

THE LEGAL PROFESSION IN TAJIKISTAN

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1. The organization and structure of the legal profession

In Tajikistan the legal basis of legal aid, and advocacy are regulated by the Law which initially had a supreme legal form – a “**Constitutional Law**”. According to the academic classification of constitutional laws it falls under the third group as a law whose enactment is expressly laid down by the Constitution.

Article 92 of the Constitution of the Republic of Tajikistan of 6 November 1994 stated that “legal aid is guaranteed at all stages of investigation and court proceedings. The organization and procedure of the activities of the Bar and other forms of rendering legal aid are determined by the **Constitutional Law**”. Tajikistan was the only CIS country that attached such a status to the Law on the Bar¹.

The **Constitutional Law** “On the Bar” was adopted on 4 November 1995 and was progressive for Tajikistan Bar since it set out the independence of the Bar and its independence from the state bodies including the Ministry of Justice, contained state guarantees of independent advocacy, the norms forbidding interference with advocacy and creating unlawful obstruction for advocacy, and also regulated the cooperation between the state bodies and the bodies of defence lawyers’ self-governance in protecting the rights, freedoms and legitimate interests of the public and provision of legal aid to physical and legal entities.

For the first time the independence of the Bar in Tajikistan was secured in law and the Bar became a legal institution of civil society which corresponded to the international law standards regarding defence lawyers’ role in society and the role of the institution of the Bar.

On 22 July 2003, after the nation-wide referendum changes and amendments were introduced into Article 92 of the RT Constitution: the words “Constitutional Law” were replaced by the word “Law”.

Subsequently, changes and amendments were introduced into the Law “On the Bar” as a result of which not only the independence of the Bar but also its integrity were jeopardized.

At present the institution of the Bar in Tajikistan is a professional public body which **does not have a unified system**.

Tajikistan is a country where there are two types of defence lawyer.

Apart from the so called “traditional” defence lawyers’ bodies, bar associations, there are unattached groups of “solo” defence lawyers and separate defence lawyers’ bodies.

Recently the number of lawyers who call themselves defence lawyers has substantially increased in Tajikistan. There have also appeared dubious public associations declaring themselves “the Bar” although in reality they are not such in accordance with the requirements of the RT Law “On the Bar”.

The disunity of defence lawyers, the lack of a single-point professional body, the appearance of defence lawyers and defence lawyers’ bodies with easier access to practice advocacy failed to live up to the role of the institution of the Bar and the expectations of society.

The objectives of the Bar in Tajikistan are based on the provisions of the Constitution of the Republic of Tajikistan²:

Article 19: “...a person is entitled to use the services of a defence lawyer from the moment of detention”.

Article 92: “Legal aid is guaranteed at all stages of investigation and court proceedings.

The organization and procedure of the activities of **the Bar** and other forms of rendering legal aid are determined by **the Law**”.

Article 1 of the Law “On the Bar” explains that “the Bar in the Republic of Tajikistan is an independent **professional body** providing, in conformity with the Constitution of the Republic of Tajikistan, **legal aid to physical persons and legal entities**”³.

¹ <http://kollegia.net/findus.php> Expert legal panel “Legal Defence”, city of Moscow.

² Constitution of the Republic of Tajikistan of 6 November 1994, www.hrt.tj (section “Legislation of the RT”).

The law provides for the creation of the Bar Association, its governing bodies, permission to engage in advocacy, the rights and obligations of defence lawyers and disciplinary responsibility of defence lawyers.

Prior to 1998 permission to engage in advocacy was achieved by way of becoming a member of the Bar Association.

There were two independent Bar Associations in the Republic of Tajikistan: the Bar Association of the Republic of Tajikistan with its Centre in the city of Dushanbe and the Regional Sughd Oblast Bar Association with its centre in the city of Khujand.

The Bar Association of the Republic of Tajikistan, called The Republic Bar Association, is the legal successor of the Soviet Bar Association. The Bar Association of the northern region of Tajikistan – the Sughd Oblast Bar Association was a part of the Republic Bar Association. Thus, there was one whole Bar Association for Tajikistan.

On 15 January 1973 the Sughd (Leninabad) Oblast Bar Association separated from the Republic Bar Association and became independent.⁴

The Republic Bar Association numbered about 250 defence lawyers and had 40 Legal Advice Bureaux.

The Sughd Oblast Bar Association numbered 130 defence lawyers and had 19 Legal Advice Bureaux.

This situation existed until 1998.

On 18 February 1998 the Decree of the Government of the Republic of Tajikistan No.42 was adopted and the Regulations on the Procedure for **Licensing** the Provision of Legal Aid by the **Defence Lawyer-poverenny** were approved⁵.

Thus, there was created the possibility of becoming a defence lawyer by way of obtaining a licence in the Ministry of Justice upon passing a Qualification Examination.

In this connection changes and amendments were introduced into the RT Law “On the Bar”:

Section 5 was renamed “Licensing the activities of defence lawyers-poverenny”.

Article 29 of the Law stated: “The provision of legal aid by qualified defence lawyers – not members of the Bar Association - is carried out on the basis of a licence according to the procedure established **for entrepreneurship activity**”.

Article 2 of the Law provided the explanation: “...A defence lawyer-poverenny is an entrepreneur who provides legal aid on the basis of a licence...”

On 29 March 2003 the **Association of Defence Lawyers of the Republic of Tajikistan** was created with the support of international organizations. It was registered in the Ministry of Justice in July 2003. At that time it had about 100 defence lawyers-poverenny.

The purpose of creating the Association was to unite the members of Bar Associations and defence lawyers-poverenny in one professional organization on the basis of voluntary membership.

The Association of Defence Lawyers at that time united half of the defence lawyers of two Bar Associations and 20 defence lawyers-poverenny.

On 17 May 2004 RT Law No. 37 “Licensing certain types of activities”⁶ was adopted.

Article 17 included the **provision of fee-paid legal services** in the list of activities for implementation of which a licence is necessary.

A situation developed when all defence lawyers who were providing fee-paid legal services had to apply for a licence in the Ministry of Justice.

The draft Law “On introducing changes and amendments into the RT Law “On the Bar”” was prepared. Section 5 provided for “Licensing of the activities of defence lawyers on

³ The Law “On the Bar” of 04.11.1995, www.hrt.tj (section “Legislation of the RT”).

