

# Justice Initiatives

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## Legal Aid Reform and Access to Justice

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This month, *Justice Initiatives* looks at legal aid reform from several different perspectives. A major focus of this issue, as of our work, concerns state-provided legal representation for indigent persons charged with crimes.

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## Introduction

*James A. Goldston, Executive Director, Open Society Justice Initiative*

The right to legal aid in criminal cases, widely proclaimed in a range of human rights instruments and national constitutions, is routinely ignored. Defendants who can't pay are interrogated, charged, tried and convicted without a lawyer, or with only the most cursory and sub-standard representation.

The factors conspiring against fulfillment of this right are often overwhelming. The criminally accused have never attracted much popular support, less so in an age of terrorism. Legal representation costs the state money—always in short supply. Worse, the money must be paid to a group (lawyers) who since Shakespeare have curried little favor. Why, many ask, when public concern with crime is on the rise in so many places, should scarce resources be diverted to defend accused criminals?

Notwithstanding these formidable obstacles, the Justice Initiative considers this a priority for several reasons. First, ensuring an adequate defense for those charged with crimes is a fundamental test of government's commitment to the rule of law and to the principles of presumed innocence and procedural fairness which underpin it. Second, competent defense advocacy is a crucial foundation of an effective criminal justice system. Capable defense attorneys free to investigate, probe and question keep police and prosecutors on their toes, forcing them to do their jobs professionally. Third, from unreconstructed police states to developed democracies, every government falls short

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in providing adequate defense. Fourth, in the field of donor-supported international law reform, criminal defense is the often-overlooked cousin to programs targeting judges and law enforcement officers. Finally, in small but significant ways, we are finding—as some of the articles in this issue describe—that change is possible.

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The Justice Initiative's most substantial effort in this field to date has been in Lithuania, where enlightened government officials, capable partners in the bar and civil society, and the impetus of European Union accession have provided fertile ground. Several articles explain the origins, present course, and future challenges of a project which has established two pilot legal assistance offices, trained a cadre of public defenders, and refashioned the legal and institutional framework relating to legal aid. The final outcome is not known, but the project has already revolutionized the debate about legal aid in Lithuania by exposing numerous actors in government and civil society to alternative models of service provision. In January 2004, the Lithuanian Justice Ministry endorsed the creation of a nationwide network of public defender offices, building on a government commission's positive assessment of the two model offices established with the help of the Justice Initiative. The recommendation opens the way for the most comprehensive reform of legal aid for poor persons charged with crimes in postcommunist Europe (see articles in this issue by Namoradze,

*Siseckas and Wattenberg and related documentation on the Justice Initiative website: [www.justiceinitiative.org](http://www.justiceinitiative.org)).*

The Lithuanian example has proved contagious. Over the past two years, after meeting with Lithuanian project participants and/or visiting the pilot offices, several governments around the postcommunist region have embarked on their own reform efforts. On October 6, 2003, the Ministry of Justice in Mongolia formed a working group on legal aid reform to draw upon the Lithuanian and other examples. In early 2003, the Bulgarian Ministry of Justice established a pilot public defender office loosely inspired in part by those in Lithuania. In cooperation with the Open Society Foundation–Sofia and the Justice Initiative, the Ministry is undertaking a comprehensive needs assessment that seeks to build on prior NGO studies (see article by Kanev). And following a Justice Initiative-organized Round Table on legal aid in Bishkek in November 2003, the Ministry of Justice is expected soon to propose the formation of a working group to develop a reform plan in Kyrgyzstan.

In these and other countries, the Justice Initiative will continue to seek expanded government financial and political support for legal aid; promote development of reliable models for assuring effective legal representation; and improve the quality of criminal defense advocacy and of paralegal services.

Although the right to legal representation for criminal defendants enjoys explicit recognition in international instruments, the need for legal advice and assistance extends to other actors and beyond the realm of penal law altogether. Two articles describe the new system of legal aid in Chile, where the government is midway through a staged process of introducing major changes, with significant effects on both victims

and defendants (*see Hirsch and Wilson*). Other pieces examine legal aid delivery in both civil and criminal cases in East Timor, Israel and the United Kingdom (*see Cancio, Hacoheh, Smith*). And in the post-conflict environment of Sierra Leone, the Justice Initiative is collaborating with a range of NGOs in establishing a network of paralegals to provide basic legal advice and assistance to marginalized populations outside of the capital, Freetown (*see Allen*).

Finally, two authors describe very different trajectories of law reform assistance. In one, a senior U.S. public defender spent two months last summer coaching, advising, and training younger counterparts starting work in the pilot office in Bulgaria. In another, one of the progenitors of legal aid in South Africa has devoted the better part of seven years sharing insights with law students, lawyers and paralegals working in university clinics and legal aid offices all over Central and Eastern Europe (*see Kinney, McQuoid-Mason*).

These experiences of knowledge-sharing lie at the heart of much of our work. And yet, the process of transferring, adapting and/or learning from criminal justice institutions, experiences and skills in different national contexts is far from a science. With every exchange, training and joint collaboration, we learn a bit more about the complex nature of changing legal culture. Notwithstanding how much we still don't know, some things seem reasonably clear when it comes to improving legal aid and the quality of legal representation afforded criminal defendants:

- Accused persons who cannot consult with a lawyer in timely fashion are more vulnerable to serious abuse—torture, coerced confessions, reliance upon legally inadmissible evidence for conviction.

In countries where such practices are endemic, access to a lawyer may be the difference between liberty and prolonged confinement, life and death.

- Absence of counsel not only engenders rights violations; it also distorts the truth-seeking function, renders less reliable the outcomes of criminal proceedings, and ultimately undermines public trust in the legal system.
- Different models of legal aid delivery abound. And yet, whatever means states choose, they must ensure that each person charged with a crime has legal assistance assigned to him, at state expense, “where the interests of justice so require.”<sup>1</sup>

*Rights enforcement must be practical and effective not theoretical or illusory.*

- Efforts to improve the quality of representation afforded criminal defendants should take account of the historical and legal specificities of the local environment. Nonetheless, it is important not to confuse legal prohibition with cultural predilection. Just because lawyers have not traditionally filed written motions, relied expressly on constitutional or international jurisprudence, or conducted their own investigations on behalf of the defense, does not necessarily mean they may not, cannot, or should not. Even in systems which rely far less on orality than most common law countries, changes in defense counsel behavior may contribute to improved representation and a balanced relationship

between prosecution and defense absent any amendments to law.

- In this sphere, as in others, rights enforcement must be “practical and effective” not “theoretical or illusory”.<sup>2</sup> To fulfill this pledge, we need empirically-grounded information about the effects of inadequate or non-existent legal aid for those denied counsel—the frequency and duration of pre-trial detention, the severity of charges, rates of conviction, the length of sentences, and the likelihood of reversal on appeal. We need tools to measure how closely the daily lives of legal aid lawyers correspond with popular conceptions of what defenders do. And we need more accurate and transparent accounting to determine the real budgetary costs of the legal services currently being provided, and the price of doing better.
- In seeking to bring about positive reform, the Justice Initiative and others have employed a variety

of methods: introducing alternative models of management and service delivery; demonstrating the possibility of improved representation through tangible results in one or two places; and documenting the hidden costs of under-funded ex officio systems (which use public funds to pay private counsel). Invariably, however, the greatest impetus for change is the constellation of local actors—members of the bar, NGO advocates, former prisoners, forward-looking government officials—united by their shared commitment to more effective legal aid for all in need. In each of the countries where we work, it is these allies who lead the struggle.

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### Notes

<sup>1</sup> International Covenant on Civil and Political Rights, Art. 14(3)(c).

<sup>2</sup> *Airey v. Ireland*, Eur. Ct. Hum. Rts., 2 EHRR 305 (1979), para. 24 (upholding right to legal aid in civil proceedings).

## LITHUANIA

# An Opportunity for Real Reform

*Starting in 1999, Zaza Namoradze<sup>†</sup> has been closely involved in an effort to establish a groundbreaking system for legal aid delivery in Lithuania, working together with the government, NGOs and legal professionals.*

Access to justice reform in Lithuania has become a matter of great interest and close scrutiny for governments and law reform NGOs throughout the countries of Central and Eastern Europe—and beyond. Lithuania is the first to concern itself seriously with the quality of legal aid for indigent

criminal defendants and nontraditional solutions to improving it. In the past three years, two pilot public defender offices have demonstrated a better quality, more cost-effective system of delivery for criminal defendants than the long-prevailing “ex officio” model—whereby defense lawyers are appointed from private practice. Initial results led two years ago to the passage of a new “Law on State Guaranteed Legal Aid.” The Law extended free legal services to low-income groups

in criminal, civil and administrative matters, and conferred formal status upon university-based legal clinics as providers of legal services.

The law also led to the establishment of a Working Group, charged in February 2003 with developing an overall framework for reform and drafting legislation on institutional organization and management, and on the delivery of legal aid. By June 2003, the Working Group had completed a concept paper and submitted it to the government, which approved a modified version on November 25, 2003.<sup>1</sup> Although the associated legal and institutional modifications are still very much underway, the success to date—in developing an alternative model of legal service delivery and in provoking serious discussion at senior government level about legal aid reform—has inspired similar efforts, in Bulgaria, Moldova, Kyrgyzstan and Mongolia.

The Lithuanian undertaking is the Justice Initiative's first major access to justice project. It was with great enthusiasm that the Lithuanian Justice Ministry received, in early 1999, a proposal put forward by COLPI, the Justice Initiative's predecessor, to pilot a joint public defender project. The aim was to create a better quality legal aid service within existing financial constraints. The Ministry was dissatisfied with the state of legal aid: lawyers' performance was sub-par, case-assignment was erratic and finances were opaque, despite considerable governmental investment (at the time, the equivalent of one million U.S. dollars annually in a country of 3.5 million people).

### The outgoing system

Legal aid systems virtually everywhere in Central and Eastern Europe and the former Soviet Union have remained unchanged since Soviet times—when defendants had few or no real procedural safeguards against state abuse, and the state dominated the criminal process. Client-centered defense was and remains almost absent from the system; the principle of equality of arms often rings hollow. Over the past decade, while many governments and foreign donors have emphasized judicial efficiency

A system in which defense counsel have little incentive to do more than show up often amounts to no legal defense at all.

and the accountability of law enforcement, all too few have paid attention to an essential aspect of the criminal process: the right to free legal counsel for indigent criminal defendants. Proclaimed in major international treaties and most national constitutions, this right amounts to little in practice for most defendants in the region.

A recent survey of legal aid needs in Lithuania indicates that more than 90 percent of all defendants were assigned a lawyer in 2002. Although indicative of a massive demand for legal aid, this tells us little about the fulfillment of the right to counsel. The great majority of criminal defendants receive nothing more than the mere presence of a lawyer at key moments in the process, in order to

satisfy purely formal requirements of the criminal procedure code and the ex officio payment process (see Valerie Wattenberg's article in this issue). A system in which defense counsel have little incentive to do more than show up often amounts to no legal defense at all—a de facto failure by governments

The creation of a network of public defender offices is a bold, untried approach for continental Europe.

to fulfill their constitutional and international obligations. The continuation of such an inefficient, formalist system not only deprives the majority of criminal defendants of the right to fair trial, it makes a mockery of the equality of arms. The prosecution habitually dominates the legal process, the police can act without fear of rigorous scrutiny, and imprisonment becomes the default outcome for both pre-trial and post-trial processes. Vulnerable groups, such as racial and ethnic minorities, are often disproportionately prosecuted and convicted. Under these circumstances, for most criminal defendants the presumption of innocence is but a formality.

The inspiration for the Lithuanian project was a similar effort in South Africa (see article by David McQuoid-Masson). Following a “Public Interest Law Symposium” in Durban in 1997, legal activists from Central and Eastern Europe began discussing how to analyze and address the region's shared problems of access to justice.<sup>2</sup> Initial studies in six Eastern European

countries revealed major flaws with respect to quality, fee structures and accessibility. It was also clear that these issues were of low or no priority for governments and international development and donor institutions. To raise the profile of access to justice, in 1999, the Bulgarian Helsinki Committee and the Polish Helsinki Foundation undertook empirical studies and analyses of state legal aid in those countries.

Against this background, the position adopted by the Lithuanian government was quite remarkable: they were openly critical of the situation in their own country and warmly welcomed our proposal to try something new. The proposed solution went far beyond reform of the existing ex officio system—the creation of a network of public defender offices is a bold, untried approach for continental Europe, one that still remains controversial.

With the help of the Ministry of Justice, the Bar Council of Lithuania, and the Open Society Fund—Lithuania, a plan was developed to set up the first pilot public defender office. In spring 2000, the office opened in Siauliai, a large industrial town. With no comparable models anywhere in Europe, our search for a suitable candidate led us to settle on Israel, which had recently introduced a public defender system (see article in this issue) with encouraging results.

Through its integration with the local criminal justice system the Siauliai project improved both case coordination and representation for defendants. By sharing case information, lawyers at the office were well placed to cover for each other,

thereby eliminating the delays that had been the norm in the past whenever attorneys were unable, for whatever reason, to show up. At the same time, initial evaluation showed that office management and litigation practices still needed attention. These considerations encouraged us to establish a second pilot in the capital, Vilnius, in May 2002.

Together the two offices highlighted hitherto hidden problems in the existing *ex officio* legal aid system, which, it became clear, required more comprehensive reform. The payment structure was found wanting. Case-allocation was non-transparent. There was no mechanism for appointing *ex officio* lawyers at the pre-trial phase, which created a gaping lacuna in basic rights. Additionally, our own analyses on a set of case files indicated serious financial irregularities and a lack of any accountability in the system. In the pilot regions, meanwhile, despite a ministerial decree calling on public defenders to coordinate case-assignment, investigators continued to by-pass the new offices and assign “their lawyers.”

Recognition of the need for comprehensive reform marked a turning point for the project. By late 2002, the initiators of the pilot public defenders project in Lithuania, in close consultations with the Justice Initiative, started to examine the problem in detail and to search for alternative models. After a visit to the Netherlands, which has a centralized Legal Aid Board to oversee accountability and efficiency, the Lithuanians proposed a similarly centralized policy making and management body to improve access to justice. In February

2003, an official Working Group was established by prime-ministerial decree to develop a concept paper on reforming the legal aid system.

The task facing the group was daunting. Charged with creating a comprehensive vision of legal aid reform, they had to develop convincing political and legal arguments for the government and general public. A workshop organized by the Justice Initiative at the end of April 2003 provided a forum for discussion of many of these issues. One important question, was whether a new independent state agency (provisionally called the Legal Aid Council), would be viewed as an extra burden on the

Recognition of the need for comprehensive reform marked a turning point for the project.

taxpayer—not a political “winner.” In the legal domain, negative reactions were anticipated from the investigative and prosecution agencies which might view managed legal aid as likely to complicate, if not obstruct, their activities. The Bar Council, whose members generally provide the *ex officio* services might also see a threat in the new institution.

The April workshop discussions helped achieve compromise on several of these issues. It was agreed, for example, that since a fully independent Legal Aid Council was unlikely to be politically feasible, a semi-independent agency under the government would instead be recommended.



As to delivery, the workshop participants agreed that this proposed Legal Aid Council would decide on the recruitment and activities of public defenders jointly with the Lithuanian Bar Council. Public defenders would become the main actors in delivering legal aid, alongside private lawyers. An important consensus was achieved when the working group agreed that the competencies and structure of the proposed legal aid management council should be left general in law, but that large discretionary powers would allow the body to adjust to changing demands as they arose in legal aid administration and delivery.

