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# ADMINISTRATION OF CRIMINAL JUSTICE PROJECT

## COMPARATIVE PUBLIC DEFENSE OVERVIEW

**September 7, 2006**

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## **SECTION I. INTRODUCTION**

The USAID Administration of Criminal Justice Project (AOCJ) consists of three components, the automation of the Prosecutor General's Offices, the development and implementation of a public defense system, and the development of a practical human rights curriculum for prosecutors.

The overarching goal of the AOCJ project is to assist our Government of Egypt (GOE) counterparts in their efforts to improve the administration of criminal justice in Egypt. Significant efforts in this regard are already underway. For example, the Ministry of Justice (MOJ) and the Prosecutor General's Office (PGO) have proposed substantial amendments to the Criminal Procedures Code which would expand the rights of indigent defendants to legal representation in a broader range of cases and at an earlier stage in the legal proceedings. The proposed revisions are pending with the legislature.

The current criminal defense system in Egypt guarantees individuals charged with crimes the right to counsel. Article 67 of the Constitution states “Any defendant is innocent until he is proved guilty after a legal trial, in which he is granted the right to defend himself. Every person accused of a crime must be provided with a counsel to defend him.” If an individual is unable to afford counsel one can be appointed if the accused so requests and in certain enumerated instances the judge must appoint counsel, such as in felony cases. Article 69 of the Constitution provides “The right of defense in person or by power of attorney shall be guaranteed. The law shall grant the financially incapable citizens the means to resort to justice and defend their rights.”

Article 93 of the Law on the Legal Profession requires the Bar Association to set up judicial assistance offices to aid indigent citizens and protect the above mentioned rights. The one enumerated qualification for being appointed to these criminal cases, pursuant to Article 97 of the Law on the Legal Profession, is the eligibility of counsel to appear before courts of appeal or courts of first instance. The appointment list is also based on the number of years the attorney has been practicing. If an attorney has been practicing in excess of 10 years then he/she can be appointed to the most serious cases, including murder cases in which the government may impose the death penalty. Appointed counsels are considered ex-officio; however it is unclear as to whether or not an official list of counsel who may be appointed to these cases is maintained. At the conclusion of each case the judge determines the amount of money to be paid to the attorney and signs a voucher for said attorney. The attorney is ultimately paid by the government for his/her services.

An essential part of the AOCJ project is to provide relevant technical and logistical assistance to the GOE to assist them with the planning and development for a comprehensive public defense system. One activity of initial importance is an overview of comparative public defense systems. The purpose of the comparative overview contained in this report is to provide a starting point for dialogue and discussion between the AOCJ and GOE counterparts regarding public defense systems in other countries, many of which could serve as models for innovations in Egypt or as possible destinations for observational study tours for GOE counterparts. The information contain herein is not intended to be an exhaustive discussion of each countries public defense system, but highlights recent trends and innovations that may be relevant for future discussions in Egypt.

## SECTION II. A SAMPLE OF COMPARATIVE PUBLIC DEFENSE SYSTEMS

The following is a brief overview of a sample of select public defense systems, primarily in civil law nations. Additional systems of specific interest to the PGO will be reviewed and a more detailed analysis of certain models provided as appropriate.