⁴ Historical information provided by the Oblast State Archive of 09.12.1988.

⁵ Decree by the RT Government PT No. 42 of 18.02.1998.

⁶ Law No.37 of 17.05.2004.

rendering legal services”. Article 29 provided for the implementation of fee-paid legal services on the basis of a licence.

The Ministry of Justice was given exclusive authority to grant permission engage in advocacy which contradicted Articles 12, 13 and 14 of the Law “On the Bar”, which provided for the independence of the defence lawyers’ profession and forbade interference with advocacy. It also contradicted Article 19 of the Law which provided for the duty of the members of the Bar Association to render **free legal aid** and to be involved in criminal cases **on assignment by** investigation and court bodies⁷.

An uncertain situation was developing in Tajikistan.

Both Bar Associations forwarded Letters to the Presidential Apparat and the Ministry of Justice in which they expressed their disagreement with the licensing of advocacy, and took part in the Round Table on 24 May 2005 in Dushanbe where they approved the Appeal against the adoption of the draft Law on Introducing Changes and Amendments into the current Law “On the Bar”.

Decree No. 337 of 1 September 2005 by the Government of the Republic of Tajikistan approved the “Regulations on particularities of licensing certain types of activities”. Chapter 49 set out the “Particularities of licensing the provision of fee-paid legal services” which included:

- providing fee-paid legal services by way of advocacy (defence lawyer-poverenny);
- providing other types of fee-paid legal services with the exception of representing physical and legal entities in law-enforcement bodies and courts.

The licensing authority is the RT Ministry of Justice.⁸

This resulted in a situation of uncertainty regarding the issue of permission to engage in advocacy.

It was not clear what professional activities should constitute advocacy.

There was no clear-cut understanding of how the requirements of the Law “On the Bar” and the Law “On licensing ...” have to be interpreted.

This resulted in a confused situation. According to the Law “On the Bar” for a person to become a member of the Bar Association he/she should have had not less than two years of work experience in the field of law or have had from 6 to 12 months of training. In addition in both cases it is obligatory to pass the Qualification Examination (Article 18)

In order for a defence lawyer-poverenny to obtain a licence, the necessary working experience in the field of law was reduced to one year with no requirement to pass either an examination or complete a course of training.

The Ministry of Justice did not administer examinations when issuing licences to defence lawyers-poverenny. The mechanism of quality control for legal aid rendered by defence lawyers-poverenny was unclear.

On 3 March 2006 Law No. 161 “On introducing changes and amendments into the RT Law “On the Bar”” was adopted. Section 5 of the Law underwent substantial changes and is now called “Licensing the activities on provision of **fee-paid legal services by the defence lawyer-poverenny**”.

Article 29 of the Law lays down that providing fee-paid legal services by the defence lawyer-poverenny shall be carried out on the basis of a licence according to the procedure stipulated by the RT Law “**On licensing certain types of activities**”. Articles 30, 31 and 32 were excluded⁹.

On 28 July 2006 changes were introduced in Article 17 of the RT Law “On licensing certain types of activities” and “**provision of fee-paid legal services**” was replaced by “**the activities by defence lawyers-poverenny**”¹⁰.

⁷ RT Law “On the Bar”.

⁸ Decree of the RT Government No. 337 of 01.09.05.

⁹ Law No. 161 of 03.03.06.

¹⁰ Law No. 195 of 28.07.06.

On 3 April 2007 Decree No. 172 by the RT Government approved the new Regulations “On peculiarities of licensing the activities of **defence lawyers-poverenny**”¹¹. The new drafting set out the requirement of two-years’ working experience in the field of law and passing the Qualification Examination.

Therefore, at present the status of a defence lawyer in Tajikistan embraces **the defence lawyers of Bar Associations and defence lawyers-poverenny**. The RT Law “On the Bar” only regulates the practice of defence lawyers – members of Bar Associations, and defence lawyers-poverenny. Other lawyers rendering legal services usually work in non-governmental organizations registered on the basis of the RT Law “On public associations” of 12 May 2007.

Article 2 of the Law “On the Bar” contains the following definitions: Advocacy is the activities of the lawyers on rendering legal aid.

The Defence Lawyer is a member of the Bar Association; Defence Lawyer-poverenny is an entrepreneur rendering legal aid. The difference between them is in the following:

- Regarding permission to engage in the defence lawyer’s profession.
The decision about admission to the Bar Association shall be taken by the Bar Association itself (by its executive body – the Presidium of the Bar Association, after a person passes the Qualification Examination administered by the Qualification Commission of the Bar Association, composed of defence lawyers).
The decision about permission to engage in work as a defence lawyer-poverenny shall be taken by the RT Ministry of Justice on the basis of a licence issued by the RT Ministry of Justice according to the procedure set out by the RT Law “On licensing certain types of activities” of 17 May 2004, after a person passes the Qualification Examination administered by the Qualification Commission of the RT Ministry of Justice.
- Expulsion of defence lawyers from bar associations shall also be carried out by the bar associations themselves. The decision about suspending the licence of defence lawyers-poverenny shall be taken by the RT Ministry of Justice.
- Defence lawyers – members of bar associations are obliged to render free legal aid in cases set out by the law (Article 19 of the RT Law “On the Bar”), as well as on demand of the bodies of investigation and court (Article 49 of the RT Criminal Procedure Code). The requirement to render free legal aid does not extend to defence lawyers-poverenny.
- Defence lawyers-poverenny have the status of entrepreneurs rendering legal aid (Article 2 of the RT Law “On the Bar”). In order to engage in their activities they receive special permission – a licence issued by the RT Ministry of Justice which exercises control over their work.
- Bar associations have Charters, Rules of Professional Ethics of Defence Lawyers, Internal Work Regulations and other documentation for internal use. The RT Ministry of Justice did not develop any rules of professional conduct for defence lawyers-poverenny.

The Bar Association is an independent organization of professional lawyers who joined forces to provide qualified legal aid to physical and legal entities”¹².

