of the proposed solutions

was to target some of the most critical problems of the currently existing system; at the same time, such factors as realism of the proposed solutions, the existing legal framework, the recourses available, the situation of legal profession, were considered.

The proposed recommendations address the issue of narrow scope of legal aid provided in Russia, its failure to provide services that are necessary for the efficient defence; problem of unavailability of legal aid on the appellate stage of criminal procedure, in administrative offence cases, where the interests of justice may require that free legal assistance is provided, etc. They target the specific problems in criminal justice system, including corruption, abuse of police power and human rights violations and suggest the relevant safeguards.

Finally, the attention is given to the problem of absence of the satisfactory management in the area. The proposed model envisages establishing of the National Legal Aid Agency – an independent body specialised in administration of legal aid provision, with the competences in the following areas: developing and managing legal aid budget; gathering and analysis of statistical information related to legal aid provision and design of the proposals on the optimisation of legal aid provision; selection, contracting and support of the prospective legal aid deliverers; elaboration of quality standards and quality control. The proposed reforms appear to be realistic; they envisage mechanisms, ensuring the financial sustainability (such as possibility of raising private funds; introducing means/merits tests; cost-effective strategies of selection of services providers); they take into account the situation of legal profession and the regulations in the field.

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