The working group submitted its concept paper “on the improvement of the state-guaranteed legal aid system” to the Ministry of Justice at the end of June 2003 (*see Linas Sesickas’ article in this issue*).

The prospect of change, and the breadth of the concept paper, took some aback. In a letter to the working group, the Minister of Justice asked for—and subsequently received—a number of clarifications. Parliamentary debate subsequently took place in late June. The working group highlighted the case in terms of good governance, noting in particular the cost-efficiency and transparency of the proposed new model, and making a case for improved accountability in the spending of taxpayers’ money.

The paper approved by the government on November 25, 2003, contained one substantive deviation from the concept paper submitted in June. The new Legal Aid Coordination Council (as it is now called) is to be created under the Ministry of Justice, rather than having full or partial

independence as suggested. Members of the working group believe, however, that this is only the beginning of the reform process, however. Once the Legal Aid Coordination Council is up and running, it is not unlikely a need for greater independence will become apparent. Countries which have undertaken similar reforms in the past ten years (England, Israel, Netherlands and South Africa, to name a few) offer interesting examples of the dynamic process of change and refinement that takes place in the institutional organization and management of legal aid over time.

The Legal Aid Coordination Council will provide for overall policy-making, management and monitoring of legal aid in criminal, administrative, and civil matters. A mixed legal aid delivery system has been agreed upon, at least to begin, combining elements of the old scheme of panel-appointed private lawyers with the newer system of in-house public defenders, rather than the replacing the *ex officio* system outright.

Through one change of government and four new Ministers of Justice since this project began, Lithuania has shown unusual foresight and commitment to making access to justice a reality for indigent criminal defendants, and extending it to civil and administrative cases. When completed, these reforms will make Lithuania the first country in Eastern Europe to create a centralized institution for legal aid management and to institutionalize public defenders as a mode of legal aid delivery.

For me personally, it has been a most satisfying professional experience to be associated with this project



and cooperate with the working group and public defenders in two pilot districts in Lithuania. Although the overall reform process is not yet completed, it is already apparent that the Lithuania project has set new benchmarks and unique standards—and not for this region alone. Furthermore, it has contributed to the quest to find real solutions for access to justice.

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#### Notes

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

<sup>1</sup> These and related materials can be viewed on the Justice Initiative website: <http://www.justiceinitiative.org>.

<sup>2</sup> The organizations involved included: COLPI, INTERIGHTS, the Public Interest Law Initiative, the Polish Helsinki Foundation for Human Rights, the Bulgarian Helsinki Committee and the European Roma Rights Center.

## Making Way For Justice: Breaking with Tradition in the Former Soviet Bloc

*Valerie Wattenberg<sup>†</sup> describes the inefficient and much abused “ex officio” system for providing legal services to indigent defendants that still prevails throughout the former Soviet states.*

The right to counsel and the presumption of innocence were among the concessions that the Soviet Union purported to make to international standards of justice. A handful of individuals—justice agency officials, judges or attorneys—strived to realize these and other ideals whenever possible—and occasionally succeeded. But the overall failure of the Soviet justice system to embrace these standards in substance rendered them hollow, like so many other principles of due process. The challenge in today’s post-Soviet states is to infuse these long-dormant standards of justice with meaning and force, in turn contributing to the legitimization of the laws and courts. It is a long road.

### The Soviet legacy

In the Soviet Union, defense lawyers practiced as individually licensed practitioners under the aegis of the Collegia of Advocates, a state-sanctioned quasi-independent bar association that authorized attorney appearances and monitored payments to them, with mandatory deductions for space and utilities, Collegia dues and social welfare.<sup>1</sup> Aside from a few foreign law firms in the region at the time, joint or shared practice was unheard of: case information was a commodity to be guarded and doled out, not shared. Although ostensibly a non-governmental agency, the Collegia would keep tabs on attorneys; activities undertaken in representing clients that were deemed contrary to the interests of the Soviet state could be grounds for exclusion from the Collegia—in which membership was required for trial lawyers.

The non-governmental legal profession suffered as a result of the distortions of justice in which lawyers (and others) were forced to take part. At times, defense lawyers' prestige was inferior to that of prosecutors and police investigators, who, if not uni-

Long perceived as brokers of expedited justice “proceedings” arranged in advance behind closed doors, [attorneys] came to be seen as unprincipled go-betweens for corrupt clients.

versally admired, at least wielded some power. They were regarded by most as legally required but often peripheral appendages to the system. Judges would pre-empt their cross-examinations; hold ex parte meetings with prosecutors and police on case substance and outcome; and capriciously deny defense requests with no foundation—defense attorney protests rarely prevailed. Although many attorneys courageously fought for their clients, particularly when they could hang their hats on procedural errors and timelines missed by the prosecution, more succumbed to the many incentives to keep a low profile, tow the party line, and offend as few as possible.

By the time the Soviet Union collapsed, attorneys' reputations had descended to a comparable nadir. Long perceived as brokers of expedited justice “proceedings” arranged in advance behind closed doors, they came to be seen as unprincipled

go-betweens for corrupt clients.<sup>2</sup> This image deteriorated further when the market freed up private practice at the end of the Soviet period: wealthy lawyers were regarded as successful and savvy, but inherently suspect; whereas the less affluent were presumed talentless.

Today, despite the disintegration of the Soviet Union, many of its administrative and governing structures have remained in place, including justice agencies, whose institutional memory outlived the departure of the former states' personnel. The attitudes burned into that memory linger in many remaining legal professionals—bureaucratic rules and procedures all but etched in stone the presumption of guilt and police superiority over the individual.

### **The right to counsel in the transition period**

Few countries made a clean break with all the laws of Soviet times. Criminal codes and criminal procedure codes were among the last to change, and changed least. Under the newly ratified norms contained in international conventions and treaties, the independent states of the region now have an incentive to comply with higher standards of defendants' rights.<sup>3</sup> But attorneys' hands are still tied by established practices harking back to a day when rights had little bearing on the criminal justice process. Among these are the following:

- Inherited criminal justice laws contemplated a right of unlimited access to defendants for police investigators. This still applies today, albeit tempered in most

countries by a right to counsel. As law enforcement's right of access could begin before grounds for suspicion existed, police interrogation became especially important for justifying arrest.

- In some countries, defendants are still not granted a private consultation with a lawyer prior to police interrogation.
- Although attorneys are now present during police interrogations, often they are expected to sit quietly, witnessing the proceeding until the investigator has finished questioning the defendant. In some countries, this is a tacit expectation. In others, procedural rules entitle the attorney to ask questions only after the investigator is finished.
- Criminal codes imposed an obligation on members of society to give evidence as witnesses, while recognizing a little-used pro-forma right to silence for defendants—the implication being that the innocent, naturally, aid the state, whereas the guilty are silent. These provisions still exist in many countries. Paradoxically, the right to silence may be less used today as attorneys are less likely to want to inconvenience law-enforcement or judges from whom they receive appointments, and who must sign off on payment vouchers. For defendants too, now as then, silence carries consequences—a “sincere admission of guilt” at the earliest stages of a case is a recognized ground for pre-trial release.

Defendants always had a right to counsel at trial, but in the past attorneys had no right to investigate

evidence of possible use to the defense and no absolute right to introduce independently discovered facts—all had to be filtered through the police investigation. Today, most countries in the region acknowledge equality of arms as a goal. Many criminal codes establish some form of right to independent investigation, but this still often translates into a right to ask *police* to question particular witnesses, pose specific questions or examine documentary evidence for relevance,

Although many governments fear reforms will cost, the voucher system virtually guarantees that money will be paid out for nothing.

all in the attorney's absence. Where the laws allow the defense to conduct its own investigation, introduction of the results is not always a *right*—rather, it is a privilege that the court may grant in its discretion. In countries where these results are admissible, equality of arms notwithstanding, police investigation is paid for by state funds, whereas defense attorneys receive no state resources for analogous efforts.<sup>4</sup>

Exacerbating the restrictions on counsel's actions, lawyers called upon to provide mandatory legal aid under the panel appointment, *ex officio*, assignment system, are still paid in accordance with a scheme whose priorities suited the Soviet state. Payment is issued only in return for vouchers that a state official can sign, for example, for time spent with police

investigators and prosecutors while they interrogated the client. Or, in some countries, a fixed fee was paid for each volume of discovery or case materials, regardless of whether they apply evenly to all defendants, or whether the attorney actually takes time to read them.<sup>5</sup> A second review would yield no payment. Client visits and case preparation are eligible only for minimal flat fees, if paid at all, as these activities were of minimal concern to the government when the system was designed.

This is the legacy of the *ex officio* system that the Soviet bloc states bequeathed to their independent successors. Throughout the region, the fiction persists that the socialist state's parameters for attorney payment on assigned cases corresponds to the services they must now provide to fulfill the states' guarantee of an inalienable right to counsel.<sup>6</sup> With a few exceptions, the independent states conducted no reexamination of these measures in accordance with today's democratic justice values, which are unrelated to the priorities of the Soviet bloc states that devised the voucher system.<sup>7</sup> There are few incentives to conduct case research, develop complex legal arguments or motions, or even to prepare diligently, aside from the dictates of individual attorneys' own conscience.

Thus, the ideals of due process, objective tribunals, the presumption of innocence, the right against self-incrimination, equality of arms and other checks and balances on state power found no resonance in attorney remuneration scales, leaving the guardians of those rights to advocate irrespective of pay, out of the goodness

of their hearts. Few see the judicial system as a channel for achieving justice, in part due to perceptions of lawyers and their practice.

### Legal aid in Lithuania

It was in this context that Lithuania undertook a reexamination of the right to counsel and the extent to which it was being realized, and established two pilot public defender offices.

Even a small number of public defenders united in a cause to deliver rights and hold other justice players to their burdens can realize certain basic rights more consistently and effectively than individual practitioners fighting separate battles. In a very short time, the public defenders of Lithuania have made a substantial contribution to improving access to justice for their clients.

Yet it remains difficult, even for the public attorneys, to initiate rights-based practices to which neither they nor their justice system counterparts are accustomed. How will the police react when an attorney insists on private meetings with her client? How to insist on a client's right to be presumed innocent, or to have no information and therefore remain silent, without negative consequences for pre-trial detention or eventual charges filed? How can equality of arms be realized when the defense lacks the funding for investigation that police have and cannot present statements taken from defense witnesses to counterbalance statements by the prosecution? What does it mean in practice for evidence to be deemed relevant only when it is lawfully obtained—how can a judge asked to declare guilt or innocence be expected

to disregard illegal evidence that she has already heard?

Despite its clear deficiencies, the voucher system for compensating assigned counsel persists in the presumed absence of a ready replacement. Although many governments fear reforms will cost, the voucher system virtually guarantees that money will be paid out for nothing: for attorney signatures on documents without their actual presence; for volumes of case materials not necessarily read; for physical presence that provides none of the safeguards for which the region's new constitutions envision a right to counsel. Add to this the many bureaucratic expenditures which flow from monitoring and processing such a system.<sup>8</sup> The true cost of the ad hoc appointment system and its voucher-based remuneration has never been calculated. At the same time, if private attorneys appointed ex officio were paid for the provision of the full range of defense services, the cost to the government of a purely ex officio defense system on a per-attorney or per-case basis would be exorbitant and prohibitive for still struggling economies.<sup>9</sup> Public defenders provide real defense in a much more cost- and time-effective manner.

Equality of arms presupposes a force of attorneys poised to counter the weight of government prosecution. There cannot be a functioning adversarial process unless the institutions of government whose job it is to discover, prosecute and judge the guilty, are equaled by a dedicated force of comparably supported defenders. This in turn stands to contribute to the ultimate objectivity and reliability of justice proceedings.

Public defender offices of salaried attorneys stand a real chance of legitimizing the region's court systems by bringing constitutional and international rights to life. Individual attorneys cannot bring about systemic change by themselves. Unified cadres of attorneys adhering to common standards of quality and dedicated to supporting laws and rights through coordinated efforts can have a powerful impact on the justice system and popular perceptions of access to it.

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#### Notes

† Valerie Wattenberg, a former public defender, is a consultant for the Open Society Justice Initiative working on national criminal justice reform.

1 Defense lawyers were among the few professional groups in the USSR who were not, technically, government employees. They received assignments, or took on individual cases, directly or indirectly through the Collegia.

2 As government directives over the years to be alternately harsh on crime or more humane took precedence over the facts and circumstances of individual cases, many legal players threw up their hands with respect to the justice system, succumbing to any enticement of otherwise irrelevant factors that could drive a case's outcome—such as bribes.

3 After ratifying the European Convention on Human Rights and other international human rights instruments, most states of Central and Eastern Europe and the former Soviet Union incorporated the right to legal aid into their constitutions and criminal procedure codes. The factors that trigger the exercise of this right vary from country to country. Some envision a right to counsel in all criminal cases; others afford a right to an attorney depending on the potential duration of incarceration or the gravity of the crime(s) charged; still others require that counsel be provided in civil cases as well, depending on the defendant's financial or disability status (physical; linguistic; mental).

4 Suspicions of tampering may still result if attorneys dare to interview state witnesses. Even if not proved, these can blight an attorney's reputation.

- 5 One violation of the voucher system reported in the region is double-billing for time spent on “familiarization with the case materials.” The assigned lawyer withdraws and allows others to take on the case—and receive the same per-volume fee—resulting in several attorneys (up to, in some reports, a dozen) breezing in and out of a single case.
- 6 The Soviet state recognized roughly the same attorney actions as today’s vouchers do, but the pay on assigned cases was so minimal that many would simply never file to receive it. Such cases were popularly referred to as “unpaid.”
- 7 Some countries in Eastern Europe, like Bulgaria and Romania, now provide a flat fee per case payment to appointed attorneys, differentiating between cases on the basis of gravity or complexity.
- 8 In Lithuania, it is estimated that 700 or more attorneys take appointments to represent indigent clients in as many as ten cases each in a year. If we assume each attorney submits an average of three voucher-certified tasks per case for payment (many submit more), the state must then process and verify 21,000 vouchered tasks in forms filled out in triplicate (63,000 copies), signed by police, prosecutor, judicial and archive personnel, registered, and stamped with the relevant agency’s seal before being filed, tallied and paid out, often piece-meal, in some 21,000 financial transactions conducted by state accountants and registered in government record books.
- 9 The range of defense services includes at a minimum: client interviews; collecting background mitigating evidence on clients; developing case strategy; seeking and reviewing documentary evidence; examining and analyzing discovery materials; visiting crime scenes independently of police personnel; interviewing witnesses; challenging the basis of accusations; consulting experts; researching law; drafting motions; making and substantiating requests for relief from violation of the presumption of innocence and equality of arms.

## A New Model of State Guaranteed Legal Aid in Lithuania

*Lithuania is poised to embrace a new system of legal aid delivery. Linas Sesickas<sup>†</sup> describes some of the history and main elements of reform.*

On November 25, 2003, the Lithuanian government took the first steps to reforming the country’s legal aid system, to make it more responsive to the needs of the poor. The new approach, which puts public defender offices at the heart of national legal aid, is the result of four years of experiment, negotiation and partnership between government and civil society.