At present there are three independent Bar Associations functioning in Tajikistan: The Republic Bar Association with its Centre in the city of Dushanbe, the Dushanbe Bar Association with its Centre in the city of Dushanbe, the Sughd Oblast Bar Association with its Centre in the city of Khujand.

¹¹ Decree of the RT Government No. 172 of 03.04.07.

¹² RT Law “On the Bar” of 4 November 1995.

The Dushanbe Bar Association was registered in the Ministry of Justice in September 2007.

There are 250 defence lawyers in The Republic Bar Association. It includes 42 Legal Advice Bureaux¹³, 5 of them operate in the city of Dushanbe, branch offices function in the city of Khujand (one branch office) and other regions of the Sughd oblast as well as in areas of central subordination, Khatlon oblast and Gorny-Badakhshan autonomous oblast.

The Sughd Oblast Bar Association has 143 defence lawyers; it includes 20 Legal Advice Bureaux in all cities and regions of the Sughd oblast. There are two Legal Advice Bureaux in the city of Khujand.

According to unofficial information, approximately 130 defence lawyers belong to the Dushanbe Bar Association. There are representation offices (surgeries) in towns and regions of Sughd oblast with some offices to be opened in other areas of Tajikistan.¹⁴

322 defence lawyers-poverenny are officially registered in the Ministry of Justice.¹⁵

On 7 July 2007 the Ministry of Justice registered the **Public organization “Defence Lawyers-poverenny of the Republic of Tajikistan”**.¹⁶

This organization includes more than 50 defence lawyers-poverenny.¹⁷

Members of Bar Associations constitute the majority of defence lawyers in Tajikistan.

The exact number of defence lawyers in Tajikistan is unknown as a **Single Register of Defence Lawyers** is not maintained.

At the moment the population of Tajikistan is 7,215,700¹⁸.

Assuming that defence lawyers, according to the Law, can be either members of the bar associations or defence lawyers-poverenny, the overall number of defence lawyers in Tajikistan amounts to approximately slightly more than 800. Based on the total Tajikistan population there is one defence lawyer for approximately 9,000 people in Tajikistan (correspondingly, there is less than 1 defence lawyer per 10,000 people).

This highlights an acute shortage of defence lawyers in Tajikistan.

The number of defence lawyers varies substantially from region to region. In some regions of Tajikistan a shortage of defence lawyers is particularly evident.

For example, in Gorny-Badakhshan Autonomous Oblast (GBAO), the territory of which amounts to 43% of the whole Tajikistan territory with a population of 221,441, there are only two defence lawyers: one from The Republic Bar Association and one defence lawyer-poverenny, as well as three lawyers from “Society and Law” NGO, two from the branch office of the “National Bureau for Human Rights and Observation of Law”.

Defence lawyers are concentrated in the centre – in the capital city of GBAO, the city of Khorog. There are seven regions in GBAO which do not have defence lawyers.¹⁹

The number of defence lawyers in the areas of central subordination (ACS) and in the Khatlon oblast is significantly less than in the city of Dushanbe and the Sughd oblast.

The RT Law “On the Bar” does not provide for any other type of defence lawyers’ organizations except bar associations.

Article 15 of the Law lays down that “bar associations shall be set up on the initiative of no fewer than forty defence lawyers. There is no need for special permission to create a bar association ...”

The Charters of The Republic Bar Association and the Bar Association of the Sughd Oblast provide for the creation by the Presidia of the Bar Associations of Legal Advice Bureaux,

¹³ From private conversation with the Chairman of The Republic Bar Association, Naim Amirbekovich Amirbekov.

¹⁴ From conversation with a member of the Presidium of the Dushanbe Bar Association, Kayum Yusufov.

¹⁵ From the official response by the Ministry of Justice No. 672-3 of 31 July 2008.

¹⁶ Ibid.

¹⁷ Source of information – Chairman of the JSC “Defence Lawyers-poverenny of the RT”, Khamzabek Mirzozaliev.

¹⁸ Source – Goscomstat of the Republic of Tajikistan, www.stat.tj

¹⁹ Source of information – an employee of the Khorog branch office of the Gorny-Badakhshan Autonomous Oblast “Bureau for Human rights and Observation of Law”, Manuchekhr Kholiknazarov.

offices, agencies and surgeries, in order to organize in cities and regions the work of defence lawyers in rendering legal aid.

Virtually all defence lawyers – members of the Bar Associations – carry out their professional activities in Legal Advice Bureaux belonging to their Bar Associations.

Private defence lawyers-poverenny practise independently or as employees/owners of legal entities.

Lawyers can work in organizations of any type recognized by the RT Civil Code. Lawyers, who are not defence lawyers, can also engage in legal practice as the staff of such legal entities.

They include: The League of RT Female Lawyers, the National Bureau for Human Rights and Observation of Law, The Centre on Human Rights inter alia. All of them are NGOs. The defence lawyers - members of bar associations - are engaged in NGO work on the basis of agreements concluded with bar associations.

The international law firm “Contract”, registered as a legal entity, also provides legal aid to the public as well as “takes on the duties to provide the defence in courts, police, prosecution bodies and other law-enforcement and administrative bodies in criminal, civil and commercial law cases ..., provides legal advice and helps to draw up a variety of legal documents ...”²⁰. This firm employs defence lawyers-poverenny. According to the reply by the Board of Justice of the Sughd oblast of 27 August 2008 No. 1180, the public association “defence lawyers-poverenny” was registered in the Sughd oblast of the Republic of Tajikistan on the basis of the RT Law “On public associations” of 12 May 2007. The information about the number of legal firms is inaccessible. The Ministry of Justice of the Republic of Tajikistan and the Board of Justice of the Sughd oblast do not reply to queries.

The data about the exact number of lawyers engaged in legal practice as well as the number of legal firms are inaccessible²¹.

It is known that as of 2005 there were 30 legal firms with different forms of ownership in Tajikistan (mainly limited liability companies and joint stock companies)²².

2. Permission to practise law

In conformity with the Law “On the Bar”, permission to practise advocacy is achieved by joining bar associations and by way of obtaining a licence in the Ministry of Justice according to the procedure established by the RT Law “On licensing certain types of activities”.

In the first case the defence lawyer acquires the status of a defence lawyer – member of a Bar Association; in the second – the status of defence lawyer-poverenny.

