

Assuring Quality Legal Aid in Mexico and the Netherlands: Horses for Courses?

by Hennie van As, Professor of Law
Director of the Institute for
Sustainable Government and
Development, Nelson Mandela
Metropolitan University
Port Elizabeth, South Africa

1. Introduction

The provision of legal aid services, in some form or another, is a phenomenon that is encountered in almost all countries and in most of these jurisdictions, it is funded by the state. As is the case with all government-financed services, it is important that not only the correct application of the funding is monitored, but also that the service that is rendered complies with acceptable quality standards. For quite some time it has been accepted in various jurisdictions that mere membership of the legal profession is sufficient to ensure control of their members' ethics and competence, assuming that they provide better quality than non-members or non-lawyers. This gave rise to the notions that lawyers cost more, but that it is acceptable because they deliver higher quality.¹ This theoretical assumption has given rise to formal protections for professions and limitations on the provision of legal services by non-members.

Various methods for the delivery of legal aid services are employed in different countries and in most instances these schemes are not static. Recently the Dutch, for example, moved from a predominantly in-house system for the supply of civil legal aid to becoming service centres. South Africa on the other hand, has moved from *judicare* to

a public defender system in criminal matters. As the main choice for service delivery is between salaried-lawyer and *judicare* models, the assumption that the private profession renders a better service becomes very important for policy-makers. Where the *judicare* system is in place and the assumption is taken at face value, it would appear that there is no need for quality control as the profession assures the quality of the services rendered by its members. However, state funding is limited and competition for it is fierce, giving rise to two important considerations when a choice is made regarding the method or methods of delivery, namely cost and quality. As it is generally accepted that a public defender scheme, for example, is not as expensive as *judicare*,² quality becomes a prominent factor. Measuring the quality of legal services is not an easy task, but doing so objectively has the potential to influence decisions on the method or methods that will be selected for service delivery.

Assuring quality in legal aid service delivery normally has its origin either in self-regulation or in the requirements set by the funding agencies or implementing bodies of the state. This paper contrasts the methods employed to assure quality in two distinct jurisdictions, namely The Netherlands and México. It also seeks

¹ Moorhead, Sherr & Paterson "Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales" 37 (2003) *Law & Society Review* 765.

² In 1997-98 in South Africa, for example, the cost per case in criminal matters was 1,423 rands in the case of private lawyers as opposed to 864 rands per case finalized by Legal Aid Board staff lawyers.

to establish who the beneficiaries of the quality assurance measures are.

2. The Netherlands

2.1 Introduction

Holland is a small, densely populated country with approximately 16 million inhabitants. The law is used to solve problems and not to create new ones. Where strict applications of the rules have the potential to create problems, it is ignored as a matter of *beleid*.³ Legal representation by an advocate is compulsory in criminal as well as civil cases in the district courts (*Kantongerechten*) and higher courts. All advocates must be registered with the *Nederlandse Orde van Advocaten* that acts as the guardian of the rules of the profession. As at 31 December 2002 the Dutch Bar had the following membership:

# Lawyer per Office	1	2-5	6-20	21-60	>60	Total
Total firms	1440	1121	405	58	19	3043
Total lawyers	1440	3363	3854	1809	2221	12687

2.2 The system

On 1 January 2004 a new Legal Aid Act⁴ replaced the previous one.⁵ The objectives of the Act are to access public funding for subsidised legal services and to ensure that the supply of legal aid services is sufficient. In order to achieve the objectives, five independent Legal Aid Boards have the duty to ensure access to quality legal assistance (*kwalitatief goede rechtsbijstand*).⁶ The methods of service delivery is changing from legal aid bureaus to a system of legal services counters (*Juridische Loketten*). The system that is being

³ Roughly translated as "policy". See Blankenburg & Bruinsma *Dutch Legal Culture* (1994) 2

⁴ *Wet op de rechtsbijstand*, 2004.

⁵ *Wet rechtsbijstand aan on- en minvermogenen*, 1958.