1. **France:** The French Civil Code of 1804 arguably represents the first modern code<sup>1</sup> and has served as the model for most civil legal systems.<sup>2</sup> A review of the French Code of Criminal Procedure<sup>3</sup> reveals a system very similar to that of Egypt. Similar rights to counsel attach to the accused at similar points in criminal proceedings. The French passed Law 91-647 on July 10<sup>th</sup>, 1991 which created two different systems of assistance for indigent defendants, the “aide juridictionnelle” and the “commission d’office”. The “aide juridictionnelle” is essentially a legal aid office where low income individuals can come and apply for assistance. Depending on their financial resources they can receive legal aid for free or at reduced rates. The “commission d’office” is essentially a list maintained by the Bar Association of attorneys willing to be appointed to criminal defense cases. French law provides that at the beginning of police custody an accused may meet and discuss his/her situation with an attorney for up to 30 minutes. If an accused cannot afford an attorney the investigating judge can contact the “commission d’office” and ask for appointed counsel. This is apparently a discretionary practice.<sup>4</sup>
2. **Turkey:** The Turkish legal system has many similarities to the Egyptian system particularly with regards to the rights of the accused.<sup>5</sup> To address certain practical problems and to bring their procedures more in line with international standards, the Turkish legislature amended their Criminal Procedures Code in the early 1990's. These amendments modified provisions concerning arrest, detention, established the right for defense counsel to be present during interrogations and, most importantly for our purposes, obligated the local bar associations to provide legal aid to detained individuals.<sup>6</sup> The local bars created “Code of Criminal Procedure Practice Units” (CCPP Units) to provide indigent defendants with legal assistance. The model CCPP Unit is in Istanbul, where salaried attorneys oversee other members of the local bar

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<sup>1</sup> See Glendon, Gordon and Carroza, Comparative Legal Traditions, West Group, 1999, at p.33.

<sup>2</sup> Id. at p.32.

<sup>3</sup> Available for review at the office of the AOCJ.

<sup>4</sup> Memo/E-mail from Marc Frilet, Managing Partner, Frilet Societe d'Avocats, Paris, France to Jim Hodes (hereafter cited as JH), Public Defense Specialist, AOCJ, 3 July 2006.

<sup>5</sup> Memo/E-Mail from Irene Baniyas, Instructor, Bosphorous University, Istanbul, Turkey to JH, 16 July 2006.

association and where services are provided 24 hours a day, 7 days a week.<sup>7</sup> This innovation appears to function well and may merit further investigation regarding potential applicability in Egypt.

3. **The Netherlands:** Pursuant to the European Convention on Human Rights and the Dutch Constitution all citizens have access to the courts and the right to be represented by counsel. The Dutch have developed two models to assist indigent defendants in receiving appropriate legal representation. The Legal Aid Board represents a clearinghouse or administrative body for attorneys representing indigent clients. Retained counsel, paid initially by the client, can apply for additional funds from the Ministry of Justice through the Legal Aid Board based on the client's income level. The Legal Aid Board also established Legal Aid Centers, which are currently being renamed Legal Aid Counters. These Centers/Counters will provide quick legal advice and/or referrals for the public to private attorneys where further services are needed<sup>8</sup>. The key to the Centers/Counters is that they are permanent structures with full time employees making them much more accessible to the public. Criminal defendants who have been unable to retain counsel may request the Court to appoint an attorney, as in Egypt, or the Court can do so *sua sponte*<sup>9</sup>.
4. **Bulgaria:** Bulgaria, like Lithuania and Hungary, is a former Socialist state which has been developing both democracy and capitalism simultaneously over the past 15 years. Bulgaria's criminal justice system, like Egypt's, also guarantees individuals the right to counsel. In Bulgaria the right attaches at the time of arrest or detention or at the time formal charges are filed. Other than some specific types of cases, like felonies, appointment of counsel is at the discretion of the investigating judge or prosecutor or at the trial stage by the trial judge. After several studies found the system failing to provide adequate legal representation either in preliminary proceedings or at the trial stage, the Bulgarian government allowed a pilot public defender's project to be established consisting of several salaried lawyers in 2003<sup>10</sup>.
5. **Lithuania:** Lithuania's criminal justice system, like most former Soviet states and other Central and East European nations, guarantees individuals the right to counsel. However, like other nations in the region, the right to counsel depends on an individual's ability to retain

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<sup>6</sup> See Egypt's Law on the Legal Profession at Articles 93-95.

<sup>7</sup> Information concerning Turkey's Legal Aid System can be found at [www.justiceinitiative.org](http://www.justiceinitiative.org) and [www.pili.org](http://www.pili.org).

<sup>8</sup> See [www.justiceinitiative.org](http://www.justiceinitiative.org) and [www.pili.org](http://www.pili.org).

<sup>9</sup> Memo/E-mail from Professor Alexander Knoops, Dutch Law Professor to JH, 20 June 2006.