Consequently, there are different procedures for granting permission to engage in advocacy.

Article 18 of the Law “On the Bar” sets out the following requirements in order to be admitted to a bar association:

- nationality of the Republic of Tajikistan;
- higher law degree;
- two-years’ working experience in practising in the legal profession;
- where a candidate has not the required working experience, a course of training from 6 to 12 months;
- passing the Qualification Examination administered by the Qualification Commission of a Bar Association.

²⁰ Court presentations of defence lawyers. Dushanbe, 2002, p.200.

²¹ The official queries to the Ministry of Justice and the Board of Justice of the Sughd oblast were left unanswered.

²² The Index of the Reform of the Legal Profession in Tajikistan, www.hrt.tj (section “Reports and Research”).

The Charters of the Bar Associations (of The Republic and of the Sughd oblast) stipulate restrictions for admission of persons who have convictions for committing intentional crime and for persons recognized as legally incapacitated.

The Qualification Commission consists of defence lawyers – members of a Bar Association. The Commission shall prepare paper questions covering all branches of the law. The Examination is oral. An applicant shall choose a paper with several questions and answer them orally.

The Qualification Commission shall produce a Conclusion about the possibility of admitting an applicant and the Presidium of a Bar Association shall decide the issue of his/her admittance by way of voting, taking into consideration the professional and moral qualities of the applicant.

Persons who have successfully completed a course of training of 6-12 months, shall also sit the Qualification Examination. Those candidates who have failed the Examination shall be offered the opportunity to take another training course of 6 months and to resit the Examination.

Chapter 47 of the Regulations “On peculiarities of licensing the activities of defence lawyers-poverenny” sets out the following requirements in order to be granted a licence²³:

- nationality of the Republic of Tajikistan;
- higher law degree;
- not less than two-years’ working experience in the legal profession;
- spent or quashed conviction for intentional crime;
- positive decision of the Qualification Licensing Board.

The Qualification Licensing Board with the RT Ministry of Justice which numbers seven people from heads and specialists of the Ministry of Justice’s bodies, shall be approved by the Order of the Minister of Justice.

The Qualification Licensing is carried out on the basis of a list of questions covering all branches of the RT law.

The decision about the admission of a candidate shall be taken by the majority of members of the Qualification Commission and communicated immediately.²⁴

Article 16 of the Law “On licensing certain types of activities” sets out the following licence fees:

- in the amount of four minimum wage units – for **considering** an application for granting a licence to the defence lawyer-poverenny;
- in the amount of ten minimum wage units – for **issuing** a licence to the defence lawyer-poverenny.

(From 1 July 2008 the level of a minimum wage unit in Tajikistan is established at 60 Somoni, equalling USD 17.50)

The licence fees are paid to the National Budget.

When the term of the licence is extended a fee is collected equal to the fee for issuing the licence.

In cases of reducing the term of the licence validity the level of a licence fee is reduced in proportion to the term of licence validity.²⁵

The Charters of the Bar Associations (The Republic and Sughd) determine the Admission fees.

When joining the Bar Association the following admission fees are collected:

- The Republic Bar Association – 400 Somoni.
- Bar Association of the Sughd Oblast – 500 Somoni.

²³ Decree of the RT Government of 3 April 2007 No. 172.

²⁴ From the official reply by the Ministry of Justice.

²⁵ The wording of Law No. 195 of 28.07.2006.

The admission fees are paid to the transaction account of the Presidium. Where an applicant fails to pass the Qualification Examination the admission fees are subject to refund. When the defence lawyer is discharged from a Bar Association the admission fees are not refunded.

According to the Law “On the Bar” only Tajikistan nationals can become defence lawyers. However, Article 33 of the Law sets out that “the Republic of Tajikistan, on the basis of reciprocity, recognizes the right of defence lawyers from foreign countries and the countries of the Commonwealth of Independent States to providing legal aid on its territory, without the right to open legal enterprises”:

In conformity with the Law defence lawyers have the right to be involved in court proceedings in criminal, civil, commercial law cases, in cases of administrative offences and in the Constitutional court²⁶ (Article 4).

In conformity with Article 49 of the RT CPC, “members of a bar association and defence lawyers-poverenny engaged by the suspect/accused/defendant or his/her representative as well as representatives of trade unions and public associations in cases involving their members shall be permitted to act as the defender. Where there is a decision by the interrogator/investigator/prosecutor, a court ruling or decision by a judge, family members and representatives of the suspect/accused/defendant can be permitted to act as the defender (RT Law No. 27 of 29.11.2000).

Where a defendant or his/her representative refuse to engage a defender, the court, at its discretion, shall provide, in cases established by the law, the involvement of a defender via a **Legal Advice Bureau**”.²⁷ (RT Law No. 27 of 27.06.1991).

According to the RT Civil Procedure Code (CivPC), “the right of the defence lawyer to act in court as a representative shall be certified by **an Order** or **a Licence** issued by the body authorized by the law” (Article 55).

In conformity with Article 52 of the RT CivPC, “the court shall assign a defence lawyer to a party to represent him/her where:

- a respondent, whose place of residence is unknown, does not have a representative;
- in other cases provided for by the law”.

According to RT CivPC, apart from defence lawyers, public authority employees and employees of bodies of local self-government and other public organizations entitled to defend their members or other persons, can act as representatives in court (Articles 49 and 50)²⁸.

In conformity with Tajik legislation, persons without legal education can also represent the interests of clients in court in civil cases and in the Economic Court.

According to RT CivPC, a representative in court in civil cases can be a legally capable person in possession of a **power of attorney** for working on a case issued and executed in conformity with the law (Articles 51 and 55 of RT CivPC)²⁹.

A representative in the Economic Court can be any physical person in possession of a power of attorney issued and executed in conformity with the law (Articles 60 and 61 of RT Code “On economic judicial proceedings”)³⁰.

The powers of the defence lawyer for the involvement in a case in the Economic Court are defined by the law (Article 60, para 3)³¹

Usually, the interests of enterprises in the Economic Court are represented by their in-house lawyers (Article 58)³².

²⁶ The RT Law “On the Bar” is published on site www.hrt.tj (in the section “Legislation of the Republic of Tajikistan”).