⁶ Combrink-Kuiters & Jungmann *Monitor Gesubsidieerde Rechtsbijstand* (2004) 2

phased out provided for two service providers: the Legal Advice and Assistance Centres (*Bureaus Rechtshulp*) and the Dutch Bar, the latter mainly for follow-up assistance. The Legal Advice and Assistance Centres are fully subsidised by the Legal Aid Boards, whereas lawyers in private practice receive a fixed fee based on an average price per assignment.

The essence of the new method of delivery is the provision of information and basic advice about a legal problem free of charge at a legal services counter. The front-line service (initial legal advice and assistance) is provided by the Legal Services Counters (*Juridisch Loketten*), which are independent, publicly funded bodies. They provide a 60-minute free consultation during which legal professionals provide information, give advice or refer the clients to specialised legal aid providers.

This initial contact at the counters also helps to funnel and sift out the cases. During the first consultation the lawyers can assess whether:

- The problem is indeed a legal problem and, if so,
- Whether it comes within the statutory criteria (not all legal problems are eligible for legal aid), and
- Which service provider is best placed to solve the problem.

At this stage the clients can also obtain information about the chances of success, the time it may take and the possible costs that may be involved. They can then make an informed decision as to whether they wish to proceed with the case.

If far-reaching legal help is desirable and if the applicant so chooses, he may then decide to consult a lawyer in private practice who may act on his behalf both in law and otherwise. In such a case the litigant is obliged to pay a contribution dependent on his income. The plan is

that the Legal Advice and Assistance Centres established in terms of the system that is being phased out should be converted either into law firms or become part of the legal services counters.⁷

2.3 Controlling quality

In order to guarantee that public funding is applied responsibly, the legal aid boards liased with the Dutch *Orde van Advocaten* (Order of Barristers) to establish a quality control system in terms of which it is determined whether subsidised legal assistance is either good or at least of an acceptable standard.⁸ This test is known as the *Kwaliteitstoets 2002* (Quality Test 2002), but it has been replaced with a system of performance measurement and quality improvement by means of audits, customer satisfaction assessment, and complaint management, known as Quality Standard 2004 (*Kwaliteitstandaard 2004*). The Bar sets the standard as part of its general quality control system.

Only lawyers who are registered with any of the five legal aid boards can undertake work in terms of the Legal Aid Act and as of 1 January 2004, a positive audit report is a prerequisite for registration with the legal aid boards. These audits are done upon receipt of a request by a lawyer's office or an individual lawyer and the standard of work rendered is evaluated by an auditor who is an advocate trained to do such audits.

In order to be able to undertake legal aid work and to receive payment for it from

⁷ Van den Biggelaar *The value-added of a good gateway to the legal aid system* (2005) Paper read at a conference entitled *International Conference on Legal Aid* hosted by the Institute for Sustainable Government and Development (ISGAD) of the Nelson Mandela Metropolitan University, the Association of University Legal Aid Institutions (AULAI) and the South African Legal Aid Board in Port Elizabeth, South Africa on 6-8 April 2005.

⁸ Combrink-Kuiters & Jungmann: 79.

the legal aid boards, an individual therefore needs to be:

- An advocate; and
- A member of the Bar and thus subject to its professional rules; and
- In possession of a positive audit report (compliance with Quality Standard 2004); and
- Registered with any of the legal aid boards.

If an advocate is not registered, no legal aid cases will be assigned to him or her. In order to stimulate requests for audits and thus participation in the legal aid scheme, lawyers who receive a positive audit report, receive financial incentives - the higher the quality rating, the higher the remuneration (*kwaliteitstoelag*). Figures released in June 2004 revealed that approximately 17% of those registered in 2003 were deregistered as a result of a failure to produce positive audit reports.⁹ The effect is negligible as this group only accounted for 1% of the *toevoegingen* (assigned cases) in 2003. The audit is only compulsory for lawyers registered with or wishing to register with the legal aid boards. The study undertaken by Combrink-Kuiters and Jungmann¹⁰ revealed that the majority of the respondents felt that the audit focuses too much on office organization and procedures and not enough on the quality of the lawyering, which, according to them, should be the determining factor when the quality of the services rendered is rendered.

