

ILAG & JUSTICE

LEGAL AID NEWSLETTER

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WELCOME

The weather here in London provides a fertile set of metaphors for the state of legal aid. Summer turns into autumn. There is a chill in the air. The leaves are drying and dying. In one of the rituals of the season, staff in the office demand the central heating should be turned out: management is holding out for next month. It is getting cold.

So, too in legal aid – at least here in Europe. Gone are the last days of the summer that warmed those fortunate enough to attend the Legal Services Research Centre's conference in the sumptuous surroundings of Magdalen College, Oxford. Gone too, pretty soon, will be the Legal Services Research Centre itself – a victim of cuts.

The news is a bit better in jurisdictions on the other side of the world where spring approaches as our winter draws in. Below is an article about the public defence system in Chile, one of a number of South American countries beginning to emerge from the shadow of military dictatorship. The author is Carolina Rudnick, a Chilean public defender who has just completed a placement at JUSTICE. Other countries on the same continent are beginning to flex their muscles after lying dormant for so long. Colombia has one of the most dynamic courts in the region. Brazil is developing a national network of public defenders with an explicit human rights brief.

Paul Ferrie has shown his usual competence in summarizing legal aid news stories over the last three months. My favourite headline is from Ghana: 'Director wants legal aid scheme to be well resourced'. Good luck, Mr Al-Hassan Yahaya Seiny. You speak for us all.

Let me end on a personal note. After 11 years, I am leaving JUSTICE to work as a researcher and journalist in the fields of human rights and legal aid on a freelance basis. My email address will, therefore, change to Rsmith@rogersmith.info. Please do contact with me any articles that you would like us to publish.

Roger Smith

Public defense delivery system in Chile: Quality assurance and control.

Carolina Rudnick

1. A brief contextualisation of the radical reforms in criminal justice and public defence in Latin-America since the 1980s.

The punitive power of the State implies the threat of the use of force and imprisonment, together with all the personal costs being subject to a criminal procedure brings along. The history of the state's penal persecution has been a story of miscarriages of justice and profound injustices. It does not come as a surprise then that the right to effective legal aid and defence has emerged as a guarantee embedded in the rule of law, materialized not only in national constitutions and legislation but also in international instruments of human rights, ratified by the international community.

Within the Latin-American scope, we have witnessed radical judicial reforms in the last couple of decades. Since the early 1980s the democratic transitional processes, the increased valorisation of human rights and the expansion of the economic activity were factors that encouraged radical changes in the structure and operation of judicial systems. Within the transformative initiatives -the radical reform from an inquisitorial procedure inherited from the Spanish tradition to an adversarial one, structured in oral hearings with jurisdictional intervention; the access to legal service, making the offer provided by the State an accessible one to – particularly- the most marginalized groups; and the introduction of managerial standards in the operation of resources) implementing and strengthening good systems of public defence became a priority. In countries with high levels of poverty, good public defence is crucial for the success of criminal systems built upon the presumption of innocence and the right to an effective defence of quality.

2. The right to defence as a guarantee recognized by the national and interregional instruments in South America.

Conceived as a human right, the right to a fair trial and within it the right to legal assistance is recognized by the regional instruments of human rights, notwithstanding of course its inclusion in the treaties of international scope. In effect, article 8.2 of the Inter-American Convention on Human Rights provides for the principles of innocence, equality before the law, and other minimum guarantees of procedural nature that need to be observed in any criminal trial. Among them we find the right to defence, conceived as *“the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law”*. One of the particularities of the Inter-American provision is the absence of any qualification in the realization of such a right. In effect, compared with the ICCPR, the latter in its article 14.3 (d) qualifies the right to have legal

assistance assigned to the defendant “*in any case where the interests of justice so require*”. Likewise, the ECHR in its article 6.3 (c) recognizes the right to “*to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require*”. This last criterion is being considered in view of such circumstances as severity of the penalty and complexity of the case in question and according to different scholars, cases where possible penalty was imprisonment were unchangeably regarded by the European Court of Human Rights as ones requiring participation of a defence lawyer in the interests of justice. However, and despite its jurisprudential construction, the Inter-American version enjoys the advantage of being more generously constructed, with an indisputable impact in the societies upon which it is meant to be realized.