²⁷ The RT Criminal Procedure Code of 1961 is published on site www.hrt.tj (in the section “Legislation of the Republic of Tajikistan”).

²⁸ RT Civil Procedure Code of 05.01.2008.

²⁹ Ibid.

³⁰ The Code of the Republic of Tajikistan “On economic judicial proceedings” of 05.01.2008.

³¹ Ibid.

³² Ibid.

3. The cost of legal services

Article 20 of the Law “On the Bar” sets out that “the services of defence lawyers shall be paid for out of the money paid by the clients for provided legal aid.

The level of the fees shall be determined by the agreement of the parties. Where there is no agreement, the level of the fees is determined in conformity with **the Instruction** approved by **the Presidium of a Bar Association** in concurrence with the Ministry of Finance of the Republic of Tajikistan”.

On 11 August 2007 the Presidium of the Bar Association of the Republic of Tajikistan approved an Instruction “On providing legal aid rendered by defence lawyers to physical and legal entities” agreed with the Ministry of Finance of the Republic of Tajikistan on 28 September 2007. This Instruction is also used by defence lawyers of the Bar Association of the Sughd Oblast.

The Instruction stipulates the rate of payment for defence lawyers’ services as a percentage of the minimum wage.

Where an agreement has not been concluded the Instruction sets out the following levels of payment for services rendered by members of Bar Associations:

- legal consultations (advice) – not less than 15% of the minimum wage;
- drawing up legal documents – not less than 25%;
- drawing up requests and certificates – not less than 25%;
- the defence lawyer’s visit to the client’s place of residence or a place of deprivation of freedom – not less than 50%, excluding travel expenses;
- drawing up draft Charters, Contracts and other complex documentation – not less than one-fold minimum wage rate;
- involvement in the preliminary investigation and in courts of the first instance – not less than 50% per day. With continued investigation or court proceedings – not less than 50% per day;
- for defence of two and more persons – not less than 50%;
- for researching, preparation and representation in court – not less than 50%;
- involvement in a civil case – not less than 60%;
- involvement in court of cassation – not less than 50% of the amount due to be paid in the court of the first instance;
- representation in the case in the cassation and supervisory courts, to those who was not involved in the court proceedings in the first instance – not less than 60%.

Business travel expenses are charged separately. Where the parties have not concluded an agreement, the level of business travel expenses shall be determined by the head of the Legal Advice Bureau or the Presidium of a Bar Association³³.

There is credible information about the cost of legal services rendered by members of Bar Associations on agreement and of legal services rendered by defence lawyers-poverenny, including the hourly rates.

One publication states that according to representatives of the focus group with one of the Dushanbe Legal Advice Bureaux, clients pay five Somoni (less than USD 1.75) for the initial consultation and a fee of 100 Somoni (approximately USD 33) for legal representation.

Most frequently defence lawyers agree with clients a fixed amount of payment. All respondents were unanimous on the fact that the majority of defence lawyers are underpaid for their services. Furthermore, the defence lawyers rendering “free” legal services are rarely paid

³³ The Instruction “On rendering legal aid” of 11.08.2007.

by the state. Defence lawyers-poverenny usually earn more than defence lawyers from Bar Associations and the requirement to render “free” legal aid does not extend to them.³⁴

4. Free legal aid

The constitutional guarantee, set out in Article 92, about providing legal aid at all stages of investigation and court proceedings is also secured in the Law “On the Bar”.

In conformity with Article 5 of the Law, “... the State guarantees real and equal access to legal aid for all persons, foreign citizens who reside or stay in its territory.

...The State guarantees necessary **funding** for providing legal aid to **low income** citizens and for paying for legal aid provided **free of charge** in conformity with the law...”

Those guarantees shall be realized through members of Bar Associations but not through defence lawyers-poverenny since, according to Article 19 of the Law, **members of Bar Associations** shall render legal aid **free of charge**:

“Members of a bar association shall render legal aid **free of charge** to:

- complainants in courts of the first instance when representing them in cases on recovery of alimony, reinstatement at work, veterans of World War II and Afghan Wars, disabled, and persons who lost a breadwinner during the Civil War in Tajikistan, refugees;
- citizens complaining about irregularities in electoral rolls;
- to Peoples’ Deputies (MPs) when giving them legal advice regarding issues of legislation related to their parliamentary powers.

Moreover, the Presidium of a Bar Association as well as the body of preliminary investigation, prosecutor and the court in charge of the case proceedings have the right to exempt a physical person from full or partial payment for legal aid ...”

According to Article 20 of the Law, “where a person is exempt from paying for his/her legal aid by the body of preliminary investigation, prosecutor or court, in case such legal aid is provided at his/her request, in addition to an agreement concluded with the client, and where legal aid was provided free of charge, expenses for paying for defence lawyers’ services shall be, in conformity with the law and the established procedure, charged to **the local budget**”.

In conformity with the current Resolution of the Cabinet of Ministers of the Republic of Tajikistan No. 206 of 04.06.1992 “On the procedure of charging expenses of defence lawyers providing legal aid to citizens to public funds”. “The basis for charging the expenses of defence lawyers, providing legal aid to the suspect and the defendant, to the local budget shall be a ruling by an interrogator/investigator/prosecutor or a court ruling ...”

The level of the sums due shall be established in conformity with the Instruction on payment for legal aid provided by defence lawyers...”³⁵

The RT Criminal Procedure Code also sets out the statutory provisions on free legal aid.

According to Article 49 of the RT CPC, the head of a Legal Advice Bureau and the Presidium of a Bar Association as well as a body of interrogation/preliminary investigation/prosecutor/court in charge of the proceedings in the case, have the right to exempt the suspect/accused/defendant fully or partially from paying for his/her legal aid. In case a person is exempt from paying for his/her legal aid by a body of interrogation or a court, the defender’s services shall be paid out of **public funds**.

There is also a statutory provision in Article 49 of the RT CPC stating that “the head of the Legal Advice Bureau and the Presidium of the Bar Association **must assign a defence lawyer** to carry out the defence for the suspect/accused/defendant”.

³⁴ The Index of the Reform of the Legal Profession in Tajikistan, p.29., published at www.hrt.tj (in section “Legislation of the Republic of Tajikistan”).