Lithuania’s 1992 constitution guaranteed the right to legal defense from the moment of detention,<sup>1</sup> but it wasn’t

until March 2000 that the right was given substance in the Law on State Guaranteed Legal Aid, which entitled indigent people to legal aid in civil, administrative and criminal cases.<sup>2</sup> However, although groundbreaking in its aspirations, the law was more successful in indicating the scope of reform needed than in effecting real change. Among the many problems thrown into relief, three stood out:

- The absence of a national legal aid body. It quickly became clear that the overall institutional structure was too fragmented to assure the efficient provision of quality legal services. The Ministry of Justice was

responsible for paying private lawyers appointed *ex officio*, but the courts made the actual payments. Aid lawyers, supposedly appointed by the Lithuanian Bar Council, were effectively assigned to cases by law enforcement agencies, who had neither a mandate nor clear criteria for doing so. This informal appointment system made some lawyers dependent on law enforcement for regular work.

- Eligibility for legal aid was to be decided by individual municipalities. However, many municipalities appeared to be unaware that indigent persons were eligible for legal aid under the new law. Others simply showed no interest in delivering the new services. The funding process was complicated: municipalities were expected first to pay lawyers for legal aid, then to submit a standardized request to the Ministry of Finance for reimbursement. In addition, the requirements for eligibility were so complicated and time-consuming that few could successfully navigate them. The result was that the system virtually ground to a halt. Of 500,000 Litas (about U.S. \$166,000) directly allocated for the delivery of legal aid in each of 2001 and 2002, less than 30,000 Litas was actually spent in total for both years.
- An absence of clear standards or monitoring procedures often resulted in poor representation of indigent defendants. Minimal interest and poor incentives conspired to produce a low quality service from *ex officio* lawyers. Lawyers were paid a rate of 12-14 Litas (U.S. \$4-5) per

hour—sub-par even by Lithuanian standards—and much standard aid work, such as research and client meetings, was not reimbursed at all absent an official seal from a judge or police officer.

The need for more thorough overhaul was clear. Parallel to these efforts, a non-governmental experiment was demonstrating alternative approaches. In 1999, the Open Society Fund–Lithuania (OSF–Lithuania) jointly with the Open Society Justice Initiative (then COLPI), the Lithuanian Bar Association and the Ministry of Justice, opened a first pilot public defender office (PDO) in the provincial city of Siauliai. A second, in the capital, Vilnius, opened in 2001. These aimed to improve legal aid delivery, primarily in criminal cases, by employing full-time defenders in place of appointed private counsel.

The PDOs were judged reasonably successful in improving legal aid delivery in their pilot areas. The Ministry of Justice, the Justice Initiative and the Lithuanian Bar Association together created an inter-departmental Working Group, which was given the task of drafting a concept paper on reforming the system. The concept paper was submitted in July 2003 and approved, with changes, in November 2003.

### **The new system**

According to the final paper, the new system will involve the creation of a coordination council under the ministry of justice. New PDOs will be set up in Lithuania's five regions. Lawyers will be paid on a case by case basis.



### *The Coordination Council*

The Council will coordinate the provision, funding and monitoring of legal aid in criminal, administrative and civil matters, and establish guiding principles for policy. Day-to-day implementation will be carried out by the Justice Ministry. Membership includes representatives of the parliamentary committees on law and human rights, the Bar Council, the Association of Municipalities and others. Members are not paid. The Council is accountable to the Ministry of Justice.

### *Eligibility for legal aid*

The five levels of eligibility currently in operation will be replaced by two—all or half of an individual's legal fees will be covered, depending on the person's income/property. Requirements for full eligibility will be simplified, with a view to making aid available to "a wider circle of people in need." The existing, complicated, declaration forms will be simplified, and indigent persons will not be required to complete them before receiving aid—although some documentary evidence of their status is needed. Public education and information on eligibility is to be promoted.

### *Public Defender Offices*

A "mixed" system of legal aid delivery (including both public defenders and ex officio private lawyers) will be introduced in Lithuania. A countrywide network of NGOs is to be established covering each of Lithuania's five regional jurisdictions. PDO lawyers will be the "key providers" of legal aid—but private lawyers will be called in if, due to their workload or conflict of interests, the public defenders

cannot take a case. The Coordination Council will contract with the PDOs annually for the delivery of legal services and to cover operational costs. According to the concept paper, "the establishment of the PDOs aims at ensuring a more effective and qualified defense of human rights and interests both in criminal cases ... and civil and administrative cases."

### *A new payment scheme*

Legal aid lawyers receive a set fee per case, varying according to case complexity and other factors. This system will replace the hourly payment scheme paid in return for officially signed vouchers demonstrating their participation in state-approved activities. Ordinarily, lawyers who have been allocated a case will take it through all stages of legal proceedings until completion. The objectives are to "reduce the costs of legal aid administration...and ensure financial transparency." The new scheme will further increase a lawyer's "personal responsibility" for a case and allow for better monitoring of legal aid expenditures.

A new law on legal aid will be submitted to parliament for adoption, anticipated in May-June 2004. Once the law is adopted, the next step will be to put in place an administrative framework, to be completed by the end of 2004.

Lithuania has long needed a legal aid system that will serve everyone, including especially the poorest and most marginalized. The crucial step is to put the needs and rights of these individuals first. Having taken that difficult step, there is room for experiment, slowly building on experience. The Lithuanian government has embarked upon a long process which

requires flexible thinking and practical administrative arrangements, in order to provide competent legal representation for all who need it. Institutions are only the beginning—time, experience and patience will be required truly to improve the quality of legal services and nurture a culture of better rights protection.

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Notes

† Linas Sesickas is a consultant with the Justice Initiative and member of the working group who drafted the new model.

1 The Constitution of the Republic of Lithuania, Official Gazette 33, 2 November 1992, Article 31 para 6.

2 The Law on State Guaranteed Legal Aid of the Republic of Lithuania, No.VIII-1591, Official Gazette 30, 28 March 2000. Entered into force on 1 January 2001.

BULGARIA AND CENTRAL AND EASTERN EUROPE

## Needs Unmet: Legal Aid in Bulgaria

*Access to justice was deficient under communism—as was the justice system as a whole. Legal aid provision in Bulgaria was among the worst in the region then, and remains so today many years after the fall of the iron curtain writes Krassimir Kanev.<sup>†</sup>*

In the areas of both criminal and civil legal aid the existing legislative and institutional framework in Bulgaria is inadequate. Despite reforms to the criminal procedure code introduced in 1999, Bulgaria has not yet incorporated international human rights standards or ensured fair representation for indigent parties in legal proceedings.

### Legal aid in criminal proceedings

The Constitution guarantees the right of access to a lawyer from the moment of detention or when charges are filed. The costs of legal services in Bulgaria are too high for most criminal defendants—especially given that the poor

untouched until 1999. According to Article 70 of the CCP, the participation of a lawyer is obligatory when:

- the defendant is a minor;
- the defendant suffers from physical or mental disabilities preventing him/her from conducting his/her own defense;
- the charge envisages deprivation of liberty for more than 10 years;
- the defendant does not have sufficient command of the Bulgarian language;
- the interests of co-defendants are conflicting and one of them has a lawyer;
- the defendant is tried in absentia.

In these cases, ex officio lawyers are appointed either at the pre-trial stage, by the body investigating the case—i.e. the police or investigators—or during the trial (and not beyond) by the trial court. Needless to say, this legal framework leaves many defendants in criminal cases without any legal representation whatsoever at both pre-trial and trial stages. That it also fails to guarantee quality legal services and generates immense dissatisfaction for clients is illustrated in many cases taken by the Bulgarian Helsinki Committee (BHC), as well as in the reports of numerous defense lawyers.<sup>1</sup> At present, several cases involving Bulgarian criminal defendants are pending at the European Court of Human Rights in Strasbourg. One case involves a person sentenced to 14 years imprisonment

One case involves a person sentenced to 14 years imprisonment without a lawyer at any stage of the proceedings.

and social outcasts are practically targeted by the system. The Bulgarian Code of Criminal Procedure (CCP), passed in 1974 and still in force today, offers a framework of free legal aid for some categories of defendants. Despite numerous amendments to the Code through the 1990s, the original provisions on legal aid remained

without a lawyer at any stage of the proceedings.<sup>2</sup>

In 2001 and 2002, the BHC conducted two surveys to determine the scope of exclusion from legal representation and the quality of legal aid in the criminal procedure. The first survey took place in August and September 2001. A total of 1,891 criminal files, dating from between January 1, 1996, and December 31, 1999, in 109 first-instance courts were studied by qualified lawyers on the basis of a standardized questionnaire. In February 2002, a second survey was carried out in Bulgarian prisons. A total of 1,001 prisoners, including both pre-trial detainees and sentenced convicts, were interviewed in person. The aims were, first, to collect information which could not have been established solely by reading the files, and second, to measure the level of satisfaction of clients with the performance of their lawyers.

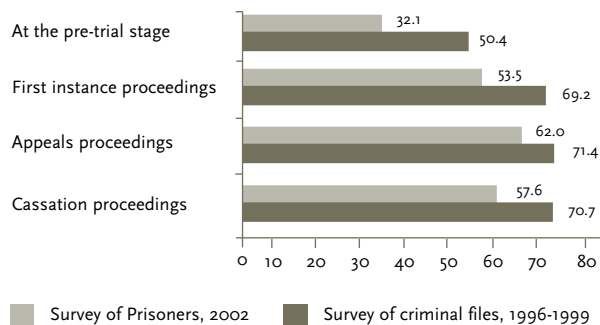
Both surveys produced striking results. As the below graph shows more than two-thirds of criminal defendants were not represented by a lawyer at the pre-trial stage and almost half of them were tried without a lawyer at first instance proceedings.

This exclusion from legal aid disproportionately affected ethnic minorities, especially Roma. The survey also indicated a significant degree of dissatisfaction with ex officio lawyers.

In reforms introduced in 1999 and in force from January 2000, the Bulgarian government introduced an additional provision to Art. 70 of the CCP, phrased along the lines of Art.6.3(c) of the European Convention on Human Rights.<sup>3</sup> Accordingly, free

legal aid is to be granted to defendants under three conditions: the defendant cannot afford a lawyer; the defendant requests a lawyer; and “the interests of justice” require representation. Subsequent jurisprudence of the Bulgarian courts has established that these conditions should be met cumulatively, i.e. that any combination of all three can be used in any given decision.

**Presence of counsel at various stages of criminal proceedings in Bulgaria, percent of cases**



Source: Access to Justice in Central and Eastern Europe: Country Reports, p.47.

The legal aid delivery system, however, was left untouched—ex officio lawyers were still to be appointed by investigative bodies and first-instance courts. The introduction of the new provision improved the situation somewhat, but as it leaves a notable degree of discretion to the bodies appointing lawyers to determine “the interests of justice,” it has failed to alter the status quo significantly. The BHC conducted two further surveys in prisons in 2002 and 2003. These as yet unpublished studies indicated that at the pre-trial stage the effect of the provision was minimal. The situation was better at

the trial stage, with judges much more willing to appoint lawyers than the police or investigators. Even at that stage, however, there were many instances of defendants facing possible imprisonment without the benefits of legal representation in court. Almost four years after the introduction of the new provision, the courts had still failed to establish a clear and uncontroversial interpretation of the “interests of justice.”

Against a background of widespread poverty and a prohibitively expensive legal services market, this narrow framework leaves many representation needs unmet.

The need to establish a comprehensive legal and institutional framework that meets Bulgaria’s international obligations to provide legal aid for indigent criminal defendants is as pressing as ever.

### **Civil legal aid**

While the problem of criminal legal aid receives at least some attention from the government and the public due to Bulgaria’s international obligations, civil legal aid is largely disregarded. The scope of free legal assistance for the poor in civil matters is very narrow. The Civil Procedure Code (CPC) provides for a limited number of instances, in which the courts appoint a lawyer or a representative for a party. For the most part this takes place in proceedings involving people deprived of legal capacity,

such as mentally disabled individuals or juveniles. In these cases, when urgent legal protection is required, courts will assign custodians, who may be lawyers. The court must also assign a representative to the “incapacitated” person where a conflict is found between their interests and those of their parent(s) or custodians. Representation of non-“incapacitated” citizens is possible under limited conditions: if they have disappeared or are absent or if they are heirs to unoccupied estates.<sup>4</sup>

Against a background of widespread poverty and a prohibitively expensive legal services market, this narrow framework leaves many representation needs unmet—and consequently many civil matters remain unresolved. In August 2002, the BHC commissioned a study of the basic legal needs of citizens in the areas of civil and administrative law, using a representative sample of the country’s adult population. The study sought to determine the importance of poverty as a factor in limiting access to civil legal services, and to capture levels of satisfaction with legal advice and representation when received.<sup>5</sup>

Asked whether they could afford to hire a lawyer in civil matters, the majority, 59.8 percent, responded that they did not need one. Among the rest, 12.8 percent answered that they needed a lawyer but couldn’t afford one. This translates to a likely 1.6 million Bulgarian citizens with outstanding legal needs that they cannot resolve due to their financial situation.

The accessibility of legal aid for both civil and criminal cases clearly remains a problem that strikes at

the heart of the rule of law in a country hoping to join the European Union by 2007.

Notes

† Krassimir Kanev is Executive Director of the Sofia-based Bulgarian Helsinki Committee.

1 In a 2002 survey conducted by the Bulgarian Helsinki Committee, 56 percent of surveyed criminal defendants in Bulgarian prisons who had ex officio lawyers gave the lowest available score to their lawyer's performance during pre-trial proceedings; 40 percent scored their lawyers the same during trial. See, *Access to Justice in Central and Eastern Europe: Country Reports*, PILI, 2003, p.73.

2 *E. P. v. Bulgaria*, Appl.No.54784.

3 ECHR, Art. 6.3: (c) "Everyone charged with a criminal offence has the following minimum rights: [...] to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

4 According to respectively Art. 16 (4) of the CPC and Art. 59 of the Inheritance Act.

5 The study was conducted by Sova-Harris, a Sofia-based polling organization, based on a questionnaire developed by the Bulgarian Helsinki Committee. See *Access to Justice in Central and Eastern Europe: Source Book*, PILI, 2003, pp.409-410.

## Bulgaria: Seeking Equality and Transparency in Criminal Defense

*Legal aid in Bulgaria is irregular and substandard, resulting in higher sentences and ethnically skewed prison populations. A pilot project demonstrates a possible alternative, writes Robert E. Kinney.*<sup>1</sup>

The quest for equality in the Bulgarian criminal justice system has, until recently, proven elusive. This is true despite the fact that Bulgarian law contains significant substantive and procedural protections for the indigent in criminal proceedings. The Constitution provides for the right to legal counsel from the moment of detention or commencement of charges, as well as the presumption of innocence for those accused of crimes.<sup>1</sup> Moreover, appointed counsel is mandatory in several clearly delineated areas, including, but not limited to cases carrying the potential of

at least ten years' incarceration and any other criminal case where the defendant cannot afford an attorney but desires that counsel be appointed, and the interests of justice so require.<sup>2</sup> In actual practice, however, Bulgaria has not historically met the goals of quality and equality in court-appointed legal representation. As in most other former Soviet bloc countries, the indigent criminally accused in Bulgaria have experienced a history of substandard, and often nonexistent, legal assistance.

### **The pilot public defender project— establishment and setup**

In an effort to address the deficiencies in the current system, improve the standard of performance of court appointed counsel, and increase access to counsel in criminal cases, Bulgaria's first public defender project began

operations in May 2003 in the city of Veliko Tarnovo. This project was created and administered by the Open Society Justice Initiative and the Open Society Foundation–Sofia, through an advisory council. Veliko Tarnovo was chosen primarily because it is centrally situated and its criminal caseload was deemed manageable by a new office, staffed by young attorneys. An agreement was reached with the local court and bar council, whereby the office would assume responsibility for nearly all cases involving indigent defendants, except where an actual or potential conflict of interest exists. By taking virtually all indigent cases, greater transparency and consistency in the appointment process were achieved.