The implementation of Quality Standard 2004, however, introduced client satisfaction surveys. Apparently the intention is to include peer reviews in the quality standard from 2006 with a view to improving the quality of the content of the service rendered by the advocates.

2.4 Recognising the need for improved quality

Seeking to provide clients with subsidized legal assistance of good

⁹ Combrink-Kuiters & Jungmann: 84.

¹⁰ 90.

quality, the 's-Hertogenbosch Legal Aid Board surveyed law firms about the conditions under which they would be prepared to subject themselves to perceptible, verifiable quality standards. This, and a request from the Ministry of Justice, resulted in a number of law firms joining hands in January 2001 and forming the Foundation Viadicte, a cooperative of law firms organized around the topic of quality in legal aid.

Members of the Foundation Viadicte mostly operate in offices with 5-20 advocates, are legal aid service providers and they established a quality standard that sets them apart from Quality Standard 2004. Offices complying with the quality requirements are allowed to display the mark of quality "Met Recht Tevreden" (Satisfied with the Law). This mark gives potential clients the assurance that the office comply with a particular standard relating to knowledge, integrity and office management, which is measured through audits and client satisfaction surveys.¹¹ The mark identifies them as being capable of rendering a quality of legal aid service that is higher than that which is normally required of a lawyer. The Foundation Viadicte as well as several law firms employs quality managers.¹²

The Foundation Viadicte is responsible for coordinating consultation between the participating offices in the fields of office procedure, information and computer technology, expert standards, customer satisfaction surveys and audits. The foundation also ensures that quality control instruments are implemented at participating offices. Members are evaluated on the following categories and sub-categories:

- General quality, which measures tasks, instructions and planning

¹¹ Stichting Viadicte *10 vragen over Met Recht Tevreden* undated brochure of the Foundation Viadicte accessible at www.metrechttevreden.nl.

¹² Partly based on information supplied by Mr Rob Creusen of the Foundation Viadicte.

- Knowledge.
 - Library
 - Training
 - Attendance of conferences etc.
 - Consultation structure (fixed agenda, minutes etc.)
- Integrity.
 - Professional liability insurance.
 - Control over trust accounts.
 - Number of points awarded for training.
 - Secrecy and confidentiality.
 - Conflict of interest.
 - Tasks performed and instructions taken that are morally doubtful.
- Office management.
- Personnel management.
- Financial management.
- Aspects relating to information technology, such as IT licences, available hardware and software, computer security, back-ups, recovery, physical and non-physical security.

From time to time the various legal aid boards also combine forces and commission independent research on quality and client satisfaction.¹³

3. Mexico

3.1 Introduction

The Mexican population comprises 97 million people¹⁴ of which 47% live in cities with more than 100 000 inhabitants.¹⁵ The Constitution¹⁶ provides for a federal republic with powers separated into executive, judicial

¹³ See, for example, INTOMART *The Accessibility of the Judicial System in the Netherlands* (1999) and Combrink-Kuiters & Jungman *supra*.

¹⁴ INEGI (Instituto Nacional de Estadística Geografía e Informática) *Estados Unidos Mexicanos XII Censo General de Población y Vivienda* (2000) 43.

¹⁵ INEGI: 50.

¹⁶ Constitution of the United Mexican States, 1917.

and legislative branches. In practice, the executive is the dominant branch with power vested in the president. The judiciary is divided into federal and state court systems, with federal courts having jurisdiction over most civil cases and major felonies.