<sup>10</sup> *Ibid.*

counsel privately. Although judges had the right and ability to appoint ex-officio lawyers to represent the indigent, often times the indigent defendant proceeded thru pre-trial proceedings as well as thru trial proceedings without counsel. A review of case files in Lithuania revealed financial irregularities as well as irregularities concerning how lawyers were appointed. As a result, the Ministry of Justice in Lithuania agreed to set up two pilot projects utilizing full-time, salaried public defenders.<sup>11</sup> These pilot projects were exceptionally well received and in 2004 the Ministry of Justice endorsed the creation of a nationwide system of public defender offices.

6. **Hungary:** The Hungarian system is also a civil law model in which ex-officio attorneys are appointed to represent those accused of criminal conduct. A study done by the Hungarian Ombudsman found that the ex-officio system failed to protect defendants against the violations and errors of authorities. Particular concerns were raised about the failure of ex-officio counsel to be appointed in time for the first interrogation of the accused or for the additional investigative acts of the police or public prosecutor. As a solution to these problems, the Hungarian government agreed to a pilot project which created a “Model Legal Aid Board.” This body essentially leaves in place the ex-officio system but requires attorneys who wish to represent indigent defendants to qualify and to be on call at least once a week. It also establishes a dispatcher for the police and public prosecutor to call when a person is being arrested. This dispatcher maintains the list of qualified, on call attorneys and is responsible for reaching and appointing the on call attorney when required.<sup>12</sup>
7. **Germany and Switzerland:** Neither the German nor the Swiss systems provide any formal public defense program. Both systems conform to the basic principles of the European Convention for Human Rights, as well as their own constitutional requirements<sup>13</sup>, which provide that individuals charged with crimes have the right to counsel. If an accused cannot afford an attorney then the judge may appoint one who is ultimately paid by the government.
8. **United States of America:** There are multiple public defense systems in the United States. The Federal Public Defender’s Office, funded by the federal government, provides indigent defendants accused of violating federal law with a criminal defense attorney. Depending on the district, this attorney is sometimes a full-time salaried employee of the federal government or is a private attorney appointed specifically for a given case. Similarly all fifty state

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<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> See Art. 29 of the Swiss Constitution.

governments are responsible for insuring that individuals accused of violating state laws are represented at the earliest opportunity. The state-level public defense systems vary from state to state. Some systems are statewide and directed from one primary office. Other systems are based in smaller, independent districts, or subdivisions of the state, such as cities, municipalities or counties. Most public defense systems, including those in smaller, independent districts have increasingly turned to full-time, salaried public defenders. A minority of states maintain ex-officio systems of court appointed lawyers. At all levels, whether federal, state, or local, the government is responsible for funding the public defense system.

### **SECTION III. CONCLUSION**

This summary report is the first step in analyzing comparative public defense systems. There are additional models that may be relevant for Egypt, including but not limited to civil law countries in Central and South America, such as Colombia, El Salvador, and Nicaragua, where efforts to develop new national public defense systems are currently underway with support from USAID and other international donors. While these models may not be appropriate for wholesale adoption in Egypt, certain attributes or innovations used in these systems may be useful for analysis as Egypt embarks on the task of strengthening its public defense capabilities.

In general, in the civil law countries noted in this report, the recent trend appears to be towards systems that provide some mechanism whereby indigent criminal defendants are guaranteed more qualified attorneys earlier in the criminal process. The mechanisms used to guarantee the right to counsel still vary from full-time salaried government public defenders to court-appointed defense attorneys, while some countries, like Lithuania, are now trying a mixed system. Also, there appears to be a clear trend toward requiring defense attorneys who wish to participate in court-appointed systems to meet minimum qualification standards set by the local bar association. This helps ensure the service provided to indigent defendants meets minimum fair trial and due process standards.

While no single public defense model may be an ideal fit for Egypt, the study and analysis of numerous comparative systems, and observational study tours to visit relevant countries, can provide valuable information and ideas as the GOE decides which characteristics and attributes of a public defense system best meet the needs of the Egyptian criminal justice system.