The public defender project aims to improve both client representation and office management skills, in a country where law firms have historically been prohibited. Specific goals were to improve the quality and extent of client-attorney contact and interaction in the course of cases; the quality and quantity of written documents prepared by attorneys; and the overall calibre of representation given to indigent persons in criminal cases through a program of training and seminars for staff attorneys.

From a management perspective, project goals were: to develop a system of standards for case management, including intake, distribution and review; create a means of data accumulation, using forms to record information about ongoing case activity, as well as attorney time and effort involved in various case-related matters; create databases for this information, to allow easy retrieval,

categorization, and reporting; and create a system for evaluating project attorneys and caseloads for overall management purposes.

The office is staffed with five relatively inexperienced attorneys, aged 28 on average, with one or two years experience practicing criminal law. The selection of young attorneys was intentional. It was felt that less experienced attorneys would be more amenable to dramatic changes in the norms of practice, and would possess the computer and word processing skills essential to a much increased emphasis on documentation. A manager, who is also chairman of the local Bar Council, provides overall supervision of the operation and of the attorneys. Finally, the office is staffed with a technical assistant.

### **Role of the foreign advisor**

During the summer of 2003, as a volunteer for the International Senior Lawyers Project, I helped in establishing a system of management and training at the public defender project in Veliko Tarnovo. It became immediately evident, from reviewing the BHC findings and observing criminal practice in Bulgaria, that significant change in the approach, skills and practice of appointed criminal defense counsel is essential if the standards adopted by the European Union for criminal justice systems were to be met.

Prior to commencement of the public defender project, indigent criminal cases were often assigned to attorneys with no active criminal practice, and who were not well motivated to criminal defense. Complicated cases, likely to generate more fees, were



often assigned by investigators to favored attorneys, without regard for the local Bar Council. Because the project accepts virtually all non-conflict criminal cases, the opportunities for favoritism in the appointment process, and assignment of indigent criminal cases to unqualified attorneys, were immediately reduced once the project began operating.

Although virtually every criminal case in Bulgaria is resolved through trial, either on issues of culpability or sentencing, court appointed counsel under the ex officio system were often completely unprepared. Due to a remarkable lack of professional concern, skills, or the fact that the ex officio system does not compensate for time and expenses of travel, a startling number of indigent defendants did not even meet with their ex officio counsel before trial. To address this problem, the project attorneys were immediately required to meet with each defendant prior to any court hearing. This simple rule vastly improved client confidence in the system, and the quality of case preparation by counsel.

Bulgaria has had a semi-adversarial system of criminal justice since 1991. The Constitution affords criminally accused persons many of the rights commonly accepted in western systems, such as the presumption of innocence, right to remain silent and to appointed counsel, and more. The Penal Procedure Code embraces these changes, and encourages active participation by the defense in criminal proceedings. Despite this rather monumental departure from the past, many criminal practitioners, even those who are highly regarded,

are reluctant to depart from the former, far less adversarial, system. It was apparent that training in a more adversarial method of practice was critical if these basic rights were to be enforced.

The notion of defense investigation of the facts and evidence remains controversial in Bulgaria. Criminal investigators are a separate branch of the criminal justice system, charged with investigating all aspects of the case. In practice, however, investigators primarily act at the request of the prosecution. Hiring investigators to work for the defense, or conducting witness interviews by the defense, is almost unheard of. Experienced attorneys in Bulgaria commonly refuse to conduct independent investi-

The almost complete lack of defense-oriented investigation is a major reason why the system remains relatively non-adversarial.

gation of the evidence, even though such practice is not prohibited. Instead, the vast majority of attorneys are willing to accept the reports of the “official” investigators without question. This is an area where even minimal change has been met with significant resistance, evidently for fear of offending the “official” investigators or the court. The almost complete lack of defense-oriented investigation is a major reason why the system remains relatively non-adversarial.

Motions or other written defense documents are rare in Bulgarian criminal cases. Documents are an effective way of presenting issues and legal authority to the Court in relevant areas. They also provide a concise basis for appellate review. Despite these benefits, defense counsel rarely file any documents in criminal cases. A common reaction is to suggest that many motions or memorandums are simply not allowed, though no authority for this position exists. As is the case with defense investigation, many criminal practitioners believe that if some motion or activity is not specifically authorized by the Penal Procedure Code, it is prohibited. A more adversarial system recognizes that simply because a document or activity is not specifically authorized in the criminal code does not mean that it is somehow forbidden. Instead, the exact opposite is true. Using that approach, the attorney becomes more creative, client confidence in the system is enhanced, and justice is more likely to prevail.

In light of the foregoing, and because project attorneys were relatively inexperienced, an important function of my duties was to provide training in basic criminal defense functions such as client interviews, investigation and review of evidence, court appearances and the like. We also covered innovative methods of preparing motions and other documents, and in presenting the case. The focus was on representing criminally accused indigent persons, many of whom are members of the Romani minority. Because criminal practice in Bulgaria has historically suffered from inadequate attention to human

and civil rights issues, the primary emphasis of our training concerned matters directly related to the client, and techniques of advocating his or her case in and out of court. Daily training sessions emphasized investigation and issue resolution, interview techniques, document preparation and courtroom presentation. Training was conducted as a group, and each attorney was given an opportunity to present input, utilizing the team approach to case analysis. Fortunately, we were able to use actual cases in the office as training material. The staff attorneys adapted very well to all aspects of training and soon became confident and competent advocates for their clients.

Training had immediate results. In a period of only two months, the project attorneys succeeded in obtaining dismissals of several unfounded prosecutions, and filed numerous documents with the court, receiving praise from the judges on the quality of their motions and argument. Because late summer is a period of reduced activity for the court in Bulgaria, trials were deferred until fall. Nonetheless, staff attorneys prepared several very complicated cases for trial, readily observing the benefits of client contact and interviews in the trial preparation process. I personally observed numerous clients who were very favorably impressed with the quality of legal representation offered by project attorneys.

### **The future**

In a very short time, the project attorneys in Veliko Tarnovo have completely changed the way in which indigent persons are represented in

the criminal court. Through their efforts, numerous cases have been resolved on terms far more favorable to the client. In the process, they have gained the respect of prosecutors and the court. Even more important, the staff attorneys have earned the respect and confidence of their clients, most of whom were completely unaccustomed to attorneys who actually care about, and advocate on behalf of, indigent persons in need of legal assistance.

The future of the public defender project in Veliko Tarnovo is very bright. The staff attorneys have, in a very short time, become competent advocates for their clients. At nearly every level of court proceedings, there is greater assurance that the rights of indigent persons in criminal cases are

being protected by the attorneys involved in the project. Most important, clients who are well represented become ever more confident in the system as a whole. It is easy to envision that the project in Veliko Tarnovo will serve as a model for similar projects elsewhere in Bulgaria, and throughout Central and Eastern Europe.

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### Notes

† Robert E. Kinney is a Volunteer Foreign Advisor for the International Senior Lawyers Project with the Open Society Justice Initiative project on access to justice in Bulgaria.

<sup>1</sup> Article 30, paragraph 4, Article 31, paragraph 3, Constitution of the Republic of Bulgaria, promulgated by the Bulgarian Grand National Assembly on 13 July 1991.

<sup>2</sup> Article 70, paragraphs 3 and 7 of the Code of Criminal Procedure, Bulgaria, as amended in 1999.

## Working Together to Deliver Access to Justice: South Africa and Central and Eastern Europe

*Experimental models for legal aid delivery being tested in Eastern Europe today are inspired by a system first developed in South Africa. David McQuoid-Mason,<sup>†</sup> a central figure in this trans-continental transfer, recounts his personal experience.*

South Africa has moved from an ex officio legal aid system—predominant in most of the Central and Eastern European countries today—to a salaried public defender system. This has been largely due to the Constitutional requirement of state-

funded legal representation in certain criminal cases and the need to curtail costs and streamline the administration of legal aid. What the South African legal aid model shows is that in order to achieve these aims it is necessary to use a variety of creative delivery techniques, and that in rural areas it is possible to incorporate law clinics and paralegal advice offices into the scheme. South Africa has demonstrated that it is possible to preserve the independence of the legal

profession by establishing an independent overarching legal aid body to coordinate legal aid services in the country.

My experience looking at some Central and Eastern European states over the last seven years has convinced me that South Africa may have a number of useful pointers for these countries.

### Travels in Europe

My first experience of the former communist countries was as a young law graduate from South Africa traveling there and in Yugoslavia in 1967, at a time when foreign visitors often felt completely alienated from the ordinary citizens of those countries. My second experience was nearly 30 years later at Oxford University in June 1996 when I participated in

...with the advent of democracy all of us were facing similar new problems...

a Symposium on Public Interest Law in Eastern Europe and Russia. For the first time I was able to interact with Central and Eastern Europeans and Russians on a personal basis. Although many of us were still experiencing the euphoria of having recently thrown off the shackles of authoritarian rule—South Africa had only achieved democracy in 1994—we were all alive to the challenges facing our countries during the transitional stage.

The Oxford meeting was a refreshing and enriching experience. My task was to speak about South African

experiences in street law—i.e. educating people about their rights and democracy; controlling police abuse through South Africa's Independent Complaints Directorate; and providing assistance to the families of victims of state-sponsored violence through our Independent Medico-Legal Unit. All three presentations seemed to strike a cord with colleagues from the former Communist bloc countries. The majority of people in Central and Eastern Europe and the former Soviet Union had in the past been subjected to similar violations of human rights (except for those based on race) to those experienced by people in South Africa. However, with the advent of democracy all of us were facing similar new problems: the loss of jobs as a result of structural adjustment programs; increasing crime as a result of police forces changing from a paramilitary to a civilian agency; the influence of international crime syndicates as a result of less restrictive border controls; and corrupt civil servants and businessmen due to the opportunities offered by privatization programs. My account of the South African experience seems to have had some impact on the participants because I was asked to host the next symposium.

### The Durban Public Interest Law Symposium (1997)

I was honored to host the second Symposium on Public Interest Law in Durban in June 1997 and to share the South African experience at first hand with some 60 colleagues from Central and Eastern Europe and Russia. The participants were exposed to a packed program of plenary sessions, workshops, site visits and

an ecological excursion. The plenaries covered the management of public interest organizations; access to justice and the delivery of legal services; and the development of new institutions such as public protectors or ombudsmen, human rights commissions and gender commissions. The afternoon workshops covered street law (i.e. public education on legal rights); clinical legal education; domestic campaigning and lobbying; litigation strategies—particularly police abuse; international advocacy; women's rights and violence against women; environmental litigation—especially the question of legal standing to sue; and internet advocacy. The last day offered delegates field trips to a rural paralegal training center, the courts, law clinics, the street law program, a public interest law firm, an advice desk for abused women and environmental campaign areas. After leaving Durban, the participants visited the Constitutional Court in Johannesburg before returning home.

The Durban Symposium seems to have played an important role in assisting with the development of clinical law and street law programs in Central and Eastern Europe and the former Soviet Union. At the time some programs were already in place. Shortly after the Durban Symposium, the Open Society Institute took the initiative in setting up a 16-country street law program in the region. It also collaborated with programs that were already being supported by the Ford Foundation in Russia and Poland. I was asked to assist with the street law and other access to justice programs in 1998. This was the beginning of my odysseys

to Central and Eastern Europe, Russia, the countries of the former Soviet Union and Mongolia.

### **Access to justice and legal aid**

From 1998 until 2002 I was mainly concerned with assisting in the development of street law programs in 16 countries of Central and Eastern Europe, the former Soviet Union and

I wanted to show how South Africa, a developing country with severe budget constraints, was experimenting with legal aid delivery.

Central Asia, especially in Slovakia, Poland, the Czech Republic, Hungary, Russia, Croatia, Albania, Kazakhstan, Kyrgyzstan, Uzbekistan and Mongolia, and I was also involved in access to justice and legal aid issues in the region.

During the 1997 Durban Symposium I gave a presentation on how access to justice and legal aid operated in South Africa, and how important it is to obtain statistical information in order to place legal services in context. My intention was to introduce countries from Central and Eastern Europe and Russia to the importance of compiling statistical data when analyzing legal aid services. I also wanted to show them how South Africa, as a developing country with severe budget constraints, was experimenting with a number of cost-effective models of delivery. Finally, I wished to indicate the important

role that law clinics and paralegal offices can play in the delivery of legal aid services.

### **Legal aid developments in 1998**

In 1998, I was invited back to Oxford to participate in a “Meeting of Experts on Legal Aid for Criminal Defendants” where I described South Africa’s pilot programs with public defenders and the use of law graduate apprentices as public defenders in the district criminal courts. The idea was to show the participants that there were viable, cost-effective alternatives to the traditional *ex officio* programs that existed in the region. Later in the year I was invited to Moscow to participate in the “Legal Services and Human Rights Workshop” where I shared South African experiences in legal aid services and human rights and clinical legal education with Russian law teachers.

### **Legal aid empirical research initiatives in 1999**

In 1999, the Public Interest Law Initiative invited me to a “Workshop on Making the Empirical Case for Improved Access to Justice for Indigent Persons in Central and Eastern Europe” in Warsaw. I described some of the methods and strategies I had used to obtain statistical data concerning the need for legal aid services in South Africa. I set out some of the possible sources and also mentioned some of the areas that had to be researched in order to get a comprehensive picture of needs. After the workshop the organizers put in place initiatives to undertake similar research in several Central and Eastern European countries during the next two years.

### **Lithuania and the Access to Justice Forum**

During 2002 I was asked by the Justice Initiative to present an overview of the Legal Aid Board and legal aid services in South Africa to an “International Conference on Improving the Legal Aid System in Lithuania” in Vilnius. My task was to show the Lithuanians how South Africa had responded to the Constitutional and other requirements to deliver legal aid within a highly restricted budget. Unlike the United Kingdom, the Netherlands, Israel and the United States, South Africa spends less than U.S. \$1 per capita per annum on legal aid—it has been necessary for the Legal Aid Board to devise cost-effective means of delivery. South Africa’s expenditure is probably more in keeping with the budgets of the Central and Eastern European countries than those of the Western European countries. For instance, the country with the most advanced legal aid system in the former group, Lithuania, currently spends about U.S. \$0.60 per capita per annum on legal aid. Likewise, South Africa, because of limited resources, has had to develop a variety of methods of providing legal aid to indigent people, predominantly in criminal cases. In December 2002, I gave a presentation on the South African models to the “European Forum on Access to Justice” in Budapest. The Forum was also given an update on some of the empirical research that had been conducted into the delivery of legal aid services in several Central and Eastern European countries since the 1999 Warsaw workshop. The developments

in Lithuania were very well received by the participants.

### **Lithuania and Kyrgyzstan**

In April 2003, at the request of the Justice Initiative, I hosted the Legal Aid Advisory team from Lithuania during their fact-finding visit to South Africa. The team visited the Legal Aid Board head office, public defender offices and “justice centres”, members of the legal profession, lower court judicial officers and the district courts. The visit was useful in helping the team to clarify such issues as whether there was a need for an independent legal aid body and how the independence of the legal profession can be maintained under a salaried lawyer public defender scheme. In November 2003, at the invitation of the Justice Initiative, I attended a legal aid round-table in Kyrgyzstan with a view to sharing the South African legal services delivery models, particularly in criminal cases. I also emphasized the need for a properly functioning legal aid scheme to enable Kyrgyzstan to fulfill its international obligations. The Kyrgyz participants were particularly inspired by the legal aid developments in Lithuania and Bulgaria. In December 2003, under the auspices of the Justice Initiative, a Mongolian Legal Aid team visited South Africa to observe local delivery models—particularly in respect of the delivery of legal services in rural areas and the linkages that can be made with para-legal advice offices.