As an obligation set upon States, although the right to legal assistance implies the possibility that defendants get a defender of their own choice, the particular socioeconomic context of Latin American population and the selectivity of the penal system (where the majority of defendants come from the worst-off sectors of society) demand from the State the duty to provide legal assistance at no cost, but making sure the standards of quality are not compromised in this subsidiarity. This is particularly important in regards to a state-provided public defence. One dimension of the right to legal counsel is its free delivery in case of not sufficient means to pay for legal assistance; but together with it, the quality of the service provided is essential to understand the right as fully implemented. As The European Court of Human Rights has stated, the very fact that free assistance is available to the applicant does not in itself guarantee that his or her rights under Art. 6.3 (c) are respected. Article 6.3 (c) requires that the competent state authorities intervene “[...] if a failure by legal-aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way”¹.

The Inter-American Court of Human Rights has had little opportunities to rule upon the right to legal assistance. However, in a Consultative opinion² about the need of an indigent person to pursue and exhaust the remedies under domestic law before lodging a petition to the Inter-American Court, it was stated that not providing legal assistance to someone that cannot afford it amounts to discrimination on the part of the State. Likewise, the lack of resources to provide for legal assistance could amount for a breach of the right to a fair trial.

3. The definition of quality standards and the contribution of inter-regional institutions.

Despite the lack of Inter-American jurisprudence, different Inter-American institutions have developed the content and principles of this guarantee in its procedural and substantive dimensions. Among these institutions, the Justice Studies Center of the Americas (JSCA or CEJA in Spanish), in collaboration with United Nations Development programme, has elaborated a Manual for Public Defence for Latin America and

¹ Elena Burmitskaya World's models of legal aid for criminal cases: What can Russia borrow?, p.

² Inter-American Court of Human Rights. Excepciones al agotamiento de los recursos internos, Opinión Consultiva OC-11/90, 10.08.1990..

the Caribbean, with the aim of delivering practical instruments to improve and strengthen the national systems of criminal defence. JSCA-CEJA is an agency of the Inter-American system that enjoys technical and operational autonomy and was created in 1999 by the institutions of the American States organisation, with the aim to conduct in-depth studies of justice systems and develop innovative approaches to discussions of judicial reform; to promote regional cooperation and the exchange of experiences among key actors in the justice sector; and to generate and disseminate instruments designed to improve the quality and availability of information on justice in the Americas. The aforementioned Manual provides for tools for the building up of solid, effective systems of public defence, providing criteria for its further implementation together with standards of quality and efficiency. Particular importance has been given to the latter. Once coverage has been fully achieved in most of Latin-American countries, the search for quality of the service has become paramount.

The American Bar Association, through its Standing Committee on Legal and Indigent Defendants, sponsored and approved in 2002 a set of 10 principles of a Public defense delivery system, which were created as a practical guide for government officials, policymakers and other parties who are charged with creating and funding new, or improving existing, public defense delivery systems.

The principles deal with issues such as independence, early stage participation, adequate resources and workload, adequate training and experience of defense counsels, parity within the system understood as an equality of partnership with the prosecution, supervision and review as a way to ensure quality of the service.

The issue of quality is directly dealt with in Principle tenth, providing that “*Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards*”. Apart from this direct provision, other principles deal with the issue of quality in connected and implicit settings, such as workload and required abilities and legal education. In effect, principle Fifth states that “*Defense counsel’s workload is controlled to permit the rendering of quality representation*”; principle Sixth “*Defense counsel’s ability, training, and experience match the complexity of the case*”; Principle Ninth “*Defense counsel is provided with and require to attend continuing legal education*”.