³⁵ Resolution of the RT Cabinet of Ministers No. 206 of 04.06.1992.

In conformity with Article 53 of the RT CPC, “a defence lawyer does not have the right to refuse carrying out the defence of the suspect, the accused or the defendant he/she committed himself/herself to ...”

Article 51 of the RT CPC lays down mandatory involvement of the defender in court proceedings in cases with the involvement of the state prosecutor; in cases involving: minors; persons with mental deficiencies or the disabled; persons not speaking the language of the court; persons committed for trial for offences where the death penalty can be applied as a measure of punishment; persons, whose interests clash and where at least one of them has a defender.

Where a defender is not engaged by the accused himself/herself, the investigator or the court must provide a defender in court proceedings (Article 51 of the RT CPC).

Article 326 of the RT CPC stipulates remunerating the Legal Advice Bureau when the defence lawyer is involved in a case on assignment³⁶.

The problem of rendering free legal aid in Tajikistan is a serious issue. The State is committed to providing legal aid to anyone who is not able to pay for a defence lawyer’s services.

Despite the guarantees of the State to pay defence lawyers for legal aid rendered to low income citizens and other persons entitled to free legal aid out of the funds of local budgets, the reality is different.

Tajikistan does not have a separate budget for paying defence lawyers for rendered legal aid. In this connection defence lawyers are rarely paid for their services. There are huge arrears in paying the fees in cases on assignment.

Apart from defence lawyers, free legal aid is also provided by lawyers from non-governmental organizations with financial support of international organizations.

Such NGOs are:

The National Bureau for Human Rights and Observation of Law, The Centre on Human Rights, The League of Female Lawyers and other organizations which have their branch offices in various regions of Tajikistan.

Despite that, in many areas of the country free legal aid is not available and defence lawyers are reluctant to take such cases on.

5. The reform of the Bar

The issues of reforming the Bar in Tajikistan have become a subject of active discussion since 2006. The Association of Defence Lawyers of the Republic of Tajikistan failed to unite members of Bar Associations and defence lawyers-poverenny into one independent body of defence lawyers.

The importance of reforming the institute of the Bar in Tajikistan at present is obvious. It is necessary, first of all, to introduce changes into the current legislation regulating the advocacy. The legislation on the Bar ceased to measure up to changes happening in political, economic and legal spheres.

Being an institute of civic society and fulfilling the important role in administering justice and defending the rights of physical and legal entities, the Bar in Tajikistan is at present **subordinate to the Ministry of Justice** in the area of licensing the activities of defence lawyers-poverenny.

The institutional independence of the Bar from the State bodies is dictated by the task to provide protection of human rights and freedoms, entrusted to it. In conformity with the international practices only the defence lawyers themselves must decide the issues of self-organizing and activities including the creation of self-governing bodies. A Special Rapporteur to the UN on the independence of judges and defence lawyers, Mr. Leandro Despouy is of the

³⁶ RT Criminal Procedure Code.

same opinion. Paragraph 87 of the Recommendations based upon the results of the mission in Tajikistan states that “another important problem is the vulnerable position of lawyers, related to difficulties in the exercise of their profession, in particular to freely provide legal counsel to their clients. **The lack of a single, self-governed and independent body** administering all issues related to the lawyer’s profession becomes all too evident.”³⁷

Legislation defines advocacy in two ways: while the Bar Association is recognized as **a public organization**, that is non-commercial, the defence lawyer-poverenny is recognized as **an entrepreneur**.

The lack of standardized rules of professional ethics and a single code of disciplinary practices, disunity of defence lawyers’ organizations do not measure up to the requirements.

The UN Basic Principles on the Role of Lawyers lay down the necessity to adopt standards of professional conduct for defence lawyers.

“Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms”³⁸ (paragraph 26).

At present there are no General Rules of Professional Conduct for legal professions including defence lawyers, in Tajikistan. Neither the Law “On the Bar”, nor the Law “On licensing certain types of activities”, nor the Regulations on Peculiarities of Licensing the Activities of Defence lawyers-poverenny do not properly regulate the issue of the rules of professional behaviour for both defence lawyers and defence lawyers-poverenny.

The Law “On the Bar” contains some norms of professional ethics and conduct which are mandatory for all defence lawyers.

Article 7 of the Law has a provision stating that “the defence lawyer must rigorously follow the ethical requirements of the professional community, constantly improve his/her knowledge and professionalism, and keep professional confidentiality”.

Article 8 of the Law contains the norms which forbid the defence lawyer to take on the assignment of rendering legal aid in the following cases:

- if he/she renders it or rendered it earlier to persons whose interests conflict with the interests of the person requesting the defence lawyer’s involvement in the case;
- if he/she was involved in the case as a judge, prosecutor, investigator, an interrogator, an expert, a specialist, an interpreter, a witness or identifying witness and also if any official involved in the investigation or consideration of the case is a relative.

A defence lawyer has no right to refuse to act for the defence.

In conformity with Article 9 of the Law “a defence lawyer does not have the right to disclose and to use in his interests or in the interests of the third party any information falling under the defence lawyer’s code of professional confidentiality”.

Article 11 of the Law also stipulates that “... a defence lawyer must constantly maintain his/her professional prestige as a party administering justice and as a public figure”.

This Article prohibits a defence lawyer from buying or in other ways acquiring the property and the rights which are the object of dispute, of physical and legal entities requesting his/her legal aid, both in his/her name or under the guise of acquisition for other persons”³⁹

The RT Criminal Procedure Code also sets out the norms of professional ethics and conduct for defence lawyers. In conformity with Article 49 of the RT CPC, “...one and the same person cannot act as a defender for two suspects/accused/defendants, if the interests of one of them are in conflict with the interests of defence of the other”.

³⁷ Report by Mr. Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, Mission in Tajikistan 30/12/2005., http://www1.umn.edu/humanrts/russian/commission/Rjudgesreport_tajikistan2005.html

³⁸ The UN Basic Principles on the Role of Lawyers. Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders in August 1990 in Havana, Cuba, zakon.kuban.ru/private/advokat/opra90.htm

³⁹ RT Law “On the Bar”.