3.2 The right to be defended

Although the birth of an independent Mexico heralded a break with the colonial past, the first Mexican Constitution of 1824 did not grant the right to be represented. However, in 1856 Congress adopted an amendment to the Constitution and section 20 V provided as follows:

“That he can be heard personally or by a person in his confidence or both, depending on his will. In the event of him having no-one to defend him, he will be represented by a public defender.”¹⁷

In 1857 a constitutional amendment established an office for defenders in the circuit and district courts. Its functions were to promote the office of the defender and to endeavour to see that justice is done as far as accused are concerned.¹⁸ The impact of the office, however, remained very limited until the Constitution of 1917 in terms of which the Office of the Public Defender, as an institution, obtained improved relevance. In terms of this amendment, the defenders were appointed by, and formed part of the Supreme Court of Justice and since that time this public service, at federal level, has been part of the judiciary. From 1922 to 1993, when section 20 of the Constitution was amended,¹⁹ the public defender service

remained more or less static²⁰ but in 1998 the Federal Institute for Public Defenders²¹ was created with the object of giving effect to the right to legal representation.

Throughout Mexican history, the idea of accused enjoying representation has been associated with justice and that, if an accused was represented, the proceedings and its results were fair. Whilst legal representation is seen as vitally important in many other jurisdictions, it seems to be accepted that “access-to-justice” requires a much more comprehensive approach and that representation is merely an element thereof.²² In Mexico, however, legal representation is equated with access to justice²³ - if the accused enjoys representation, he has access to justice. Legal representation is obligatory when part of the criminal process²⁴ and the importance attached by the legislator to the right is illustrated by the fact that, apart from the Constitution, it is also contained in several other federal legislative instruments.

Section 1 of the Constitution provides that all individuals within the jurisdiction of the Mexican State possess the rights set out in the Constitution, including foreigners.²⁵ In terms of section 14 no person will be deprived of his freedom unless by judicial process and after the application of all the essential procedural requirements in accordance with the

²⁰ Instituto Federal de Defensoría Pública “Las Reformas Constitucionales de 1993 y 1996” 19 Sept 2001 <http://www.ifdp.cjf.gob.mx>.

²¹ *Diario Oficial de la Federación* of 28 May 1998.

²² Van As *Regsverteenwoordiging as element van regstoeganklikheid* (1998) Unpublished doctoral thesis, University of Stellenbosch, South Africa.

²³ Esquina Muñoa “Defensoría Pública: Garantía de profesionalismo y honestidad” May 2001 *Compromiso* 1. Esquina Muñoa is the Director General of the *Instituto Federal de Defensoría Pública*.

²⁴ Cuenca Dardon: 154.

²⁵ This corresponds with section 1 of the Constitution of 1857

¹⁷ Own translation. See Zarco Francisco *Crónica del Congreso Extraordinario Constituyente 1856-1857* (1968).

¹⁸ Lozano and Dublan *Legislación Mexicana Edición Oficial* Tomo VIII (1877) 73 in Silva Ortiz and Vasquez Hernández: 14.

¹⁹ See par 4.1 *infra*.

law. It fundamentally consists of the opportunity to defend oneself, which, in turn, entails two essential aspects; the possibility to submit proof and the ability to advance arguments.²⁶ This necessitates the intervention of qualified, effective legal representation. In order to invoke the right to a hearing, there must be an existing right, which includes an "interest", of which there must be a danger of being deprived. Furthermore, a hearing must be necessary in the sense that it must be indispensable for the protection of the right.²⁷ Where there is no right to be heard, it necessarily implies that there exists no right to representation during investigations prior to arrest,²⁸ investigations into the constitutionality of apprehension orders²⁹ and decrees of formal imprisonment.³⁰

In terms of section 20 of the Constitution, persons involved in the penal process enjoy a number of guarantees. This includes the right to a public trial,³¹ and the right to be heard in his own defence, either personally, by a person in his confidence or by counsel, or by both, as he may desire. Should he have no one to defend him, a list of official counsel shall be submitted to him in order that he may choose one to act in his defence. If the accused does not

wish to name any counsel after being called upon to do so at the time of his preparatory hearing, the court will appoint counsel for him. The accused may name his counsel immediately upon arrest, and shall be entitled to have him present at every stage of the trial.³²

3.3 The standard of assistance

The 1993 Constitutional amendments established the right to an "adequate defence" and thus a criterion that gives guidance in the process of determining whether the process itself was conducted properly or whether there exist grounds for declaring proceedings invalid by virtue of the fact that the *inculpado* could not rely on an adequate defence. The common interpretation attached to the latter is that representation is adequate only if the defender is an expert in law, in other words, an attorney.³³ This means that he must be in possession of a law degree and a licence to practice.