### **Reflections and conclusions**

It is often neither possible nor desirable simply to transplant legal concepts from one legal system to

another—it is necessary to make changes and adaptations that suit local conditions. Nonetheless, the South African legal aid system has proved to be a useful example for Central and Eastern European and Central Asian countries because of its comparatively cost-effective delivery models. It is also useful because of the countries’ shared

South Africa offers a unique beacon of hope for developing and transitional countries.

backgrounds of transition from autocracy to democracy. Furthermore, South Africa has a civil law substantive law background although its procedural law is adversarial—an element that increasingly influences procedures in some Central and Eastern European and Central Asian countries.

There are several valuable lessons worth considering. For instance, the Central and Eastern European countries may learn from the South African experience in setting up an independent legal aid board to preserve the independence of the legal profession. Likewise, they are likely to find that, given their expanding constitutional imperatives (and the demands, for many, of the European Convention on Human Rights), it may be more efficient and cost effective to introduce a public defender model than to continue with the *ex officio* model in criminal legal aid cases. It may still be necessary to use private lawyers in addition to the public defenders,



but in South Africa these tend to be used where there is a conflict of interest or the public defender office does not have the capacity to handle the cases. In addition, those countries that require law graduates to serve apprenticeships should seriously consider introducing the South African concept of the apprentice public defender as an economical and effective means of delivering legal aid services. The South African legal aid board also works closely with legal aid clinics and public interest law firms and enters into cooperation agreements with them to deliver legal aid services in areas where it is not represented—this is another model that could be considered by countries with strong law clinic programs. During the past two years the South African legal aid board has brought all these initiatives together in one-stop-shop legal aid law firms called “justice centres.”

The Central Asian countries can also learn from South Africa, which too has large rural populations. In addition to the foregoing examples, Central Asian countries might also consider two rural models that have been developed in South Africa. The first involves the placement of law graduate apprentices in small rural law firms, funded by the legal aid board, with the requirement that they deal with a certain number of new legal aid matters each month and devote one day a week to legal aid work. The rest of their time may be

used to help the principal lawyer with his or private practice. The second model is for the legal aid board to work closely with community-based paralegal advice offices and to incorporate them into the national legal aid scheme. The paralegal advice offices work with the legal aid board’s justice centres or university legal aid clinics on what is termed a “cluster” basis—whereby a number of paralegal advice offices, covering several small towns or villages are served by either a legal board office or a law clinic.

Finally, although there may be no benchmark figure for the percentage of a country’s national budget that should be spent on legal aid, it may be useful for the Central and Eastern European and Central Asian countries to consider that South Africa manages to run a reasonably sophisticated national legal aid scheme with an annual allocation of only one dollar per head of population. As a result South Africa offers a unique beacon of hope for developing and transitional countries which are often presented with legal aid models and budgets from wealthier countries that appear to be far beyond their limited financial resources.

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### Notes

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## CHILE

## Growth of the Access to Justice Movement in Latin America: The Chilean Example

*Many Latin American countries have introduced public defender systems recently, but Chile has gone further than most, Richard J. Wilson<sup>†</sup> argues, in mapping the issue and finding institutional solutions.*

During the last two decades, virtually all of Latin America has undergone a revolution in reform of criminal procedure. Most Central and South American countries went through an intense period of modernization of their codes, transforming their criminal processes from the classic civil or Roman law model, often grounded in a formalistic written procedures from the nineteenth century, to a modern oral system that fuses elements of the old inquisitorial system with more adversarial trial processes. These reforms have had immense impact on access to justice in Latin America, however unplanned that impact was in the initial design.

Much of the reform effort was led by a small but influential technical assistance project grounded in Buenos Aires, Argentina, the Institute for Comparative Study in Criminal and Social Sciences (INECEP), led by Dr. Alberto Binder. Binder's influence in justice reform, and its collateral (and perhaps unintended) impact on access to justice, cannot be underestimated. His model for modernization included a strengthening of the institutions of prosecution and defense, both given

newly expanded powers in evidence gathering and presentation of proofs at trial. Because the institution of prosecutors was not new in Latin America, but represented an already-existing large state bureaucracy, reforms contemplating an expanded role for defense counsel normally replicated that same bureaucratic model. Thus, in virtually all the reforming countries, poor people—those normally and overwhelmingly requiring representation by a government-paid defense attorney—now had a new institutional structure, usually in the form of what was called a Public Defender program.

In Central America and the Caribbean, Costa Rica is considered to have developed one of the first of these new nation-wide institutional reforms for provision of public defense services to the poor, predating the INECEP reform era. Since then, new public defender programs developed in Mexico, El Salvador, Guatemala, Honduras, Nicaragua, Panama and the Dominican Republic. Latin America further boasts extensive programs in Brazil, Argentina, Venezuela, Peru, Colombia, Paraguay, Bolivia and Chile. In 2001, under the sponsorship of the Justice Studies Center of the Americas, most of these public defender programs gathered for the first time to share experiences,

and they have since met annually, most recently in 2003 in Rio de Janeiro, Brazil.

These new public defender programs differ from their U.S. counterparts in at least three significant ways, each of which benefits the poor and the marginalized in the legal process. First, the new public defender programs are *institutions*, not ad hoc lists of counsel appointed in their individual capacity under patriarchal and often crony-ridden judicial appointment systems. Fees in such systems were also low or non-existent, with the state justifying its failure to adequately fund the right to counsel for the poor based on the lawyers' alleged *pro bono* obligations. The new institutions carry political weight in the legislative process, and their

The new institutions carry political weight in the legislative process.

budgets are normally adequate to support well-paid lawyers. The result is a proportionally more effective service for the poor. Second, the new public defender programs provide *unlimited eligibility for services*, meaning that anyone, regardless of income, is usually eligible for representation on request. The underlying assumption of such a system is that people with the money to do so will hire a private attorney. Thus, the institution is not identified as a "poor people's lawyer" but as an entity existing to provide equal access to justice for all. Third, and perhaps most important to the impoverished clients of these offices, the new public

defenders provide *expanded scope of representation*. In general, these programs provide representation in any criminal or civil matter in which the client seeks and qualifies for legal representation. In the criminal field, services often extend not only through trial and appeal, but throughout any period of incarceration.

### The Chilean experience

Chile is one of the countries to undergo recent extensive reform of its criminal process, and, like the majority of other countries that underwent modernization, it established a new public defender program in 2001 which is expanding its operations as the revised criminal code is put into practice. However, Chile's experience with comprehensive programs for access to justice is much broader and deeper than this new addition alone would suggest, and can perhaps provide useful models for other developing or transitional countries.

Despite the extended "interruption" of democracy during the 17 years of General Augusto Pinochet's dictatorial rule from 1973-1990, Chile has been considered one of the most stable and prosperous democracies in Latin America since the turn of the twentieth century. As early as 1928, the Chilean legislature created a system for legal representation of the poor through a new Chilean Bar Association. Ironically, it was during the Pinochet years that the country developed a system of regional Corporations for Judicial Assistance that served as a kind of institutional precursor to the modern public defender programs. In addition to providing a wide range of legal services,

the Corporations, publicly funded entities with which the Bar cooperated, included a system of *postulación*, or mandatory apprenticeship, by which every graduate of a Chilean law school was required to provide them with six months of service as one of the steps toward the formal admission to law practice. While not unlike the formal system of apprenticeships that exist in much of Europe and other parts of the world, this system assured that all aspiring lawyers had structured exposure to the legal problems of poor people as part of their legal training.

Another major and long-standing innovation in the Chilean access to justice movement is its commitment to an effective system of clinical legal education, by which law students are trained for the profession while offering needed legal services to poor communities and populations. Clinical legal education is not unusual in Latin America, where national law sometimes makes participation in a clinic a pre-requisite for law school graduation, but the long historic commitment and sophisticated structure of the Chilean clinics make them unique to the region, and indeed, to the developing world. My own study of clinics at Chile's three major law schools—the University of Chile, the Catholic University, and Diego Portales University—found that they had developed designs and pedagogies that reflect extensive knowledge of innovation in teaching methods as well as deep commitment to the ethics and values of social conscience in the legal profession.

Chile has adopted additional government and private reforms that contribute to comprehensive access to justice, some of which were initiated

even before the return to democracy. A long-standing commitment of the Bar Association was a *pro bono* requirement for lawyers, over and above the mandatory period of service with the Corporations, after graduation from law school. Since 1986, lawyers have been required to provide free legal services as *abogados de turno*

The institution is not identified as a “poor people’s lawyer” but as an entity existing to provide equal access to justice for all.

(“rotation attorneys”), a scheme under which free legal services are provided to those without means to afford them. While these mandatory service programs are inferior to the institutional services of the Corporations or the new public defender, the infrequency of appointments under the mandatory programs makes them a useful complement in the access to justice constellation.

Second, in Chile, unlike its neighbors, public and private institutions have made extensive efforts to document and map the problems of poor people. For example, studies performed by the private Corporation for University Promotion surveyed the legal problems of poor people across a range of issues, while government programs like the *Programa de Asistencia Jurídica* (PAJ), the Legal Assistance Program, or FORJA, and the Legal Training for Action program, provide additional mapping and service functions. PAJ has developed

a national network of “socio-legal assistance” which links poor people to social services through information services, legal literacy and advice programs, and mobile stations in rural areas, while FORJA, which became independent in 1989, works to make law an instrument for the strengthening of democracy through programs such as a National Lawyers Network, a kind of legal Peace Corps. These and other public and private legal services programs make Chile a hemispheric, if not global leader in access to justice work.

This is not to say that access to justice in Chile is complete. The national geography and the usual budgetary limitations leave its programs in a constant struggle to meet client needs, with lawyers carrying excessive case-loads and not having adequate time to supervise their *postulantes*, or recent

graduates. However, the Chilean experience is notably historic and broad—an example to the rest of the world.

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#### Further Reading:

Richard J. Wilson, “Three Law School Clinics in Chile, 1970-2000: Innovation, Resistance and Conformity in the Global South,” 8 *Clinical Law Review* 515 (2002).

Michael A. Samway, “Note: Access to Justice: A Study of Legal Assistance Programs for the Poor in Santiago, Chile,” 6 *Duke Journal of Comparative & International Law* 347 (1996).

Many of the 2001 reports by national public defender offices in the Americas are available, in Spanish, in the “virtual library” archives of the Justice Studies Center of the Americas, at [www.cejamerica.org](http://www.cejamerica.org).

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#### Notes

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## Access to Justice for Victims and Defendants in Chile

*Joe Hirsch*<sup>†</sup> explored Chile’s criminal justice system before and after a recent and ongoing overhaul of crime victims’ services and found the gains in increased access to justice are tempered by the continuing hardship in which both victims and defendants often live.

Between 2000 and May 2003, I lived and traveled in Chile in order to learn about sweeping reforms introduced in 2000 to make the criminal justice system more responsive to people’s needs. I did so while working for the Vera Institute of Justice, a New

York-based NGO. The reforms include the establishment of: a new national prosecution service; a public defense with full time public defenders; victim services units within the prosecution staffed by social workers, psychologists as well as lawyers; and courts staffed with technology-savvy clerical staff and updated computer equipment. In the past, proceedings were conducted in secret with verdicts issued in judges’ chambers, sometimes in the absence of the defendant.

In the new system there are public arraignments and trials with oral testimony given before three-judge panels.

The reforms are being introduced gradually, in smaller regions first.<sup>1</sup> Only in 2005 will the administration of justice in the metropolitan area of Santiago, where 40 percent of Chileans reside, be governed by the new rules. The phased introduction of the reforms makes it possible to compare the nature of access to justice in the old and new systems.

#### **The unreformed courts of Santiago**

Having spent a lot of time in the new courts of the reformed regions, I realized I needed to see how things worked in the courts of the old “unreformed” system to get a balanced view. I therefore went on to spend several months observing the way courts work in Santiago.

There is widespread sentiment that Chile’s archaic criminal justice process disadvantages the poor and deprives them of meaningful access to justice. Civil society groups in Chile have long held that the inquisitorial justice system, in place since colonial rule, privileges the country’s small economic elite. One of the main criticisms of the old system is that middle class and wealthy criminal defendants fare reasonably well in the inquisitorial system: they hire skilled private defense attorneys who use the disorganized and overwhelmed criminal courts in ways that help their clients escape punishment. Indigent defendants, by contrast, are assigned young and inexperienced lawyers who serve short, state-mandated stints as public defenders, with predictably negative results.

The horror stories about the plight of defendants in criminal cases under the inquisitorial system are legendary—of defendants receiving token legal representation, then spending months or years languishing in pretrial detention without ever seeing a judge, being visited by counsel, or being informed of the charges against them. Many people tell stories

The horror stories about the plight of defendants in criminal cases under the inquisitorial system are legendary.

about accusers who seek only revenge and manipulate the system by making unsubstantiated accusations, knowing that a complaint alone may be sufficient to put their adversary behind bars indefinitely in the absence of due process.

Another concern with the old system is that victims do not have meaningful access to justice. In Santiago, justice is homely but manifestly poor. First time court users, be they crime victims or defendants, are disoriented when they walk into an old-style courthouse. There are no victim advocates and no daily case calendars posted to guide the public. On entering the courtroom, the victim is led into a large cluttered room in which clerks sit cramped side by side at desks in a wide-open space. On all sides, clerks can be seen conversing with defendants, taking depositions, typing data, calming family members, searching for lost files between collapsing cabinets, beseeching reluctant victims to prosecute, choosing between a

dazzling selection of official stamps, and hurriedly documenting case information with dull-pointed pencils in dozens of dog-eared casebooks pock-marked throughout with whiteouts, illegible scribblings and smeared erasures. In Juzgado (Courthouse) 13, the judge sits three feet above the

Even the new system, with its fancy new buildings and dedicated staff, is not always able to deliver what victims want.

floor at the front of the court conversing with and listening to victims, defendants, suspects, clerks, police, lawyers, random family members and assorted interested parties about cases, confessions, jail, files, laws and lunch simultaneously, usually having to yell to be heard over the clamor of the clerks and the wailing of wives to husbands being transported to prison on buses on the street outside over by the holding cells. In the musty archive rooms, thousands of cases in paper files dating from many years prior are kept bundled together, tied with string, leaning in precariously tilting stacks, amidst an assortment of old casebooks and personnel manuals.

The outgoing system operates on a shoestring with no victim support staff and low paid, poorly trained clerical staff working in desultory courthouses. Opportunities to help victims are extremely limited. Maria Luisa, a judge in Santiago, sits patiently with crime victims, trying to make them feel comfortable and heard as

best she can. I once saw her spend one hour counseling and consoling a ten-year-old girl who had been repeatedly raped by her father. Maria Luisa's compassion was evident, as she went well beyond the formal trappings of her profession to provide human kindness otherwise unavailable in the justice system.

Maria Luisa's staff wishes they had the resources to help victims more consistently. They are even resentful of the superior resources in Chile's reform regions. "If we had that kind of budget," one clerk told me, "we too could fix people's lives."