4. The particular case of Chile: the regime of legal practice in general and the regime of public defence.

Commentators usually refer to three main types of actors who directly participate in providing free legal aid in criminal cases. These are: a) privately practicing lawyers appointed on a case by case basis, a system that is usually named ‘exofficio’ in Europe (‘judicare’ in the US terminology); b) salaried practitioners directly employed for public legal services delivery by the body administering legal aid and c) so-called ‘public defenders’ - staff attorneys employed by an independent organization (Public defender office) and undertaking a full representation of defendants. Any of these schemes may be employed within ‘contracted services’

scheme, which envisages that legal aid providers have to compete for a contract granting state funds for delivering public legal services.

In Chile, public criminal defence is provided by a mixed system that combines public and private attorneys. The Public Defender Office was created in 2001 as a public service, with functional independence, juridical personhood and own resources, under the oversight of the President of the Republic through the Ministry of Justice. Its aim is to provide legal criminal defence to all defendants or accused of a criminal offence whose jurisdiction lies in criminal courts, regardless of the seriousness of the offence, and that do not have an attorney. It is interesting to highlight that the criteria is not having an attorney and not necessarily *not having the means to afford* legal assistance. It is true that the system prioritizes the provision of legal aid to those sectors of society that cannot afford it, but nevertheless, being the core of its function the realization of the guarantee of legal defence from the early stages of investigation regardless of the means to pay, it has implemented financial tests and the subsequent reimbursements procedures to make sure defendants that can afford legal counsel pay back to the institution.

The Public Defender Office's staff comprises *institutional* defenders –salaried state employees-, and contracted private lawyers throughout a bidding process. Both attorneys are properly public defenders, and subject to the same standards of quality in their performance. The latter defenders are the predominant formula and represent roughly 65% of defenders.

The right to defence is constitutionally guaranteed and legally defined and structured. In effect, the 1980 Political Constitution assures all persons equal protection under the law in the exercise of their rights, prescribing the right to legal defence and prohibiting any restriction or disruption of the intervention of lawyers, whenever their action has been required. Lastly, in order to guarantee this right, the Constitution establishes that the law shall define the means to grant legal advice and defence to those unable to obtain it themselves. The legal framework provided by the Criminal Code of Procedure establishes – among its Basic Principles – that from the very beginning of the procedure undertaken against the defendant, he/she has the right to be defended by a lawyer, and subsequently, regulates aspects such as the right of the defendant to freely choose his/her defence, the possibility of declaring the procedure null and void as a result of the absence of a defender whenever the law clearly demands his/her participation; the extent of rights and faculties of the defence counsel, and likewise the rights and faculties of the defendant; the consequences and obligations derived from the abandonment of defence and the intervention of the office of the public defender in these cases.

The particularities of the public criminal defence delivery system appear when contrasted with the overall system of legal services in Chile. In Chile, lawyers enjoy a regime of freedom of practice. Within this regime, many of the self regulatory characteristics that the profession possesses in other countries, as well as the ability of lawyers' associations to exert ethical control and assure the quality of service provided by its

members, loose relevance in a national set-up based on non-mandatory membership of professional associations.

In this picture, the assurance of quality of the public defence service becomes mandatory and several mechanisms have been developed and implemented in order to ensure that the quality of the service is not compromised by the widely free legal market. The Public Defender Office, consequently, has introduced quality assurance criteria into the admission requirements for institutional and contracted job positions, into the bidding process and into the actual exercise of the role of public defender.

5. Assessment of Chile's system in the light of quality principles.

The Chilean public defence system has managed to implement and improve quality introducing it as a criterion from the early stages of selection of the defenders to the actual performance of the service. In effect, quality standards have been introduced as pre-requirements for applying to the service, as the prevailing factor in the bidding process and implementing a system of permanent evaluation and assessment of the public defender's training and work.