"Adequate defence" is not defined, but a number of examples of "inadequate" conduct, which does not satisfy the guarantee to an adequate defence, have crystallized.³⁴ These include defence with ignorance, clumsiness and ineptitude. Whether the defence is adequate or not, is a matter for *judicial evaluation* during the *course of proceedings*. The requirement makes it obvious that it is not just any defence which is required, but defence which is adequate in content as well as in the nature of the guidance given.³⁵ It need not be perfect, but it must be capable of benefiting the process and the decision that has to be made eventually. García Ramírez³⁶ is of the opinion that the question whether the defence is adequate must not merely be evaluated in terms of the defender, but also within the context of the development of the trial. He agrees, however, that the

²⁶ Lara Espinoza *Las Garantías Constitucionales en Materia Penal* (1998) 90 and *Amparo en Revisión 2592/85*, Luis Salido Quiroz, 13 de noviembre de 1985. Unanimidad de 4 votos.

²⁷ T. LXXX, p 3819. *Amparo Administrativo en Revisión 5990/43*. M de Valdez María Soledad, 22 de junio de 1944, unanimidad de 5 votos. *Jurisprudencia Suprema Corte de Justicia*.

²⁸ T. CXXVI, p 392. *Amparo Directo 4577/51*. Guillermo Oribe Losche, 7 de noviembre de 1955, unanimidad de 4 votos. *Jurisprudencia Suprema Corte de Justicia* where it is referred to as "la fase preparatoria del proceso."

²⁹ *Amparo en Revisión 434/91*, Socorro Jiménez Hernández, 11 de octubre de 1991, unanimidad de votos, Octava Epoca, Tomo IX, abril de 1992, p 558. *Jurisprudencia Suprema Corte de Justicia*.

³⁰ Lara Espinosa: 93.

³¹ Section 20 VI.

³² Section 20 IX.

³³ Cámara de Diputados: 864.

³⁴ Rabasa and Caballero: 92.

³⁵ García Ramírez *Proceso Penal y Derechos Humanos* (1993): 103.

³⁶ 1993): 103.

manner in which the defender conducts the defence is becoming increasingly important. This does not mean that the adequacy of the defence is measured against its success. It is sufficient if the defender performed his function honestly and reasonably.

In order to qualify as a public defender, a person needs to be a *licenciado* in law, be in possession of a professional certificate and have a minimum of three years' professional experience in matters relating to the type of services being rendered.³⁷ Currently, federal public defenders are recruited from the ranks of practising attorneys.³⁸ Candidates are tested on their knowledge of their particular field of interest and expertise and, if they achieve an average of 80% or higher in the examination, they qualify for psychological evaluation. The examination covers constitutional law, human rights, the law of *amparo*, criminal law, federal criminal procedure and the Public Defender's Act. In September 2001, 467 federal public defenders were in the employ of the Institute.³⁹

3.4 Administration of the system and quality assurance

The federal legal aid system is administered by the *Instituto Federal de Defensoría Pública* (Institute), an independent body functioning as part of the judiciary⁴⁰ that has been in existence since 1998.⁴¹ A body consisting of six professionals, the *Junta Directiva*, is an integral part of the Institute. The *Junta* determines policy, promotes the improvement of public defender services and is tasked with performing a number of functions with the aim of raising the

³⁷ Section 5.

³⁸ See Instituto Federal de Defensoría Pública "Acuerdo Publicado en el Diario Oficial de la Federación" 19 Sept 2001 <http://www.cjf.gob.mx/capoiconsejo/acuerdos/1999>.

³⁹ Yong: 47.

⁴⁰ Section 3.