### The reforms and after

In the early 1990s a cadre of young Chilean lawyers and academics decided it was time to mothball what they perceived as the dark medieval labyrinth of black death-era justice. Many of these young intellectuals had studied in Europe or the United States, and combined their observations abroad with their knowledge and instincts of Chilean realities to conceive and produce a justice system that they hope will work more effectively and fairly.

The pace of change has been dizzying. At midnight on December 16, 2000, the reforms swung into effect in the regions of Coquimbo, north of Santiago, and La Araucania, south of Santiago. An eighteen-year-old who broke into a car in the city of Temuco shortly after midnight became an unwilling celebrity as the first defendant to be caught, detained and arraigned in the new system. The story of the broken family he came from and the poverty in which he grew up captured public attention for about a



week. Stories about his life mentioned that the defendant was functionally illiterate, and made it clear that he had no understanding of Chile's criminal justice systems, relic or reformed.

The investment in the reforms has raised people's expectations of justice, especially among victims. Even the new system, with its fancy new buildings and dedicated staff, is not always able to deliver what victims want. One victim of violent assault and continued harassment told me, "Yeah, the reform is nice. The building they're in is nice. The people treat you nice. But they can't give you back the dignity you lose when something like this happens to you." An irate car salesman who called on prosecutors to get payment for a car that was not forthcoming for several months said, "sure, they talk pretty, but they didn't resolve my problem. They said they couldn't do anything yet, that my case depends on the police. Where does that leave *me*?"

In spite of the increased care and personal attention victims receive from representatives of the state, there are no guarantees that this assistance is helpful. For many people, the reforms aren't worth much if the advances they promise can't be translated into tangible improvements in people's lives.

### **Norma**

I met Norma early in 2001, shortly after the implementation of the reform, and maintained contact with her throughout my stay in Chile. Prosecutors referred Norma to the new Victim Services Unit in a small Chilean city after she was assaulted, knocked unconscious and left for dead by her husband.

Norma's marriage had been fraught with violence for two decades. She was severely injured by her husband a number of times, sometimes reporting the incidents to police, sometimes not daring to out of fear. When Norma reported her husband's violent attacks during the reign of the inquisitorial system, she says police would derisively dismiss her pleas for action, siding with her husband, never following through on charges. However, on the occasion of the last assault, the new procedures motivated the police to arrest Norma's husband and bring the case to the prosecutor's office. The prosecutor succeeded in convincing Norma to follow through on her initial charges, despite her dwindling determination to pursue the case as time passed after the assault. Norma followed through, driven by the zeal of the prosecutor, and her testimony eventually garnered a conviction against her violent husband for the first time in a twenty-year reign of abuse.

The diligent victim services staff who helped Norma to recover from her injuries also assisted her in relocating to a big Chilean city and in finding a job. But even these modern solutions don't always serve victims' needs. Norma's assailant has been released from prison and is overturning every rock in Chile to find and punish her for her capitulation to the state's demand to hold him responsible for his actions.

I met up with her in her new location to see how she was acclimating after the traumatic events of the past. Norma is now working as a housecleaner and a nanny for a nouveau-riche couple in a mansionsque house

in a glitzy new subdivision. She rarely leaves the house because the intricate alarm system “sounds like a pack of wild dogs fighting, and I don’t know how to turn it off.” On the rare occasions when she does manage to venture outside without tripping the alarm, she joins the undocumented Peruvian housecleaner-nannies in the upscale compound for a quick smoke. “The Peruvian girls are very sweet, but I feel like I’m a refugee just like them. I’m not a refugee,” she says, “This is my country.” Norma cannot travel home to see her eighteen-year-old drug addicted gang member son because he lives in the same town as her husband, and her life would be in danger. “My friends at the Victim Services Unit saved my life. They have done so much for me,” she told me. “But they have their jobs, their families, and their lives.”

I spoke to Juan Eduardo Fernandez, director of the Victim Services Unit in Temuco about this dilemma. “You’re right,” he responded. “We can’t be there at all times for every victim. And as our caseload has skyrocketed since the reform’s implementation a few years ago, we don’t have the luxury of spending as much time on every single crime victim. But that doesn’t mean we should stop trying to make things better for people.”

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### Notes

† Joe Hirsch has worked with the Vera Institute of Justice in Chile and acts as a consultant on access to justice in that country, Brazil and elsewhere in Latin America.

1 Three of Chile’s thirteen regions launched the reforms in December 2000. Two more regions were added in December 2001, and another three in 2002.

## EAST TIMOR

## A New Office for a New State: East Timor's Public Defenders

*Cancio Xavier<sup>†</sup> describes the political context in which East Timor's groundbreaking public defender office was born and the challenges facing it today.*

Following independence, East Timor adopted a new constitution which recognized legal representation as a fundamental right for all. Subsequently, a Public Defender Office (PDO), headed by a National Public Defender, was created by the United Nations Transitional Administration in East Timor (UNTAET), in charge of East Timor between October 1999 and May 2002. After years of violent civil conflict, the Public Defender Office was part of a wider attempt to return judicial power to civil authority. Faced with a judicial vacuum, UNTAET recruited candidates for training in Australia. A new civil judiciary, including eight judges, four prosecutors and five public defenders, was selected from the trainees. These legal practitioners started their duties on February 7, 2000, supported by UNTAET.

East Timor's Public Defender Office is the first institution of its kind in Southeast Asia. Today there are nine public defenders in East Timor's four offices (one central PDO and three branch offices).

### **Role of the PDOs in the judicial system**

For three and a half years, East Timor's public defenders have worked alongside, but independently of, the coun-

try's equally new judges and prosecutors to build a balanced judicial sector. Public defenders obey a code of ethics (currently awaiting parliamentary ratification) which requires they maintain a distance from the influence of judges and prosecutors. Their motto is "Serve without Fear or Favor." They represent a means of monitoring

The very existence of the Public Defender Office has brought hope to the people of East Timor that the bitter wounds of the past can be healed.

the administration of justice in all legal processes and a guarantee that the human rights of persons suspected of crimes will not be violated. Public defenders engage with civil as well as criminal cases—they provide critical legal representation to those without the economic means to afford private counsel.

Since their establishment in 2000, the PDOs have received an average of 20 to 30 new cases each month. This is high, considering East Timor's population of just under one million. There are concerns that the Public Defenders will be overwhelmed by the volume of work, and that the quality of legal service provided may suffer as a result.

East Timor's economic growth is unstable, compared to other small countries in Southeast Asia and the Asia Pacific region. The period of recovery and stabilization is expected to be long, with the country largely dependent on donors for the next 10 to 15 years. Given the historic experience of the island's people—at no time under either Portuguese or

With its budget in the hands of the justice department, it is difficult for the PDOs to plan activities.

Indonesian colonization was there any semblance of fairness in the justice system for the economically weak—it is vital that the judicial sector can rise above the economic strain and function impartially.

### Benefits brought by the PDOs

The very existence of the Public Defender Offices has brought hope to the people of East Timor that the bitter wounds of the past can be healed—as the great volume of cases consistently pouring in demonstrates. The enthusiasm of these applicants is a clear indication of hope that trust can be placed in the legal system. This hope—that corruption, collusion and nepotism have finally left the justice system—is like medicine for the long suffering people of East Timor. However, the PDOs have to work hard to convince people that it is not an arm of the government—that their relationship is purely administrative.

### Institutional concerns

During the UNTAET era, there were plans to create an independent Legal Aid Institution to oversee public defenders, to include a scheme for salaried payments. However, the Institution had not been established by the time UNTAET withdrew on May 20, 2002. As a result, the PDOs have been administratively and financially under the authority of the Department of Justice. This administrative structure is a source of concern for four reasons:

- Institutional proximity may lead to a perception that Defenders can be easily pressured, particularly in important cases brought by the government.
- With its budget in the hands of the justice department, it is difficult for the PDOs to plan activities.
- Low salaries may lead to public concern that defenders can be bribed.
- It is difficult to monitor either the internal administration of defenders or their perseverance in serving the interests of justice.

A separate concern is the administration of international criminal justice in East Timor. In 2000, a Special Panel of Serious Crime was created in East Timor, to deal with the most serious violations of human rights during the conflict years. This allows public defenders to handle crimes against humanity and genocide. However, international assistance is not available to public defenders, although the Special Panel's judges and prosecutors are both assisted by international experts. Unfortunately,

in practice, local public defenders lack the experience to tackle such cases without the assistance of international legal experts.

### Recommendations

The following are suggestions to improve the contribution public defenders can make to access to justice in East Timor:

- A system of legal aid provision designed specifically to cover the costs of public defenders would avoid the perception of possible government influence.
- More public defenders and paralegals are needed to deal with the great number of applications received.
- Training programs on crimes against humanity and genocide would help public defenders fulfill their duties in this area, as would exchange programs with more experienced countries.
- In handling serious crimes and crimes against humanity, there is a need for an approximation of equality of pay (relative to living circumstances) between local counsel—i.e. public defenders—and international counsel.

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#### Notes

† Cancio Xavier is a Public Defender in East Timor's Public Defender Office and Secretary General of the Association of East Timor Lawyers.

ENGLAND AND WALES

## Quality and Criminal Legal Aid in England and Wales

*Due to the high costs of legal aid in England and Wales, the government and the legal profession have each taken steps to assure quality. Roger Smith<sup>†</sup> describes the main features.*

More is spent in England and Wales on legal aid in both criminal and civil matters than in any other country, per head of population. The total spent in 2002 through the two main channels of aid—the Criminal Defence Service (the term for criminal legal aid since April 2001) and the Community Legal Service—was £1.8bn (U.S. \$3bn). Expenditure on criminal legal aid in 2002 was £508m in the lower criminal courts and £536m in the higher courts, a total of £1044m (U.S. \$1.8bn). The population of England and Wales is around 52 million.

As a result, the government and its institutions are concerned about value for money. Recent changes are intended to secure that aim. Three elements of the current system of quality assurance may prove interesting to those from other jurisdictions:

- a) Accreditation of individual lawyers and legal service providers;
- b) Requirements, largely set by the professional bodies themselves, as to how an office should be run and organized;
- c) Direct testing of work undertaken on files, initially by a method involving “transaction criteria” (a checklist approach to essential elements in handling a case) but

increasingly now involving peer review.

### The development of contracts for legal aid providers

With expenditure on criminal legal aid at such high levels, it is unsurprising that the quality of services has arisen as an issue over the last decade or so. From its beginnings in 1950 until 1989, legal aid was administered by the Law Society, the professional association that represents and regulates solicitors (who, with barristers, together constitute the English legal profession). The Law Society took relatively little interest in quality. However, a major increase in concern with quality came when the administration of legal aid was transferred by the Legal Aid Act 1988 from the Law Society to a Legal Aid Board. The new Board was what is known as a “Quasi-independent national government organization” or Quango. In other words, the board was given statutory responsibility for managing the legal aid budget, decision-making in individual cases, and implementing policy; but was otherwise independent of government, save that ministers appointed its members and it had to report on its spending. The Board has since been replaced by a Legal Services Commission (LSC) which is legally the same—created by statute, independent in its decision-making, appointed by the relevant government

minister and bound to follow the guidelines of government policy.

The government requested the Legal Aid Board to concern itself not only with “existing targets and indicators of performance” for legal aid administration but also to look at legal aid practice itself from the perspective of performance. The Board was, of course, in a position to do this in a way that was not possible for the professional body, the Law Society, which was hampered by its representative role. Responding to the challenge, the Board developed the idea of “preferred suppliers,” a concept taken from the private sector. It wanted to identify a rather smaller group of practitioners than it had inherited to whom it would give preferential terms and with whom it would work in partnership to set and maintain certain standards for work that was paid for by the board.

### “Franchising”

Originally, the Board intended the relationship between itself and providers to be voluntary. However, it used confusing but rather prescient terminology. The board developed in the late 1980s and early 1990s the idea of “franchises”—agreements between itself and the solicitors with which it dealt. Franchisees would be given certain advantages in return for meeting certain standards. The Board explained in an early document:

...franchising involves identifying those who can satisfy criteria of competence and reliability, assisting and encouraging them by freeing them from some of the restrictions now applying to legal aid.<sup>1</sup>

In other words, a provider who held a franchise would have the advantage of certain devolved powers and be able to approve certain levels of action that would otherwise have to be agreed by the Board.

The Board was very much influenced by the then fashionable notion of “total quality management” and began, for example, producing lists of the reference books that it required legal aid firms to have in their library and prescribing other “inputs” or conditions on staff training and the like. It soon became clear, however, that more was required to ensure that cases undertaken actually reached a sufficiently high level of quality.

### Bad publicity for the profession

Another cause for interest in the quality of legal work in criminal cases came from a major academic study, the results of which were published in 1994 as *Standing Accused—the Organisation and Practices of Criminal Defence Lawyers in Britain*.<sup>2</sup> This was based on one of the largest observational studies of practitioners ever conducted. Its findings were damning. The research revealed that much work was actually undertaken by non-lawyers—paralegals—and that many defense lawyers rarely took the initiative in the running of their cases, being content to respond to the evidence provided by the prosecution. The study was particularly critical of the conduct of solicitors and their representatives in police stations, where it suggested, effectively, that lawyers were doing very little for their clients.



### Raising standards by encouragement

The adverse publicity about the standards of solicitors and their representatives during police station interrogations led the Law Society to take action. It sought to encourage solicitors to raise their standards. In particular, it published books setting out best practice for solicitors in criminal cases. The first, *Active Defence*, is now into its second edition.<sup>3</sup> The idea behind it is suggested by its title—defense lawyers must take the initiative, rather than always being responsive to the prosecution. At significant milestones in a case, they must

- “... analyse and take stock of the information obtained so far;
- “... consider the implications of this information for both the prosecution and the defence;
- “... make decisions about the actions to be taken in consequence, particularly defence investigation.”<sup>4</sup>

In addition, the Law Society published *Criminal Defence: a Good Practice Guide in the Criminal Courts*, now also in its second edition. The guide’s advice is extremely detailed on practical issues that can easily be overlooked, such as the importance of keeping a record when a solicitor attends a police station to be present during the interrogation of a client.<sup>5</sup>

### Raising standards by accreditation

The Law Society had independently developed the idea of accreditation schemes to assure the quality of solicitors working in areas like mental health and with children, where concerns had been raised about the

quality of work. These schemes also operated to some degree as advertisements for practitioners to publicize their accredited status. Facing attacks on its members’ work in police stations, it devised a special accreditation scheme, initially for solicitors’ representatives who attended police stations.

The police station duty solicitor scheme—which provides access to a lawyer for anyone who has been arrested and is detained in a police station—has now been extended so that it covers both solicitors and their representatives. The qualification scheme for membership is linked to an accreditation scheme for those who appear in the magistrates’ (lower) criminal courts. Together, these form two parts of a “Criminal Litigation Accreditation Scheme (Stage one).” (An advanced “stage two” does not yet exist.) This is likely the most detailed accreditation scheme anywhere run by a representative body of the legal profession regulating the quality of its own members’ criminal work. For example, to attain the Police Station Qualification, a candidate has to keep a portfolio of work which covers five cases “in which the candidate has personally advised and assisted a client at the police station when no other solicitor or representative was present.”<sup>6</sup> The portfolio is marked as pass or fail by an agency which has been approved by the Law Society as an assessor. The candidate then has to pass a “critical incidents test” which includes a tape of an interrogation where the candidate has to show how and why s/he would intervene. There is a similar structure for the Magistrates Court Qualification

involving a portfolio of short notes on 20 cases and more detailed notes on five. This is then followed by an interview and advocacy assessment.