5.1 Admission requirements.

In terms of requirements to obtain a professional title, lawyers are conferred their title by the Supreme Court of Justice, following their oath of office to loyally and honestly practice their profession, once they have fulfilled the following requirements: to be 20 years old; to be Chilean (except for those cases that have international treaties on this matter); to hold a degree in Juridical Sciences legally issued by a University; not to have been sentenced or held for trial for crimes deserving capital punishment, personal restraint or penal servitude, except for crimes against the domestic security of the State; to hold a record of good behaviour; and to have completed a 6-month practical practice period. As opposed to these general requirements that allow any lawyer to intervene as such in criminal procedures, a mandatory exam of technical evaluation is set for lawyers who want to participate in the call for positions within the Public Defender Office, either as institutional defenders or as contracted lawyers. The results obtained not only act as an entrance filter but also impact the selection process since it translates into higher scores in the bidding process as well as in the institutional appointments' process.

5.2 Quality assurance criteria in the bidding process

Since 2010, new quality assurance criteria have been introduced into the bidding process. The two main factors of any bidding offer have been the technical offer and the economic offer, where bidders present their defender candidates and the prices they are willing to obtain. The Public Defender Office sets the maximum prices bidders can apply, which in turn is linked to an amount of cases in a period of time that runs from one to three years. From 2010 onwards, the experience, studies and technical exam results have been assigned a higher weight than the economic offer in the bidding process. Consequently, more expensive bidders which

probe to be better qualified attorneys can still be selected over cheaper bidders with less technical qualifications. In that way the system introduces incentives for the selection of the best candidates despite of not being the cheaper candidates. Likewise, the setting of maximum prices assures that the system can finance its implementation and controls the available resources and institutional budget.

5.3 Standards of quality and its control

Quality in the provision of legal aid is a complex concept, in particular, because the duty of criminal defenders is a duty of means more than a duty of result. Therefore, particular importance will have to be given to the development of the concept into measurable and comprehensible standards of practice that can easily guide the attorneys' performance and contribute to its proper assessment and future improvement. The Manual for Public Defence for Latin America and the Caribbean has stated that in order to meet the requirements of quality it must be possible to assess whether the public defence service meets some minimum standards that make it effective; in other words, if the attorney's presence contributes to add value in the discharge of information throughout the process; if indeed the performance of the defender was a challenge to the application of criminal law or actually managed to create a tension between the State's claim of punishment and the will of the accused³. This added value and its potential challenge to the State's persecution are translated into a set of standards linked to objective practices, activities and behaviour. The standards of quality in the provision of defence need to be link to objectives and these in turn need to be link to goals. The objectives and goals must be linked to measurable indicators that allow a third-party to assess the performance of a public defender.

These standards, objectives and goals have been introduced into the Chilean system by Resolution Nro. 3389 of the National Chief Defender, its last version enacted in December 2010. The standards seek to guide the action of defence counsels in order to assure high quality, real and effective criminal defence, within relevant areas such as activities linked to rights and guarantees -technical defence-, freedom, human dignity, to be tried within a reasonable period of time, to present and challenge evidence, to appeal against judicial resolutions, to be informed of charges and the development of the investigation, and lastly, respect for the principles of the accusatory system in criminal proceedings. Resolution 3389 defines "Standard of criminal public defence" as the norm imposed upon the defender intended to provide to the beneficiaries of the system a real and effective quality of service. For its fulfilment objectives will have to be considerer and within the latter, goals. Objectives have been defined as a statement about the results the system wishes to achieve, and its determination is done considering one or more goals. Goals, in turn, have been defined as the result of one or more specific activities related to the objective.

³ P.33. This concept needs to be understood in the context of the former systems of criminal defence in Latin-America, characterized by the formal and subordinated exercise of defense, lay back attitudes and huge negligence in the preparation of cases and the absence of a common organization for all public defenders.

The standards have been classified in three major areas: standards of professional competence in the defence performance; standards regarding the relation with the client and management standards. The first set of standards comprises standards of defense activity, liberty, evidence, appeals, specialized juvenile defense and defense of convicted juveniles. The second set of standards comprises standards of information to be given to the defendant and dignified treatment. The last set of standards comprises management standards, such as IT system requirements.