⁴¹ Vazquez Gargallo "Defensoría Pública: Garantía de profesionalidad y honestidad" 2001 *Compromiso* 1.

quality of the services.⁴² The *Junta* determines the general foundations (Bases) for the functioning and organization of the Institute.⁴³

Within the Institute a number of units were established, namely the Unit for Public Defence and Evaluation in Criminal Matters, the Unit for Civil Legal Aid and Evaluation of the Service, the Unit for Supervision and Control and the Unit for Operational Support. One of the functions of the Units for Public Defence and Evaluation in Criminal Matters and the one for civil legal aid is to evaluate the quality of the services and to make proposals regarding quality improvement.⁴⁴ The Unit for Supervision and Control has, amongst others, the capacity to visit public defenders and to exercise direct supervision⁴⁵ whereas the Unit for Operational Support has the power to establish links and enter into agreements with universities regarding the rendering of compulsory social service by students.⁴⁶ As at 19 September 2001, agreements had been entered into with seventeen universities.⁴⁷

Strong emphasis is placed upon supervision of the services rendered by the Institute⁴⁸. Supervision includes quality control and it takes the form of documental and direct supervision either in court or in the office.⁴⁹ Direct supervision can take place without prior notification. The report, which must be submitted within five days, must, *inter alia*, contain the following information:

- The manner in which the defender performed with regard to defence strategies;

⁴² Section 29.

⁴³ The policy document governing the organization and functioning of the Institute, published in the *Diario Oficial de la Federación* on 26 Nov 1998.

⁴⁴ Section 7.

⁴⁵ Section 10.

⁴⁶ Section 13 V.

⁴⁷ In México City alone, there are more than 30 universities. [Http://jurist.law.pitt.edu](http://jurist.law.pitt.edu).

⁴⁸ See *Titulo Quinto*

⁴⁹ Sections 50 - 52

- Initiative and diligence;
- Compliance with the general prescriptions (Bases); and
- Administrative organization and working conditions.

The *Bases* creates career paths and opportunities for promotion, depending on performance.⁵⁰ This, together with very good remuneration, result in a low staff turnover and retention of experienced staff.

3.5 Evaluation

The Mexican Bill of Rights and the guarantees it contains, has been in place for many years.⁵¹ The idea of equality and justice is therefore not new to it – it is not a foreign concept to be struggled with. However, it appears as if consecutive governments, for many years, were content with the document, and therefore the idea, being in place. The ability, or will, to implement and enforce was lacking. The impression is gained that the Constitution of the United States of America was leaned on heavily at the time of drafting, but that the political drive to give effect to its provisions, was not taken over. This will only showed itself late in the twentieth century.

Mexico, and especially its government departments, is not open. Requests for information are met with resistance and suspicion.⁵² Part of the origin of the problem is to be found in the Constitution itself⁵³ that stipulates that legislators may not be re-elected after

completion of a term, they must sit out at least one term before running again. The effect of this is that legislators are permanent newcomers, and that bureaucrats dominate the system resulting in over-government and under-delivery. This means that Mexican people need to be guided through the legal and bureaucratic labyrinth which they inevitably encounter when coming into contact with the government or its organs. It is a case of the whole government system being responsible for creating a huge slice in the legal needs cake.

Graduates are allowed to practice law, provided that they obtain a licence to practice, which is merely an administrative requirement. There is no compulsory membership of a professional body and thus no further examinations. Whilst these facilitate access to the profession, there exists no set of professional rules governing conduct or standards. This contributes to the fact that Mexican legal professionals are inactive in the process of promoting access to justice. The problem is exacerbated by the proliferation of university law clinics, with the resultant variance in standards. They have been called upon to rethink the present and future of their profession.⁵⁴ A change of attitude is desperately needed.

The system is open for abuse. People with legal qualifications, but without licence to practice, and even people without legal qualifications, are able to act as persons in confidence and receive payment *bajo de la mesa* (under the table) for their services – thus act as lawyers without being entitled to do so. There are numerous instances⁵⁵ where unqualified persons dispense legal advice on the sidewalks, some under the “guidance and control” of “lawyers” who visit them during the day to ascertain whether they are experiencing problems which they are incapable of handling.