### **The Criminal Litigation Accreditation Scheme**

Applicants for the Law Society accreditation scheme take a course run by providers and approved by the Law Society, and then take a practical examination where the candidate listens to a tape of an interrogation and has to indicate where and why he or she would intervene. It must be remembered that the legal system of England and Wales is an adversarial one with the defense and the prosecution/police very much feeling and acting as different parties. This may be different in other countries. Underlying the scheme is a set of three competences: knowledge—of the relevant law; skills—such as intervention in an interrogation; and standards.

The professional body—the Law Society—therefore plays a number of roles in relation to the encouragement of quality among practitioners. These go significantly beyond simple representation of their interests and the basic regulation of training to include setting and maintaining standards of qualification and training.

### **Beyond franchising to contracts**

The government Legal Aid Board was never convinced that action by the legal professional bodies would provide a sufficient guarantee of quality of service. So it proceeded to develop a set of its own standards. The first version was known as the Franchising Quality Assurance Specification

(LAFQAS) and came into effect in 1993. The Legal Services Commission, which took over from the Board in 2000, developed a whole family of standards for different types of work—including for non-legal organizations giving only advice. In April 2002, it brought all the standards together under a “Quality Mark” scheme. LAFQAS then became the Specialist Quality Mark. To obtain the Specialist Quality Mark, a firm must meet certain standards in relation to its organization. A provider needs to get the Specialist Quality Mark in order to have a contract. Officials are sent from the Commission to each firm before grant of a contract to check for compliance.

The terms of the Specialist Quality Mark are based on standards devised by the Law Society at the urging of the Legal Services Commission.<sup>7</sup> These represent a set of standards for running an efficient office. It is not enough for procedures to be in place; they must also be written down and demonstrably operational. Practitioners have grumbled about the bureaucracy this involves, but a number will privately concede that their business has improved by reconsidering their procedures.

### **Transaction criteria and auditing client files**

In addition, as it devised franchising, the Legal Aid Board sought to find some way of measuring the quality of solicitors from an examination of their files. What it wanted was a process by which a non-qualified auditor could inspect files and come to some sort of preliminary judgment on how well the work had been done. To do this

the Board employed academics to advise them on quality measures that had been tried in other jurisdictions and might work in England and Wales. The academics advised the use of what they called “transaction criteria.”<sup>8</sup> These are “a series of points and questions that a trained observer checking the file after the event would use to evaluate what was done and the standard to which it was done.”<sup>9</sup>

The idea behind the transaction criteria is that each of a series of questions could be answered by a trained lay person, from looking at the case file.<sup>10</sup> This does depend on a theoretical leap—that good lawyers keep good notes—and the transaction criteria have been criticized from this perspective. However, their use has undoubtedly allowed at least an initial judgment to be made of effective quality. The researchers were always clear about what level of quality was acceptable: “a competence threshold” which was “not perfection.” In management jargon, they sought “fitness for purpose.” The criteria are organized so that scores attained can be expressed as percentages.

The Legal Services Commission, like the Legal Aid Board before it, has a statutory right to inspect legal aid files, overriding professional privilege. The auditor selects a small random sample of files and gives them a score. The firm passes the audit only if every file scores above the pass mark. A larger sample may be requested if some files pass and others fail.

The transaction criteria are very closely related to the detailed breakdown of procedures laid out above.

They are, however, somewhat rough and ready. The Commission is now exploring other ways to judge quality, including sending staff incognito into firms to explore how they are treated (“mystery shoppers”) and, notably, peer review. The Commission, like the Board, had been slow to implement peer review because of the assumed cost. However, peer review was initially implemented in relation to immigration and asylum work, where the government was concerned that some practitioners were conspiring with their clients to abuse procedures. Two practitioners, selected for their excellence, visit a firm where a question of quality has arisen and produce a reasoned analysis of a sample of cases.

The reduced numbers of legal aid providers means that peer review is much more practicable than previously. Requirements in relation to quality are incorporated within providers’ contracts—and any practitioner wishing to undertake legally aided criminal work must have a contract and, in effect, be of a certain size and competence. As of March 31, 2003, there were 2,900 providers supplying services for the Criminal Defence Service.<sup>11</sup>

### **Public defender offices**

Legal aid in England and Wales is still overwhelmingly provided by lawyers in private practice. There is an experiment involving eight small public defender offices, but their contribution to legal aid provision has been relatively minor to date. They do, however, give the Legal Services Commission direct insight into the work undertaken by lawyers. They are expected to act to the same quality criteria as private practice. Two

additional safeguards are designed to protect the independence of lawyers employed in public defender offices. A code of conduct for salaried employees gives some guarantee of independence. In addition, a Commissioner who is also a leading private practitioner has a role as the professional head of the service outside the strict management structure and can, thus, be used by a member of staff facing any kind of professional issue.

### Conclusion

The English legal profession and its legal aid system have elements of uniqueness. It is an adversarial system; there is a split legal profession; jury trials, which are expensive, are a major part of the structure; there are lay judges in the lower courts; legal aid is well established. With all the usual caveats about comparing legal aid schemes in different cultures and contexts, the main lessons from the English experience would appear to be:

- Itemization of best practice and the resulting checklists represent a way in which best practice can be captured, encouraged and monitored.
- The identification of best practice should be undertaken by practitioners and academics working together, so that the standards have a wide degree of credibility.
- The value of an independent body, in our case the Legal Services Commission, to administer legal aid, separate from both the government and the legal profession.

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#### Notes

† Roger Smith is Director of JUSTICE, a London-based human rights and civil liberties organization.

1 Legal Aid Board, *Second Stage Consultation on the Future of the Green Form Scheme 1989*, Para 21.

2 M McConville, J Hodgson, L Bridges, A Pavlovic, *Standing Accused—the Organisation and Practices of Criminal Defence Lawyers in Britain*, Clarendon Press, 1994.

3 R. Ede and E. Shepherd, *Active Defence*, Law Society, 2000.

4 R. Ede and A. Edwards, *Criminal Defence: a Good Practice Guide in the Criminal Courts*, Law Society, 2002, p.37.

5 *Ibid.* p.61.

6 Law Society, *Criminal Litigation Scheme, Assessment and Accreditation Procedures*, para 3.1.2. Online at <http://www.lawsociety.org.uk>.

7 There is a separate quality scheme for barristers, not discussed in this paper because it is likely to prove confusing in any jurisdiction which does not have a split profession like the United Kingdom's.

8 A. Sherr, R. Moorhead and A. Paterson, *Lawyers—the Quality Agenda, Volumes One and Two*, Legal Aid Board, 1994.

9 *Annual Report 1991-92*, Legal Aid Board, HC50, HMSO, 1992, p.24.

10 An example list of transaction criteria questions is available on the Justice Initiative website, <http://www.justiceinitiative.org>.

11 *Annual Report*, Legal Services Commission 2002-3, HC743, HMSO, 2003.

## The Public Needs Defending, but Who Provides the Service?

*Richard Whitehead*<sup>†</sup> provides an overview of the merits of the Public Defender pilot project in England and Wales.

An effective criminal defense service is fundamental to the human rights and justice system in the jurisdiction of England and Wales. This is fully supported by government figures,<sup>1</sup> which show that:

- In 2002, 11,742 people in custody awaiting trial were acquitted by the court or had the proceedings against them dropped.
- In the same year, 58,000 prisoners were remanded in custody awaiting trial—an increase of 5000 from 2001.
- Some prisoners are locked in shared cells for up to 22 hours a day.
- The average time spent in custody awaiting trial is 49 days for men and 37 days for women.
- On average, 72 remand prisoners harm themselves each month—36 committed suicide in 2002.

Under the legal aid system that prevailed until recently, if you were arrested you were defended by a lawyer of your choice. The lawyer sent you the bill, which you passed on to the state to pay. Today, the system has been enhanced by the Legal Services Commission—a quasi-non-governmental body which decides and implements policy on legal aid—to ensure that only reasonable rates of pay are

charged for nothing less than quality criminal work. Only costs relating to legal aid available at police stations and at courts have remained largely unchanged.<sup>2</sup>

### The government

The British government is committed to ensuring that the criminal justice system remains fair and efficient, commanding public confidence; sensitive to the needs of victims and witnesses and to public interests; and able to meet quality assurance standards.

On the June 6, 2000, a consultation paper was published: *Criminal Defense Service—Establishing a Salaried (Public) Defense Service and Draft Code of Conduct for Salaried (Public) Defenders Employed by the Legal Services Commission*. The purpose of the paper was to allow the Legal Service Commission to use the power given to them, in the 1999 Access to Justice Act, to employ defense lawyers directly. This was achieved on May 14, 2001, when a four-year Public Defender Service pilot scheme was launched. Six Public Defender Service offices and two satellite offices have now been set up in England and Wales, with an independent research team to report back on the impact of the service in 2005.

### The Public Defender Service

Each Public Defender Service office has been set up to operate in direct

competition with local private practice in a mixed economy. The Commission has recruited professional office heads, with private sector experience in providing and managing criminal cases, to ensure professional integrity.

The Commission has no access to client records, other than through its quality audits. It delegates control of criminal matters to the Professional Heads, who are guided and monitored—through research and complaints—by the Head of the Public Defender Service.

Each office is staffed by quality people, with real clients, doing an essential job. In addition to their public defender work, they provide hard facts to the Commission that enable it to better manage the 2,800 law firms currently contracted to carry out criminal legal aid work.

By way of an example, the Public Defender Service records the time it takes to do tasks in real time (not units of time). This allows the real cost of tasks to be calculated; greater rigor and accountability to be applied; and best practices to be benchmarked and developed. Additionally, if contract changes are made as a result, the Public Defender Service can test them, refine them and report on them without the distraction of profit. Delays and inefficiencies within other criminal justice agencies can be highlighted and reported.

### **Cost and independence**

Since the launch of the Public Defender Service, the issues of cost and independence have dominated the debate on the pilot scheme. Charges that the service is too expensive and

insufficiently independent have not been demonstrated however.

The Legal Services Commission has recognized from the outset that any system of public defense must be properly funded and staffed to retain the confidence of the public, lawyers

It has been shown repeatedly that inadequately-funded organizations of inexperienced legal representatives with overwhelming case loads are held in low esteem by their clients, opponents and the law courts.

and the law courts. It has been shown repeatedly that inadequately-funded organizations of inexperienced legal representatives, with overwhelming case loads, are held in low esteem by their clients, opponents and the law courts.

A properly funded, independent Public Defender Service offers lawyers:

- a structured career path, in which they are respected public servants;
- coordinated and sophisticated training;
- reasonable working hours;
- more formal relationships with, and protection from, clients;
- no commercial interests in the retainer;
- a professional code of conduct, overseen by a practicing lawyer.

Equally, the benefits to clients are:

- quality-assured representation by highly-trained, well-resourced legal specialists;
- a focus on the issues to hand, without the distraction of profit.

And, the benefits to taxpayers are:

- a value-for-money public service, with transparency and accountability.
- economies of scale.

The Legal Services Commission ensures the independence of the Public Defender Service through the professional head of each office and the effective implementation of its *Code of Conduct*.

The government needs to provide access to justice and equality of arms. Put simply, every police station and court must provide anyone accused with rapid access to trained lawyers. The Public Defender Service ensures that this access and equality is achieved throughout England and

Wales, especially where there is a real need for criminal defense services. Furthermore, defense lawyers need to protect the interests of the suspect or defendant, ensuring that the prosecution proves its case and advises the client on the appropriate course of action.

The Public Defender Service, since its inception, has provided a powerful case for its continued life after the pilot's deadline, especially in terms of quality and effective defense. It is on these grounds that I, personally, hope that the Public Defender Service will continue to exist after the pilot deadline of 2005.

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### Notes

† Richard Whitehead is Head of the Public Defender Service Office in Liverpool.

1 Prison reform trust for the prison figures up to December 31, 2002.

2 Lord Chancellor's Department, Criminal Defence Service, *Establishing A Salaried Defence Service—The Government's conclusions following consultation*, April 2001.



## ISRAEL

## Building a Rights-based Framework for Legal Aid in Israel

*Moshe Hacohen<sup>†</sup> explains how Israel's legal aid framework has shifted from a matter of good fortune and official discretion to systematic delivery of a basic right.*

The right of indigent individuals to legal representation at public expense is not constitutionally recognized in Israel's written bill of rights. Nor has it been proclaimed by the Supreme Court. Lower court decisions have referred to legal aid as *facilitating* fundamental constitutional rights, such as freedom, human dignity, privacy, property and access to justice. The reason given is that professional legal representation is vital to ensuring the due process of law, which is in turn deemed essential to preserving basic constitutional rights. Unfortunately, due to its inferior status, the right to representation is prone to alteration as a result of regular legislative processes.

Furthermore, courts have stated that the existing legislation affording free legal representation applies only to those indigents, who meet the legally prescribed—and in certain cases arbitrary—substantive and financial eligibility criteria, in order to strike a proper balance between the public interest in due process and financial constraints.<sup>1</sup>

Despite this somewhat disappointing legal-constitutional backdrop, the country has managed, through the efforts of many dedicated individuals and governmental commitment, to set up quite an extensive legal aid system,

catering to the needs of tens of thousands of clients each year.

The legal aid system in Israel is divided into two main entities, one dealing with the provision of legal aid in civil matters, such as family and labor law and social benefit legislation, and the other, the Public Defender Office (PDO), providing legal aid in criminal cases. This separation is repeated throughout the

Appointed counsel were financially dependent on the court system, which conflicted at times with their ability to represent their clients zealously.

entire legal aid framework; each sector is governed by its own set of statutes and regulations. Administratively, the PDO and the civil legal aid system constitute separate departments within the Ministry of Justice and each has its own budget line.

Prior to the establishment of the civil legal aid system in 1972, the Ministry of Justice ran three legal aid offices for indigent clients, by virtue of an administrative order. This assistance did not nearly meet the high and growing demand for legal aid. In addition, because the aid had no statutory basis, it was supposedly provided through the benevolence of the offices

rather than as a legally-mandated response to indigent clients' needs as a matter of right.

Before the establishment of the PDO in 1996, legal aid to indigent defendants was delivered through "ad hoc" court-appointed counsel. This system had some major drawbacks. Appointments were not made on a

administration and terms of reference;<sup>2</sup> the categories of defendant that qualify for aid; the scope of assistance granted and the contribution made by clients.<sup>3</sup> These statutes also set forth application procedures for legal aid, and regulations governing the appointment and obligations of legal aid lawyers, including their supervision, payment and replacement where necessary.<sup>4</sup>

Civil legal aid is controlled by a Civil Legal Aid Department within the Ministry of Justice. The department is headed by a director assisted by a department administrator and an office manager. Five regional offices—in Jerusalem, Tel Aviv and the Central regions, the Southern region, Haifa, and the Northern region—are each staffed by an executive director and deputy, a combination of internal state-employed lawyers and external private lawyers (referred to as "retainers"), a secretary and clerical staff.

The legal aid system for defendants in criminal cases consists primarily of the national Public Defender Office, headed by the National Public Defender. Given the sensitive nature of criminal cases and the fact that the State Prosecutor's Office is also within the Ministry of Justice, a Board of Public Defenders was set up to supervise the PDO and ensure its independence. However, as the Board sets neither the budget nor overall policy, the Office is in practice only semi-independent of the Ministry of Justice (and the other government bodies authorized to make these decisions). The Board has five members: the Minister of Justice (who presides), a retired Supreme Court justice, a

The number of applications for public defenders in criminal cases more than tripled from 1998-2002.

principled basis: prior acquaintance between the judge and the lawyer sufficed. Indeed, there were no guidelines either for selecting and training counsel or for making appointments in individual cases. In addition, appointed counsel were financially dependent on the court system, which conflicted at times with their ability to represent their clients zealously. Other disadvantages included budgetary constraints, and the absence of either systematic codification of the statutory norms on appointing counsel or a central policy-setting body.