According to Article 52.1 of the RT CPC, “a defence lawyer, a representative of a Trade Union or another public organization does not have the right to be involved in a case as a defender or to represent a complainant, a civil plaintiff and civil respondent, if he/she has been providing or had provided earlier legal aid in the same case to a person whose interests are contrary to the interests of the person requesting representation, or if he/she earlier had been involved as a judge, a prosecutor, an investigator, an interrogator, an expert, a specialist, an interpreter, a witness or an identifying witness, and also if an official involved in an investigation or case proceedings is a relative of a defence lawyer, representative of a Trade Union or another public organization”.

Article 53 of the RT CPC also lays down that “a defender must use all statutory means and methods of defence in order to bring to light circumstances exonerating the suspect, the accused or the defendant, extenuating their responsibility and render them necessary legal aid”⁴⁰.

In 1999 The Republic Bar Association adopted Rules of Professional Conduct for Defence Lawyers of the Republic of Tajikistan which had been used by the Bar Association of the Sughd Oblast until 2006.

On 26 January 2006 the Bar Association of the Sughd Oblast also adopted the Rules of Professional Ethics for Defence Lawyers.

The RT Ministry of Justice did not develop the Rules of Professional Conduct for defence lawyers-poverenny. The Rules of Professional Conduct for Defence Lawyers adopted by The Republic and Sughd Oblast Bar Associations do not extend to defence lawyers-poverenny, and therefore the latter are not obliged to comply with the norms of professional ethics set out in the Rules, with the exception of those laid down in the Law “On the Bar”.

Consequently, there is no one single code of ethical rules which extend to all those providing legal services.

One single code dealing with disciplinary practices for defence lawyers does not exist either.

Section IV “Disciplinary responsibility of defence lawyers” set out by the Law “On the Bar” (Articles 23-28) applies only to the defence lawyers from the Bar Associations. Penalties are imposed by the Presidium of the Bar Association.

The Regulations on the Peculiarities of Licensing Certain Types of Activities of 3 April 2007 (Chapter 47) state that, regarding defence lawyers-poverenny, “where the Ministry of Justice receives more than two complaints about the negligence on the part of a licensee, his/her licence shall be suspended⁴¹. It was not possible to access the information about what the procedure of investigating complaints should be, and what decision has to be taken if the complaints are not upheld.

According to the Law “On licensing certain types of activities” of 17 May 2004 (Article 14, para 1), “the licensing body has the right to suspend the licence in cases where repeated violations or flagrant breaches of licence requirements and conditions by a licensee are established. A licence can also be suspended in extraordinary circumstances when it is dictated by the necessity to thwart the immediate threat to the health and life of people, the onset of man-induced disaster, the infliction of irreparable damage to nature or environment, and where it is impossible to prevent the above-mentioned by other means”. In conformity with the said Law (Article 14, para 4), revocation of a licence shall be based on the court’s ruling, with the exception of a case where a licensee has not paid a licence fee for licence award within a 15-day period, when a licensing body itself can cancel a licence.

Taxation of defence lawyers – members of Bar Associations and defence lawyers-poverenny also differs greatly with regard both to kinds of taxes and taxation rates.

In 2006 an attempt to conduct a reform of the Bar within the framework of judicial reform was undertaken.

⁴⁰ The RT Criminal Procedure Code.

⁴¹ Decree of the RT Government of 03.04.2007.

The Draft **Guidelines for Reforming the Bar of the Republic of Tajikistan** were prepared. The Guidelines were developed with the financial support of the Tajik division of the Institute of Open Society – Assistance Foundation, in 2006. The Working Group to develop the Guidelines included representatives of The Republic Bar Association, the Sughd Bar Association, defence lawyers-poverenny and a lecturer from the Tajik State National University (TSNU).

In some countries defence lawyers are members of defence lawyer associations (Russia, The Netherlands, Germany, the USA and France). For example, in Germany and France – of a Bar Association, in the USA – of an Association of Defence Lawyers and in Russia – of the Federal Chamber of RF Defence Lawyers⁴².

Therefore, the Guidelines emphasized the necessity to set up a single nation-wide association (for example, a Union) of RT defence lawyers.

The creation of the Federal Chamber of Defence Lawyers in the Russian Federation can serve as a model. At the outset of their work on the Guidelines the members of the Working Group for the development of Guidelines for Reforming the RT Bar, visited Moscow and the Ivanovskaya oblast of the Russian Federation, where they studied the experience of reforming the Bar of the RF. Since the experience of RF seemed to be appropriate for Tajikistan, the members of the Working group were advised that they should create a single defence lawyers' body similar to the Federal Chamber of the RF.

The Guidelines propose the creation of a single organization of defence lawyers which will be a non-commercial and non-state organization based on mandatory membership of all defence lawyers of Tajikistan brought together for joint provision of corporate interests.

This organization will have to represent and protect the interests of defence lawyers in the bodies of state power, bodies of local self-government, public associations and other organizations, to coordinate the activities of defence lawyers locally, to take measures aimed at providing high quality legal aid rendered by defence lawyers.

It is envisaged setting up regional divisions within the framework of this organization in all areas of Tajikistan.

Founding a single nation-wide body of defence lawyers is necessary for the following purposes:

- to guarantee the uniformity of defence lawyers' professional conduct and ethics throughout the whole area of Tajikistan;
- to ensure that qualified legal aid be provided by defence lawyers and high level professional standards be observed;
- to protect the professional rights and interests of defence lawyers;
- to represent the interests of the defence lawyers' community.

Mandatory membership is necessary for ensuring:

- control over access to the defence lawyers' profession;
- control over the qualifications of the defence lawyer;
- disciplinary control.

In order to eliminate contradictions in the legislation and indefiniteness in the position of defence lawyers in Tajikistan as well as for the purposes of supporting the highest professional standards of advocacy and qualified legal aid rendered by defence lawyers, it is necessary to create a single professional organization of defence lawyers.

In our opinion, without such an association in the Republic of Tajikistan it is impossible to have a really independent Bar as a necessary condition of advocacy.