⁵⁰ Sections 64 – 73.

⁵¹ Procuraduría General de la República *Los Derechos Humanos en el Constitucionalismo Mexicano* (5 Sept 2001) <http://pgr.gob.mx>.

⁵² Stevenson: 1. Also based on personal experiences. Requests for information and interviews personally directed to the Mexican Bar Association, the General Directorate of Human Rights Protection of the Attorney-General’s Office and the National Human Rights Commission all elicited promises, but no results or replies. The exception was the Office of the Federal Public Defender.

⁵³ See Chapter III of the Constitution.

⁵⁴ Cuenca Dardon *Manual de Derecho Procesal Mexicano* (2000) 150.

⁵⁵ Based on personal observations in Mexico City.

Some of these “legal” services are available for \$10.⁵⁶

At federal level, much has been done in recent years to improve the standing, working conditions, remuneration and effectiveness of public defenders. The Institute makes a point of obtaining suitable office accommodation for federal public defenders in order for them to work in “places more dignified.”⁵⁷ In Mexico City, for example, the offices are geographically accessible, close to inexpensive public transport and clearly marked. The offices contain proper workstations with modern furniture and equipment, the front office staff is knowledgeable and friendly and there is proper security. Clients receive treatment similar to what they will receive at any well-established private firm. The general impression is one of professionalism and quality. The defenders earn, for example, \$30 000 (pesos)⁵⁸ per month compared to the \$3 500 per month earned by those not part of the federal system. The federal public defender, the display case of the legal system, has attracted praise when a special reporter for the Independence of Judges and Lawyers from the United Nations Organization, Dato Param Cumaraswamy, complimented the Mexican authorities for bringing defence services to those who lack the means to engage private practitioners.⁵⁹ He expressed the opinion that the system is one of the better ones encountered by him.

At the federal level there are definite sustained attempts to improve capacity. The Institute has an annual programme using formal courses, round table projects and conferences for this purpose. The contents and objectives are clearly stated. In order to assist public defenders in the performance of their duties and to keep them informed regarding developments in their field, the Institute publishes the *Gaceta de la Defensoria* on a quarterly basis. It

⁵⁶ Approximately R8,40.

⁵⁷ Instituto *Informe*: 13.

⁵⁸ R1,00 = .85 peso.

⁵⁹ Yong: 47.

contains all the latest (relevant) jurisprudence, new legislation and amendments.

At state level the Office of the Public defender does not have the power, the organization or the administration necessary to be a force to be considered in the sphere of criminal justice. In effect, it is merely a technical measure within the criminal process, purporting to fulfil the promise of legal representation expressed by the Constitution. This lack of teeth has resulted in the inability of the institution as a whole to defend the rights of accused, leading to calls for a new defence organization.⁶⁰ The system is fraught with problems – a lack of sufficient funding, the non-availability of experts and investigators, insufficient personnel and a lack of credibility. Some are reduced to operating from beneath a flight of stairs or street corners, armed with old typewriters.⁶¹ In practice, public defenders are relying on favours from friends and those willing to assist them if they wish to produce anything resembling a defence.⁶²

As a result of the image presented by state public defenders, there is a lack of trust in the public defender system.⁶³ This includes members of the judiciary and employees of the department of Justice. It was stated⁶⁴ that the blanket allocation of defenders, without applying some form of merit test, amounts to “a covering of the requirements” of the Constitution and nothing else. However, at federal level the Institute took huge strides forward to deliver on promises made in Constitutions over the past 200

⁶⁰ The inability of the Public defender system to protect the rights of accused, was one of the factors which led to the creation of the National Human Rights Commission. (Cuenca Dardon: 167).

⁶¹ Interview with Lic. Jesús Guinto López on 19 Sept 2001 in Mexico City.

⁶² Cuenca Dardon: 166.

⁶³ The recent efforts aimed at improving the federal system may take some time to filter through to the community.