### **Structure and administration of the legal aid system**

The primary regulations governing the right to free or subsidised assistance are the Civil Legal Aid Statute, 1972 and the Public Defender Statute 1995. Together with their subsidiary regulations these laws and guidelines address: the establishment of public defender entities; their composition,

criminal law practitioner selected by the National Council of the Bar Association, a criminal law practitioner appointed by the Minister of Justice with the consent of the President of the Bar Association, and a criminal law professor appointed by the deans of the faculties of law.<sup>5</sup> The Board has no permanent staff to monitor the activities of the Public Defender Office, gather information or prepare meetings. An annual report presented to the Board by the National Public Defender and reviewed by the Minister of Justice is the only official source of information regarding the activities of the Office.

The Board is empowered to appoint the National Public Defender, who heads the Public Defender Office and whose term of office is of five years, with a possible extension for a second term of five years. The Board also has sole authority to dismiss the National Public Defender.

The following tables give details of the sources of referrals for representation by public defenders, and the kinds of procedures involved, for the year 2002.

**Table 1: Sources of Referral to the PDO, 2002<sup>6</sup>**

	Total	Percent
Independent application to the PDO	3,327	6%
Court referrals	26,766	49%
Counsel on duty at the court	13,863	26%
Police station	6,936	13%
Probation service	1,995	4%
Total	53,934	100%

**Table 2: Types of Proceedings Represented by Public Defenders in 2002**

Petitions for remand	21%
Pre-trial procedures	26%
Criminal cases	46%
Criminal appeals	2%
Other detention procedures	4%
Other procedures	1%
Total	100%

The National Public Defender is responsible for the administration of the system and for establishing national policies governing the delivery of legal aid. He or she also represents the Office before governmental, parliamentary, judicial and non-governmental institutions, including the Bar Association and the general public.<sup>7</sup> The National Public Defender is assisted in the execution of his/her functions by a Deputy National Public Defender and a Head of the National Appellate Division, as well as legal and secretarial staff. District Public Defenders, responsible for providing aid in the five judicial districts, are also supervised by the National Public Defender. Each district office is headed by a District Public Defender, and further staffed by a deputy, together with “topical” department heads, lawyers—both internal and external “retainers” and secretarial staff.<sup>8</sup>

### The provision of legal aid

Both the civil and criminal legal aid systems retain the services of a combination of staff and private lawyers.<sup>9</sup> However, in the civil system, staff lawyers work almost entirely on the financial and substantive eligibility of clients, and examine the merits

of cases, while the private lawyers are appointed to represent clients throughout the legal procedures. In the criminal legal aid system, by contrast, there are three categories of

University-based legal clinics also provide legal advice, generally given by law students who can receive academic credits for their participation in practical legal aid courses.

legal aid providers. First, internal staff lawyers are employed in each of the five district offices to provide legal aid in cases allotted them by the District Public Defender. Second, each District Public Defender has a list of external private attorneys, who can be appointed to represent defendants and are supervised by internal lawyers.<sup>10</sup> These external defenders are paid on a scale established by statute, based on a combination of the number of cases and court sessions attended. The third category is relatively new and designed to save costs—it involves transferring cases to attorneys on a wholesale contractual basis. In this model, a private attorney consents to represent clients in a pre-agreed number of cases for a fixed sum, which includes all proceedings and actions in the case.

University-based legal clinics also provide legal advice, generally given by law students who can receive academic credits for their participation in practical legal aid courses. However,

clinics cannot provide defendants with actual legal representation.

Legal aid is offered for public interest litigation on a voluntary basis by different public interest organizations. There are no binding criteria—the assistance is provided according to the decision of the relevant organization. Government funding for public interest organizations, where it exists, is not generally connected to their public interest litigation activities.

### **Supervising the quality of legal aid services**

Ethical rules for all lawyers are provided by statute and regulations, and in the Israeli Bar Code. The Israeli Bar Association is authorized to address breaches of these rules, via an internal disciplinary tribunal elected by its members. Public and private law agencies conduct internal monitoring of employees, and different PDO guidelines apply to, respectively, legal aid lawyers and retainers working for the PDO.

In addition, as internal staff lawyers are also civil servants, they are subject to the civil service code and the Civil Service Statute of 1970. Breaches of this code may result in disciplinary action, ranging from a reprimand entered into the lawyer's files to formal complaint procedures brought before a civil service disciplinary tribunal.

On receipt of payment, civil legal aid lawyers are required to submit detailed reports of documentation and case developments. In addition, monitoring is executed by administrative staff, through general inspections of cases and lawyers performed by the

district directors, with special attention given to new lawyers and complicated cases of potential significance.

In the criminal sphere, an intricate system of structured consultation enables internal lawyers to supervise the public defender work of private retainers throughout the course of a case. The level of supervision is determined by the private lawyer's experience and skills and the type of case. Within two weeks of receiving an appointment, the retainer submits a report on the case to his/her internal supervisor. The report offers a general outline of the case and covers other details such as compliance with the required procedures, the feasibility or otherwise of a plea agreement, and the need for expert testimony.

In addition, retainers are required to keep notes of any significant action taken during the course of a case; these are later reviewed by the supervising internal lawyer. Review and approval of appeals and plea bargains, as well as overall case-evaluation, are performed by supervising, internal lawyers of the PDO.

As well as these general forms of monitoring, lawyers in both the Public Defender Office and the Civil Legal Aid Office are required to attend training sessions. The National Public Defender and directors of the Civil Legal Aid District Offices supervise these sessions in order to ensure the professionalism of all legal aid lawyers. Separate sessions are held for regular employees and for retainers. The latter are not obliged to attend, although it is advised.

## Results

The establishment of these two legal aid entities—the Civil Legal Aid Office and the Public Defender Office—has contributed to an increase in the number of indigent clients who receive legal aid free or almost free of charge. This has vastly improved the integrity of the entire legal system in Israel. However, this very progress also imposes a growing financial burden on the state budget. The number of applications for public defenders in criminal cases more than tripled from 1998-2002 from 15,102 to 53,934. Since 2001, the number has stabilized. Part of the initial burst of growth can be explained by the gradual process through which the new system was extended nationwide and by the expansion process of the right to comprehensive legal representation for juveniles and indigent pre-trial detainees which was completed only in 2002.<sup>11</sup> The number of civil aid cases has also increased, if less dramatically.

Although the Civil Legal Aid system has been in place since 1972, there has been steady growth in the provision of legal aid since 1998. Two reasons for this are, first, the rise in the general population as a result of a vast wave of immigration from the former Soviet Union and Ethiopia in the early 1990s and, second, Israel's severe economic downturn in recent years, which unfortunately is not expected to improve in the near future. As a result, in the coming years, the demand for legal aid in Israel is expected to continue to grow. Given that public funding is constantly shrinking, a major question will be

how to meet this demand. In the meantime, Israel's legal aid providers will continue to strive to improve the system to provide better services to greater numbers of people despite decreasing budgets.

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### Further Reading

Hacohen, Moshe "Israel's Office of Public Defender: Lessons from the Past, Plans for the Future," *Materials on Access to Legal Aid*, 2002, pp.1-8.

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### Notes

† Moshe Hacohen is District Public Defender, Jerusalem district, Israeli Office of the Public Defender. He would like to thank Ms. Shani Pogoda for her assistance in drafting and editing this article.

1 Criminal Appeal (Tel Aviv) 70570/01 *Israel State Prosecutor v. Shalom Kaatabi*.

2 Civil Legal Aid Statute 1972 s 1,7; Public Defender Statute 1995 s 1-4.

3 Subsidiary Regulations of the Civil Legal Aid Statute 1973 s 1-6; Public Defender Statute 1995 s 18; Subsidiary Regulations of the Public

Defender Statute 1996 s 1-5, 7.

4 Civil Legal Aid Statute 1972 s 3-6; Subsidiary Regulations of the Civil Legal Aid Statute 1973 s 1,4,7,10-11; Public Defender Statute 1995 s 15, 19-22; Subsidiary Regulations of the Public Defender Statute 1996 s 1-3(a), 10.

5 Public Defender Statute 1995 s 2-3.

6 National Public Defender et al., *Data Regarding the Activities of the Public Defender During the Year 2002, 2003*, pp.1-18.

7 Public Defender Statute 1995 s 4-8.

8 Public Defender Statute 1995 s 9-11.

9 Civil Legal Aid Statute 1972 s 2 and Subsidiary Regulations pertaining to this statute s 4.

10 Public Defender Statute 1995 s 17 and Subsidiary Regulations pertaining to this statute.

11 The Public Defender statute determined that the five districts would be established gradually over a period of three years, starting with the establishment of the Tel Aviv district in 1996 and ending with the Northern district, situated in Nazareth, in 1999. Eligibility for legal aid was expanded gradually, to include representation for juveniles and indigent pre-trial detainees, during the years 1998-2002. Due to organizational and financial reasons, the Haifa District was the last to provide overall representation.

## SIERRA LEONE

## Accessing Justice in Rural Sierra Leone—A Civil Society Response

*Sierra Leone's formal justice system is undermined by low-level access to legal services, particularly outside the urban centers. Paul James-Allen<sup>†</sup> describes a new project to improve access to justice in the provinces.*

Among the causes of the 10-year conflict recently concluded in Sierra Leone, some have included the justice system itself—judicial bias in favor of the rich and powerful; low or no access to rights guarantees for the rest; and endemic corruption and impunity. Since the war's end, two accountability mechanisms—a Truth and Reconciliation Commission and the Special Court for Sierra Leone—have been established. But after the bitter experience of war, the justice system is still regarded by many Sierra Leoneans with distrust or as beyond their reach.

Sierra Leone has a dual legal system—part formal common law, a colonial legacy; part customary law, based on the traditions and cultures of its peoples. For most, the formal system has little relevance. Despite the supposed supremacy of common law courts, the great majority can only access them by traveling to the nearest regional capital. Today, this country of approximately five million people boasts only 125 lawyers, 95 percent of whom are based in the capital Freetown.<sup>1</sup> Few can afford their comparatively exorbitant—and unregulated—fees. The single legal aid organization in the country, the Lawyers Center for Legal Assistance

(LAWCLA), serves only Freetown and the city of Makeni. In practice, most legal issues are regulated by customary law, using informal mechanisms that are, unfortunately, not always in line with Sierra Leone's Constitution or the international human rights treaties to which the country is party.<sup>2</sup>

Justice is inaccessible to most, as a result of weak delivery institutions, corruption or inadequate human resources.

In early 2001, the National Forum for Human Rights (NFHR), an NGO coalition, decided to improve access to justice for ordinary Sierra Leoneans. The initial idea was to train paralegals from human rights and community-based groups who could provide legal education and advice to their local communities. A question arose immediately—given Sierra Leone's dual legal system, which jurisdiction should be engaged? Whereas training materials on the common law system are easily located, the customary law system is more relevant to most communities.

As a preliminary step, the NFHR undertook a study of the status of customary conflict resolution mechanisms and the general perception of the justice system as a whole in certain



districts of the country. A report was produced, entitled *The Law the People See*.<sup>3</sup> Among other things, it found that, regardless of the system—customary or common law—justice is inaccessible to most, as a result of weak delivery institutions, corruption or inadequate human resources. This situation is exacerbated in remote communities. The publication recommended that civil society and human rights groups participate in making justice accessible to Sierra Leoneans.

But how can non-state actors help? One possible model was provided by South Africa's "advice office" movement.<sup>4</sup> The Community Law and Rural Development Centre (CLRDC) at the University of Natal, Durban, deploys about 350 advice officers countrywide. Beginning from a pilot project and a handful of rudimentary offices, it is now housed in its own building and has a network of 56 offices in the rural areas of KwaZulu Natal and parts of the Eastern Cape province. The offices provide intensive training to individuals who then return to their communities to serve as legal advice officers. The efforts have greatly increased the accessibility of justice and legal aid for ordinary people in that region. A similar movement could revolutionize access to justice in Sierra Leone.

To this end, the NFHR worked closely with its member organizations, the Open Society Justice Initiative and others, in developing a proposal to address the enormous justice gap in Sierra Leone.<sup>5</sup> It focused on both the common law courts and the assertion of constitutional rights in informal courts run by traditional chiefs. The resulting project aims to train and

employ members of five communities as advice officers to assist clients, including those engaged in civil disputes, indigent arrested and detained persons, and crime victims. Advice officers' remit will include advocacy—directly or through assisted individuals—for the evolution of customary or common law towards greater compliance with constitutionally and internationally mandated human rights.

As of November 2003, training has begun. In each of five localities, two individuals are being taught to advise their communities on asserting their rights. In time, a reference manual explaining substantive and procedural common law on subjects of common concern to ordinary citizens will assist in the training process. The manual will cover areas such as landlord/tenant law, real and personal property, and family law, and will serve as a reference text for advice officers. Lawyers specializing in specific legal areas will be engaged to write relevant chapters and teach the material to advice officers during their training.

The axiom that the first way to protect rights is to create awareness of them is central to the design of the project. Under Sierra Leone's Legal Practitioners Act of 2000, it is illegal for anyone not licensed as a lawyer to practice law, hold themselves out as legal practitioners, or give the impression that they may be licensed attorneys.<sup>6</sup> Training is therefore focused tightly on human rights education and advocacy, and their application in customary dispute resolution. The Sierra Leone Bar Association will be engaged for guidance and expertise.

It is hoped that a tangible improvement in human rights and access

to courts in these five districts will encourage other communities and NGOs to replicate the initiative in other parts of the country. Increased protection of human rights can then provide a balm for the slowly healing wounds of post-conflict Sierra Leone.

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Notes

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1 Estimate of the State Counsel in the Law Officers Department in Freetown as of November 2003.

2 Sierra Leone has ratified the major human rights treaties, including: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Elimination of Racial Discrimination, the Convention against Torture, and Convention on the Rights of the Child.

3 Owen Alterman, Aneta Benienda et al., *The Law People See*, National Forum for Human Rights, 2003. Online at: <http://www.sierra-leone.org>.

4 The model was introduced to the NFHR through discussions in late 2002 with the Open Society Justice Initiative and Jamie O'Connell, then supervisor of the Fourah Bay College Human Rights Clinic in Freetown.

5 The Access to Justice Coalition includes the National Forum for Human Rights, Campaign for Good Governance, Network Movement for Justice and Development, Campaign Against Violent Events, Center for Human Rights and Democratic Reform, and Fourah Bay College Human Rights Clinic together with the Open Society Justice Initiative.

6 Article 21 of the Act prohibits non-lawyers from practicing law. It reads: "Any unqualified person who (a) practices or acts as a legal practitioner; or (b) willfully and falsely pretends to be, or takes or uses any name, title, addition or description implying that he is duly qualified to practice or act as a legal practitioner, or that he is recognized by law as so qualified, commits an offense . . . ."

# Justice Initiatives

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The Open Society Justice Initiative pursues law reform activities grounded in the protection of human rights and contributes to the development of legal capacity for open societies. The Justice Initiative joins empirical practice and legal advocacy with the dissemination of knowledge in its areas of core concern: national criminal justice; international justice; freedom of information and expression; equality and citizenship; and anticorruption.

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