Leandro Despouy, the UN Special Rapporteur on independence of judges and defence lawyers in the Republic of Tajikistan, in his report of 30 December (based on the results of the visit to Tajikistan from 23-30 September 2005) also recommended "the establishment of a

⁴² Juridical encyclopaedic dictionary, 3d edition, revised and enlarged, Moscow, Infra-M, 2001, p. 9.

single, self-governed body with compulsory membership, which would administer issues related to the bar such as access to the profession, removal from the profession, disciplinary measures, respect for ethical rules and continuing legal education. This body should be independent of the executive branch”⁴³.

Unfortunately, the Judicial Reform Programme⁴⁴ did not pay any attention to the reform of the Bar.

At present all areas of Tajikistan are holding Round Tables to present the report on the “Index of Independence of the Legal Profession in Tajikistan”, the “Recommendations on the Reform of the Bar in Tajikistan” and the draft Guidelines for Reforming the RT Bar.

From 2004 to 2005 the American Bar Association (ABA/ CEELI) supported by the Tajik division of the Institute of Open Society – Assistance Foundation, conducted in Tajikistan a study entitled the “Index of the Reform of the Legal Profession for Tajikistan (IRLP). The Index is based on 24 factors resulting from internationally recognized standards for the legal profession determined by such organizations as the UN and Council of Europe.

The Index lists both positive and negative factors which can be observed in the activities of Tajik defence lawyers.

Out of 24 factors, 13 are evaluated as negative, 8 as neutral and only 3 as positive.

Positive factors are: ethnic and religious minorities as well as both genders are represented adequately; no discrimination as to the procedure of granting permission to practise advocacy; defence lawyers have an opportunity to engage in legal practice both as a sole trader and jointly with other lawyers.

Negative factors are, in particular, the following:

- bar associations do not receive adequate funding and do not have sufficient financial resources for providing necessary services to their members;
- there are no Centres for upgrading defence lawyers’ legal qualifications;
- the majority of defence lawyers do not have proper access to legal information and other resources;
- the defence lawyers are not paid appropriately for their services;
- the number of defence lawyers in some areas of Tajikistan is insufficient; the quality of legal services provided do not correspond to necessary requirements;
- lack of sufficient knowledge and practical skills;
- restricted access to detainees, inter alia.⁴⁵

From 1 July 2008 the Tajik Division of the American Bar Association /The Programme of Rule of Law (“ABA/Roles”) within the framework of the Programme of Criminal Law in Tajikistan began the implementation of the Programme of strengthening the current reforms of criminal law by the way of providing the electronic legal database “Adliya”, renewable monthly, to three Bar Associations: the Sughd Bar Association in the city of Khujand, The Republic Bar Association in the city of Dushanbe and the Dushanbe (city) Bar Association.

For this purpose Resource Centres were created in the head offices of the Bar Associations. ABA/Roles furnished the Centres with equipment, installed the electronic legal database on each computer and provided access to the Internet for monthly renewal of the database and also made available one lawyer as a staff employee on a full day basis to work in the Centre. The programme is expected to run for one year. At the end of the year, starting from the installation of the database in the Bar Associations, the latter will have the right of ownership for the equipment, furniture and the remaining office materials and will bear responsibility for the expenses and system operation⁴⁶.

⁴³ www.hrt.tj (section “Tajikistan in the UN system”).

⁴⁴ Decree of the RT President No. 271 of 23.06.07.

⁴⁵ The Index of the Reform of the Legal Profession (IRLP), published on www.hrt.tj (section “Reports and Studies”).

⁴⁶ Memorandum of Understanding between ABA/Roles and Bar Associations for creating a legal study and mechanism supporting defence lawyers.

Conclusion

The existence of defence lawyers-poverenny who are entrepreneurs, goes against the independence of the defence lawyer profession because advocacy is not a commercial activity and cannot be regulated by the RT Law “On licensing certain types of activities”. In conformity with Article 13 of the RT Law “On the Bar”, there is no need for special permission in order to practise advocacy. The licence issued by the executive body of power – the RT Ministry of Justice, represents permission to practise advocacy and control by the body of executive power.

Licences can only be issued by defence lawyer organizations themselves but not by a state authority.

Unfortunately, at present there is no unanimity in Tajikistan regarding the future of the defence lawyers’ profession. Positions of representatives of the existing defence lawyers’ formations are different. The priority task at this stage is to achieve compromise between the existing Bar Associations and defence lawyers-poverenny regarding the creation of a single self-governing body of defence lawyers.

The Chairman of The Republic Bar Association N.A.Amirbekov said that the existing Association of Defence Lawyers of the Republic of Tajikistan could become such a body, bringing together all defence lawyers of Tajikistan (note by the author – at present the RT Association of Defence Lawyers consists exclusively of the members of The Republic Bar Association). The Guidelines for Reforming the RT Bar propose the creation of a body which would comprise the Central nation-wide body and independent self-governing bodies of defence lawyers in the form of regional organizations, for example, **the Union of Defence Lawyers of the Republic of Tajikistan and its regional oblast and Dushanbe city divisions**. It is assumed that the Union of RT Defence Lawyers is to be a non-commercial non-state association based on mandatory membership of all defence lawyers of the Republic of Tajikistan.

The supreme body of the Union of Defence Lawyers will be the National Congress of Defence Lawyers convened not less than once in four years and the annual Conference of Defence Lawyers – in the period between Congresses. The Board of the Union of Defence Lawyers will be a permanent executive body which will report to the Nation-wide Congress. It is assumed that regional divisions of the Union of Defence Lawyers (at the level of oblasts and the city of Dushanbe) will become the defence lawyers’ organizations uniting defence lawyers in the territories of the corresponding RT regions. The supreme body of the regional division will be the General Assembly of Defence Lawyers of a corresponding region convened on an annual basis.

The defence lawyers can practise advocacy in various organizational forms of their choice: as sole traders – in a defence lawyer’s office, as a team – within Legal Advice Bureaux, bar associations, legal surgeries.

Permission to practise the profession will be granted by the Qualification Commission headed by a representative of the Bar. The Qualification Commission will also include representatives of the judiciary, the Ministry of Justice and academics.

Up to the present time it has not been possible to achieve agreement between the existing formations on the said aspects of the Guidelines for Reforming the Bar of the Republic of Tajikistan.

The RT Law “On the Bar” adopted as early as 1994 has become out-dated. The creation of a single professional body of defence lawyers by way of prompt adoption of the new Law “On the Bar” is self-evident.