⁶⁴ During an interview with Angel Moreno Contreran, a judge of the *Tribunal Superior de Justicia*, in Mexico city on 6 Sept 2001.

years. The manner in which it is done displays a sophistication that one would expect from a “developed” system and it can therefore be described as “progressive”.

4. Conclusion

A recent study in England and Wales,⁶⁵ confidently asserts that:

- Taken as a group, non-lawyers perform to higher standards than lawyers;
- It is possible for non-lawyers to perform at the same or higher levels of quality than lawyers;
- Specialization, and not professional status, is the best predictor of quality.

If this is the case in a comparison between non-lawyers and lawyers who are members of a professional body, how much longer do we have to debate choosing between a legal aid system using lawyers who are members of their professional bodies (judicare) or choosing salaried lawyers (public defenders)? The cost factor has been resolved long ago⁶⁶ and now the theory behind professionalism, exclusive knowledge and higher quality, seems to be put to rest as well. Moorhead, Sherr & Paterson⁶⁷ emphasise the importance of specialization⁶⁸ and experience in the legal aid arena, stressing external

⁶⁵ Moorhead, Sherr & Paterson: (2003) 795.

⁶⁶ Although Moorhead, Sherr & Paterson: 798 has found non-lawyers to be more expensive in the study undertaken by them, they also found that it may be the result of the legal aid contracting scheme of England and Wales.

⁶⁷ 799.

⁶⁸ According to McQuoid-Mason “The Legal Aid Board and the Delivery of Legal Aid Services in South Africa” in *PILI Access to Justice Source Book* (2002) 113, the standard of service of Legal Aid Board clinic candidate attorneys in the lower courts is often better than that of qualified attorneys or privately employed candidate attorneys because the interns obtain specialist knowledge in conducting criminal and poverty law cases.

quality assurance in addition to self-regulation.

In the Netherlands competition for a share in the lucrative legal aid market has probably provided an additional lever for attempts from within the profession, especially amongst those who involve themselves actively in legal aid work, to improve quality to a standard that is higher than that required as the minimum by the professional body.

In México the Federal Institute for Public Defence has developed sufficient expertise to assure quality, but it does so selectively. Two distinct systems are encountered, federal and state. At a federal level, the showcase to the world, one encounters legal aid services and legal aid providers that are subject to stringent quality control, albeit of a self-regulatory nature. At state level, where most citizens come into contact with the law, the picture is totally different. No attempt is made at ensuring at least minimum quality standards. It is so poor that event judges treat it with contempt. Members of the profession contribute very little towards alleviating the burden on the state and improving their image. This resulted in the Mexican people not respecting their legal system. The opinion has been expressed that defenders with capacity are needed.⁶⁹ Within the wider Latin-American context the public defender system has been severely criticized as lacking the “lawyer-mentality” of being critical and combative, having an employee-mentality and not having a professional reputation.⁷⁰

In the Netherlands, efforts aimed at quality control are directed towards providing customer satisfaction as the user of the service is seen as the ultimate recipient and judge of a benefit that is paid for by the state. Those

⁶⁹ By Lic. Andrea Santiago Gómez, also of the *Tribunal Superior de Justicia* during an interview in Mexico city on 6 Sept 2001 as well as judge Moreno (*supra*).

⁷⁰ Calamandrei *Demasiados Abogados* (1960) 47-48.

lawyers involved in the rendering of legal aid, constantly strive to elevate the status of legal aid work, as is evidenced by the Foundation Viadicte setting standards that are higher than that required by the profession. Specialization seems to lie at the heart of the Dutch system. Whereas the Foundation Viadicte represents a core of lawyers specialising in legal aid work, it appears to be a continuation of a predecessor, the Association of Social Advocates (*Vereeniging van Sociale Advocatuur*) whose popularity seems to have waned over the past few years, especially as the number of remaining *wetswinkels* (law shop) activists decline.

In Mexico on the other hand, the state, through improved international standing, appears to be the beneficiary of the system as its window to the world, the federal legal aid system, projects an image that is not experienced by those who it is supposed to service.