The evaluation and control of the service is done through four mechanisms provided by the law: Inspections; External Audits; Reports, six-monthly and final; and Complaints from beneficiaries. The internal inspections and the external audits, applicable to both types of service providers -institutional and contracted- are based on the idea that the specialized task can be observed by the trained eye of a third party, especially educated or trained to perform such evaluations.

The inspection consists of an exhaustive examination of the actions of defence counsels, conducted by an expert of the same Institution (Inspector Lawyer), in accordance with previously known methodological criteria. It results in an evaluation report on the work of the defence in the cases reviewed, submitted to the respective Regional Public Defence Office. Copy of the report is also presented to the defender under inspection and he/she can make any observation deemed relevant. The result of the inspection does not lead directly to the application of sanctions against the service provider, but it is regarded as a source of information for the authority in charge (Regional Chief Defender) to begin a penalization procedure, if applicable.

As from 2003, the design of the inspection system is based on three zone inspectorates in charge of managing inspections conducted in a specific geographic zone, thus assuring adequate control coverage in accordance with the number of defenders and cases projected for each region and location. In order to fully comply with the task of evaluating the performance of public criminal defence counsels, inspector lawyers must possess a series of characteristics and meet the requirements outlined below: they must have acted previously as local defenders or have experience in the new criminal procedure; have specific knowledge related to Criminal Defence Standards and their measurement, to performance control systems and legal rules and regulations related to the Schedule of Fees and Bids of the criminal public defence service, and experience in the use of existing IT and management systems, as well as ISO 9001 standards.

Since 2004, the zonal inspectorates have worked together with the Regional Defence Offices in workshops that intend to show the performance of institutional and contracted defenders of the region throughout the analysis of the results obtained in the individual inspections. At the same time, the workshops provide mechanisms and instruments to improve the performance of those standards that show impoverished performance.

The methodology used in this workshops has been improved and systematized throughout time, involving compromises and agreements between the zonal inspectorates and the Regional Defender Offices.

The external audits seek to measure the quality of the service provided, and quantify the alignment between the behaviour of the defender and the standards of public criminal defence. They are basically a collection, accumulation and evaluation of evidence on information obtained from a specific universe of cases belonging to each service provider, in order to establish the degree of alignment between that information and the criteria established in the defence standards. Together with the evaluation of the degree of efficiency and effectiveness of compliance with standards, audits are a management tool, in the sense that they enable a systematic examination of defence activities and related activities in order to formulate recommendations. Unlike the Inspection system, the audit necessarily involves the review of cases that are examples of other defence proceedings. Thus, representative sampling is fundamental.

The regulatory framework for this tool establishes that audits shall be conducted by independent companies, with qualified teams, that shall be selected by means of competitive bidding based on the qualification and composition of the professional teams and on their experience in evaluating and auditing public entities or related activities.

NEWS

These reports are largely compiled from news articles on the internet on the basis of a simple search under the words 'legal aid'. Readers must, just as buyers, beware of authenticity. The links worked at the time of writing but some will fail after a period of time.

This section is compiled by **Paul Ferrie** of the *University of Strathclyde*. If you would like to suggest news articles for inclusion in this newsletter or have any comments please contact Paul by emailing paul.s.ferrie@strath.ac.uk

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Call for \$330m funding boost for legal aid – ABC News – 16/07/12 [\[Read more\]](#)

New pro bono initiative to provide greater access to justice in the Asia-Pacific – South Pacific Lawyers Association – 16/07/12 [\[Read more\]](#)

Lawyers call for \$330m to bridge legal aid gap – Sydney Morning Herald – 17/07/12 [\[Read more\]](#)

Double legal aid, say community lawyers - The Australian – 02/08/12 [\[Read more\]](#)

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CBA launches three initiatives on access to justice, future of legal practice, and enhancing inclusion in law firms – Canadian Bar Association – 12/08/12 [\[Read more\]](#)

Canada's justice system staggering under weight of federal reforms: bar association – The Globe and Mail 13/08/12 [\[Read more\]](#)

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Justice Ministry to run community legal education programs on radio – East Timor Law and Justice Bulletin – 22/08/12 [\[Read more\]](#)

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